Public Version

IN THE MATTER OF AN ARBITRATION UNDER THE CANADA-UNITED STATES-MEXICO AGREEMENT ("CUSMA"), THE NORTH AMERICAN FREE TRADE AGREEMENT ("NAFTA"), AND THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW ("UNCITRAL") ARBITRATION RULES

ALBERTA PETROLEUM MARKETING COMMISSION, Claimant, *v.* **THE GOVERNMENT OF THE UNITED STATES OF AMERICA** Respondent.	**ICSID Case No. UNCT/23/4**

CLAIMANT'S MEMORIAL

16 April 2024

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TABLE OF DEFINED TERMS

2014 Final EIS	Final Supplemental Environmental Impact Statement for the Keystone XL Project dated 31 January 2014
2015 Record of Decision	Department of State Record of Decision and National Interest Determination, TransCanada Keystone Pipeline, L.P. Application for Presidential Permit, dated 3 November 2015
2017 Presidential Permit	Presidential Permit issued by the Department of State on 23 March 2017 authorizing TransCanada Keystone Pipeline, L.P. to "*construct, connect, operate, and maintain pipeline facilities at the International border of the United States and Canada at Morgan, Montana, for the import of crude oil from Canada to the United States*"
2017 Record of Decision	Department of State Record of Decision and National Interest Determination, TransCanada Keystone Pipeline, L.P. Application for Presidential Permit, dated 23 March 2017
2019 Final EIS	Final Supplemental Environmental Impact Statement for the Keystone XL Project dated December 2019
2019 Presidential Permit	Presidential Permit issued by President Donald Trump on 29 March 2019 authorizing TransCanada Keystone Pipeline, L.P. to "*Construct, Connect, Operate, and Maintain Pipeline Facilities at the International Boundary Between the United States and Canada"*
2254746 Alberta Ltd.	Alberta incorporated subsidiary wholly-owned by APMC
APMC	Alberta Petroleum Marketing Commission
APMC US Member	The United States based, wholly-owned subsidiary of the Alberta Petroleum Marketing Commission and joint owner of 181531115 LLC, the US SPV
BLM	Bureau of Land Management, an agency within the United States Department of the Interior
bpd	Barrels per day, a standard unit for measuring oil
Canadian SPV	2249158 Investments L.P., the sister entity to the US SPV. Part of the managing partnership for the Canadian investment and assets for the Keystone XL Project

CER	Canada Energy Regulator (previously, the National Energy Board)
COP21	Twenty-first session of the United Nations Climate Change Conference
CUSMA (or USMCA)	Canada–United States–Mexico Agreement
Department of State	U.S. Department of State
EIA	U.S. Energy Information Administration
EIS	Environmental Impact Statement
Enterprise	2254746 Alberta Sub. Ltd., Delaware company subsidiary indirectly owned by the Alberta Petroleum Marketing Commission, and limited partner of US SPV
E.O.	Executive Order
FERC	U.S. Federal Energy Regulatory Commission
FOIA	U.S. Freedom of Information Act
GHG	Greenhouse gas
Gulf Coast Project	Pipeline connecting the southern portion of the Keystone Pipeline System to refineries on the U.S. Gulf Coast, built in Phase III of construction
INDC	Intended Nationally Determined Contribution
Investment Agreement	Investment Agreement between TransCanada Pipelines Ltd. and the Alberta Petroleum Marketing Commission, dated 31 March 2020
Keystone Pipeline System	Existing pipeline system that transports crude oil from Hardisty, Alberta to refining markets in Missouri, Illinois, and Oklahoma (built in Phases I and II of construction), as well as to refineries on the U.S. Gulf Coast (Phase III of construction)
Keystone XL (or Project)	Proposed expansion to the Keystone Pipeline System. Original proposal was to add a second pipeline from Alberta to an existing hub on the Keystone Pipeline System in Steele City, Nebraska, as well as connecting the southern portion of the Keystone Pipeline System to refineries on the U.S. Gulf Coast (*see* Gulf Coast Project

	above). Proposal was later amended to exclude the Gulf Coast Project.
NAFTA	North American Free Trade Agreement
NEB	National Energy Board (renamed the Canada Energy Regulator)
NEPA	U.S. National Environmental Policy Act
NDC	Nationally Determined Contribution
NWP 12	Nationwide Permit 12, a general permit issued for pipelines and other utility projects
Paris Agreement	Agreement adopted by 196 parties to the United Nations Climate Change Conference ("COP21") in Paris on 12 December 2015
PHMSA	U.S. Pipeline and Hazardous Materials Safety Administration, part of the United States Department of Transportation
PMA	Alberta Petroleum Marketing Act
Project (or Keystone XL)	Proposed expansion to the Keystone Pipeline System. Original proposal was to add a second pipeline from Alberta to an existing hub on the Keystone Pipeline System in Steele City, Nebraska, as well as connecting the southern portion of the Keystone Pipeline System to refineries on the U.S. Gulf Coast (*see* Gulf Coast Project above). Proposal was later amended to exclude the Gulf Coast Project
Record of Decision	Document issued by the Department of State summarizing the findings of an environmental impact statement and analyzing whether a proposed project would serve the national interest
Revocation	Executive Order 13990 "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," dated 20 January 2021, which, *inter alia,* revoked the March 2019 Presidential Permit for the Keystone XL Project
SPVs	Special purpose vehicles
TC Energy	TC Energy Corporation and its subsidiaries (prior to May 2019 was known as TransCanada Corporation)
TCPL	TransCanada Pipelines Limited, parent organization of US Carrier

TransCanada LP (or, US Carrier)	TransCanada Keystone Pipeline, L.P., conducted the Keystone XL Project in the United States; holder of the Presidential Permit
TransCanada Corporation	Parent Corporation, renamed TC Energy Corporation in May 2019
TSAs	Transportation Service Agreements
UNCITRAL	United Nations Commission on international Trade Law
UNFCCC	United Nations Framework Convention on Climate Change, of which the United States has been a member since 1992
USACE	U.S. Army Corps of Engineers
US Carrier (or, TransCanada LP)	TransCanada Keystone Pipeline, L.P.; conducted the Keystone XL Project in the United States; holder of the Presidential Permit
US Carrier GP	TC Keystone Pipeline G.P. LLC, a Delaware company and General Partner of US Carrier
US SPV	181531115 Limited Partnership, responsible for administering all of the costs, revenues and management related to the Keystone XL Project
US SPV GP	181531115 LLC, one of two members of the US Carrier GP
USTR	United States Trade Representative

DRAMATIS PERSONAE

Begley, Adrian	Chief Executive Officer of the Alberta Petroleum Marketing Commission (2017- Present); Author of Witness Statement dated 16 April 2024
Biden, Joseph R.	46th President of the United States (2021–present)
Coleman, James Wilton Schwarz	Professor of Law at the Southern Methodist University, Dedman School of Law; Author of Expert Report dated 16 April 2024
Maguire, Patrick T.	Partner of Bennett Jones LLP; Author of Expert Report dated 13 April 2024
Mandell, Lauren	Lead United States negotiator of the investment chapter of the CUSMA
Obama, Barack H.	44th President of the United States, (2009–2018)
Prakash, Saikrishna B.	James Monroe Distinguished Professor and the Albert Clark Tate, Jr., Professor at the University of Virginia School of Law; Senior Fellow at the Miller Center for Public Policy, University of Virginia; Author of Expert Report dated 16 April 2024
Rosen, Howard N.	Managing Director of Secretariat; Chartered Accountant, Chartered Professional Accountant, and Chartered Business Valuator; Author of Expert Report dated 16 April 2024
Sourgens, Frédéric G.	James McCulloch Chair in Energy Law at Tulane Law School and Director of Tulane Center for Energy Law; Author of Expert Report dated 9 April 2024
Trump, Donald J.	45th President of the United States (2018–2021)

> "*I actually don't think it would. The Keystone was not an oilfield; it's a pipeline.* [. . .] [T]*he oil is continuing to flow in, just through other means. So it actually would have nothing to do with the current supply imbalance*."
>
> - Press Briefing by White House Press Secretary Jen Psaki, 7 March 2022[1]

I. INTRODUCTION

1. Claimant Alberta Petroleum Marketing Commission ("**APMC**", "**Claimant**", or "**Investor**"), on its own behalf and on behalf of its enterprise, 2254746 Alberta Sub. Ltd. (the "**Enterprise**"), respectfully submits this Memorial of its claims against the Government of the United States of America ("**United States**," "**U.S. Government**", or "**Respondent**") for violations of Respondent's obligations under the North American Free Trade Agreement ("**NAFTA**") and Annex 14-C of the Canada-United States-Mexico Agreement ("**CUSMA**") causing not less than CAD 1,553,700,000.00 in damages related to APMC's investment.

2. Claimant is the Provincial Crown corporation of the Government of Alberta ("**Alberta**") responsible for marketing Alberta's conventional crude oil[2] royalty and maximizing the value of Alberta's resources by, *inter alia,* participating in the development of energy infrastructure projects. One such project was the Keystone XL pipeline ("**Keystone XL**" or "**Project**") that was being built by TC Energy Corporation (unless otherwise specified, TC Energy

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[1] Press Briefing by Press Secretary Jen Psaki, dated March 7th, 2022 (C-1). In the context of the high gas prices after the February 2022 invasion of Ukraine, this was a response to a question about whether undoing the Revocation of the Keystone XL pipeline would help decrease oil prices.

[2] This Memorial follows the U.S. Energy Information Administration's ("**EIA**") definitions for "**oil**", "**petroleum**", "**crude oil**", and "**petroleum products**": "*The terms **oil** and **petroleum** are sometimes used interchangeably"* and refer to *"a broad category that includes both crude oil and petroleum products.* Whereas "**crude oil"** refers to the "*mixture of hydrocarbons that exists* [in liquid phase in natural underground reservoirs]"; and "**petroleum products**" refers to the wider range of products that "*are produced from processing crude oil … at petroleum refineries* [….]." U.S. Energy Information Administration, What is the difference between crude oil, petroleum products, and petroleum?, last reviewed 1 December 2023 (emphasis added) (C-2).

and its subsidiaries are collectively referenced herein as "**TC Energy**").[3] On 20 January 2021, at the beginning of a new U.S. presidential administration, that Project was unilaterally destroyed without good reason or compensation by the United States, but purportedly on the basis of prior climate change-related policy.

3. Prior to Claimant's investment in 2020, the U.S. Government had rigorously analyzed the environmental impacts of Keystone XL, consistently concluding that: 1) the Project was unlikely to increase greenhouse gas ("**GHG**") emissions; and 2) in the absence of the Keystone XL pipeline, crude oil would continue to be transported by less environmental means, such as by rail, which would result in *higher* GHG emissions. In other words, the Government believed – consistent through two Presidential administrations and turnover in executive departments – based on extensive research and analysis that the Keystone XL pipeline was the most environmentally sound means to transport crude oil and that demand for and supply from the Alberta oil sands was inevitable.

4. Having actively encouraged and supported the Project, and after years of analysis and comprehensive environmental assessments, the U.S. Government issued Presidential Permits for the Keystone XL Project on 23 March 2017 and 29 March 2019 to construct, operate, and maintain the 1.4-mile border-crossing portion of the Project (the "**Presidential Permit**"). The underlying decision to issue a Presidential Permit cited substantial economic benefits and long-term North American energy security, and reduced environmental risk in the transport of

[3] Prior to May 2019, TC Energy Corporation was named TransCanada Corporation. Unless otherwise specified, all TransCanada Corporation entities will also be referenced herein as "**TC Energy**").

affordable crude oil supplies. In reliance on the legal stability of the Presidential Permit, in March 2020 APMC agreed to commit up to US$ 5.3 billion to secure the future of the Project.

5. Notwithstanding the Government's own environmental analysis, on 20 January 2021, President Biden issued Executive Order ("**E.O.**") 13990 revoking the Presidential Permit (the "**Revocation**") and erasing APMC's investment with the stroke of his pen, mere hours after his inauguration, citing the need "*to exercise vigorous climate leadership in order to achieve a significant increase in global climate action. . . .*"[4] He did so without any finding that the Presidential Permit's terms or applicable law had been violated, and thus made a decision that was contrary to the Government's consistent environmental analysis and was instead grounded in a prior political analysis regarding issues of international relations which were not properly relevant at the time, and unquestionably no longer relevant in January 2021. Moreover, President Biden destroyed APMC's investment without providing a formal notice or opportunity to engage in meaningful consultation to either APMC or the Presidential Permit holder.[5]

6. As will be described herein, the Revocation of the Keystone XL Presidential Permit was a breach of the United States' obligations under NAFTA Articles 1102, 1103, 1105 and 1110. The Revocation was an arbitrary measure, a targeted discrimination, and expropriatory. The U.S. Government's conduct was manifestly not based on a rational policy justification, was a denial of due process, and was plainly contrary to the environmental policy of the Government in respect of climate change.

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[4] Exec. Order No. 13990, § 6(d) (20 January 2021), 86 Fed. Reg. 7037 (25 January 2021) (C-3).

[5] A subsidiary of TC Energy.

7. In particular, the destruction of oil and gas infrastructure, through the revocation of a previously granted permit, is simply not part of the U.S. Government's climate change policy. The Revocation of the Keystone XL Presidential Permit was contrary to long-established Government policy supporting pipelines, and is the only instance Claimant is aware of where a Presidential Permit for a cross-border oil pipeline has been revoked. Moreover, the U.S. Government fully understands that oil and gas will continue to be an essential part of its energy system well into the future, and that pipeline infrastructure remains the preferred method to deliver oil and gas in a secure, economic, and environmental manner.

8. This Memorial is organized as follows:

- **Section II** sets forth the facts underlying APMC's claims;
- **Section III** explains how the United States' arbitrary, discriminatory, and expropriatory conduct breaches its obligations under NAFTA;
- **Section IV** confirms that the Tribunal has jurisdiction over these claims;
- **Section V** sets out the basis for APMC's entitlement to damages; and
- **Section VI** sets out the relief sought by Claimant.

9. In addition to the exhibits and legal authorities submitted in support of this Memorial, Claimant also submits:

- The **Witness Statement of Mr. Adrian Begley**, dated 16 April 2024 ("**Begley Witness Statement**"). Mr. Begley is the Chief Executive Officer of APMC and responsible for managing APMC's day-to-day operations and implementing APMC's strategic plans;
- the **Expert Report of Professor James Wilton Schwarz Coleman**, dated 16 April 2024 ("**Coleman Expert Report**"). Professor Coleman is a Professor of Law at Southern Methodist University Dedman School of Law. He researches and teaches in the area of energy law, including on energy transport construction and the environmental review process for energy projects such as the Keystone XL pipeline. He provides a report analyzing the United States' environmental impact assessment of the Keystone XL Project;

- the **Expert Report of Mr. Patrick Maguire, K.C.**, dated 13 April 2024 ("**Maguire Expert Report**"). Mr. Maguire is a partner at Bennett Jones LLP and specializes in energy project development, including pipelines, and energy transactions and project financing, and provides a report on the structure of APMC's investment;
- the **Expert Report of Professor Saikrishna Prakash**, dated 16 April 2024 ("**Prakash Expert Report**"). Professor Prakash is the James Monroe Distinguished Professor and the Albert Clark Tate, Jr., Professor at the University of Virginia School of Law. He is also a Senior Fellow at the Miller Center for Public Policy. He researches and teaches constitutional law, particularly regarding presidential powers and the separation of powers. He provides a report on the U.S. domestic law legality of the 20 January 2021 Revocation;
- the **Expert Report of Professor Frédéric G. Sourgens**, dated 9 April 2024 ("**Sourgens Expert Report**"). Professor Sourgens is the James McCulloch Chair in Energy Law at Tulane Law School and Director of Tulane Center for Energy Law. His scholarship focuses on transnational energy, climate law, and geo-engineering. His report discusses the context of United States international climate policy before, during, and after the Government's scrutiny of the Keystone XL Project; and
- the **Expert Report of Mr. Howard N. Rosen**, dated 16 April 2024 ("**Secretariat Expert Report**"). Mr. Rosen is a Managing Director of Secretariat who works exclusively with business valuations, financial litigation, and corporate finance-related matters. He is a Chartered Accountant, Chartered Professional Accountant, and Chartered Business Valuator. He provides an analysis of APMC's quantum of loss arising directly from the Revocation of the Keystone XL Permit.

II. FACTS

A. North American Oil Dependence

10. The United States both consumes and produces more oil than any other nation in the world, and its increasing rate of domestic oil production has transformed it into one of the top global oil exporters as well. Supporting and facilitating the United States' oil complex is a network of over 2.6 million miles of pipelines, that spans the continent and connects with pipeline networks in Canada and Mexico. In this broader context, and as will be examined

throughout this Memorial, the United States' conduct with respect to just one pipeline, the Keystone XL Project, is arbitrary, discriminatory, and expropriatory.

1. The United States is the Largest Consumer and Producer of Oil in the World

11. The United States is the world's largest consumer of oil. According to the U.S. Energy Information Administration ("**EIA**"),[6] in 2021 the United States consumed almost 20 million barrels of oil[7] *per day* ("**bpd**"), a 20% share of total global oil consumption.[8] By comparison, the People's Republic of China – with more than four times the U.S. population[9] – had a 16% share of global oil consumption, while the other top oil-consuming countries utilized only a fraction of this amount:[10]

The top 10 oil[1] consumers and share of total world oil consumption in 2021[2]

Country	Million barrels per day	Share of world total
United States	19.89	20%
China	15.27	16%
India	4.68	5%
Russia	3.67	4%
Japan	3.41	4%
Saudi Arabia	3.35	3%
Brazil	2.89	3%
South Korea	2.56	3%
Canada	2.26	2%
Germany	2.23	2%
Total top 10	60.20	62%
World total	97.26	

[1] *Oil* includes crude oil, all other petroleum liquids, and biofuels.
[2] Data source: U.S. Energy Information Administration, International Energy Statistics, Total oil (petroleum and other liquids) consumption, as of September 22, 2023

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[6] U.S. Energy Information Administration, About EIA ("*The* [EIA] *collects, analyzes, and disseminates independent and impartial energy information to promote sound policymaking, efficient markets, and public understanding of energy and its interaction with the economy and the environment*.") (C-4).

[7] U.S. Energy Information Administration, What countries are the top producers and consumers of oil?, last updated 22 September 2023 ("'*Oil' includes crude oil, all other petroleum liquids, and biofuels*") (C-5).

[8] U.S. Energy Information Administration, How much oil is consumed in the United States?, last updated 22 September 2023 (C-6).

[9] U.S. Census Bureau, U.S. and World Population Clock (The United States' population is over 336 million people, while China has over 1.4 billion people) (C-7).

[10] U.S. Energy Information Administration, What countries are the top producers and consumers of oil?, last updated 22 September 2023 (C-5); *see also* U.S. Energy Information Administration, Oil and petroleum products explained: Use of oil, last updated 22 August 2023 (C-8).

12. Moreover, the United States' oil dependence is not anticipated to diminish in the coming decades, with the EIA projecting that the United States' consumption of oil will remain fairly constant through 2050.[11] Therefore, ensuring a reliable supply of oil will be key to the United States' ongoing economic and energy security goals.

13. The United States is also the world's largest producer of oil, with 21% of the global production share in 2022 – 8 percentage points more than the second highest oil producing nation, Saudi Arabia:[12]

The top 10 oil[1] producers and share of total world oil production[2] in 2022[3]

Country	Million barrels per day	Share of world total
United States	20.30	21%
Saudi Arabia	12.44	13%
Russia	10.13	10%
Canada	5.83	6%
Iraq	4.61	5%
China	4.45	5%
United Arab Emirates	4.23	4%
Iran	3.67	4%
Brazil	3.17	3%
Kuwait	3.01	3%
Total top 10	71.83	74%
World total	97.70	

[1] *Oil* includes crude oil, all other petroleum liquids, and biofuels.
[2] Production includes domestic production of crude oil, all other petroleum liquids, and biofuels and refinery processing gain.
[3] Data source: U.S. Energy Information Administration, International Energy Statistics, Total oil (petroleum and other liquids) production, as of September 22, 2023

14. U.S. *crude oil* production – a subset of the figures above – has been steadily increasing since 2009, with the more widespread use of a process for crude oil extraction known as fracking, and comprises the bulk of the United States' total oil production.[13] As the EIA recently

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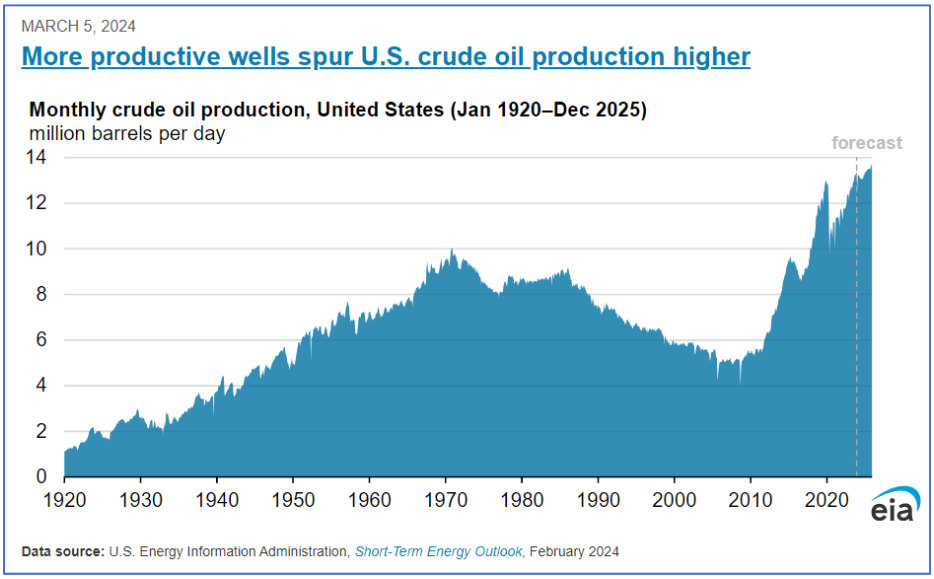
[11] U. S. Energy Information Administration, Oil and petroleum products explained: Use of oil, dated 22 August 2023 ("[T]*he U.S. Energy Information Administration projects U.S. total consumption of petroleum and other liquids in 2050 to be nearly equal to the projection for 2023. Petroleum and other liquid fuels will decline from about 37% of total U.S. energy consumption in 2023 to about 34% of total annual U.S. energy consumption in 2050.*") (C-9).

[12] U.S. Energy Information Administration, What countries are the top producers and consumers of oil?, last updated 22 September 2023 (C-5).

[13] U.S. Energy Information Administration, Oil and petroleum products explained: where our oil comes from, last updated 21 September 2023 (C-9); *see also* U.S. Energy Information Administration, More productive wells spur U.S. crude oil production higher, updated 13 March 2024 (C-10).

announced, the United States has "***produced more crude oil than any nation at any time*** […] ***for the past six years in a row***."[14]



15. This increased crude oil production reflects improvements in technology as well as U.S. Government policies favouring domestic production as a strategy to increase economic growth and reduce vulnerability.[15] As the above figure shows, U.S. crude oil production has more than doubled on a largely linear trajectory since 2010 through to the present day. This is regardless of the changes in Federal office-holders and Congressional majorities, with political affiliations that have changed in every federal election since 2010 (with the exception of 2012)

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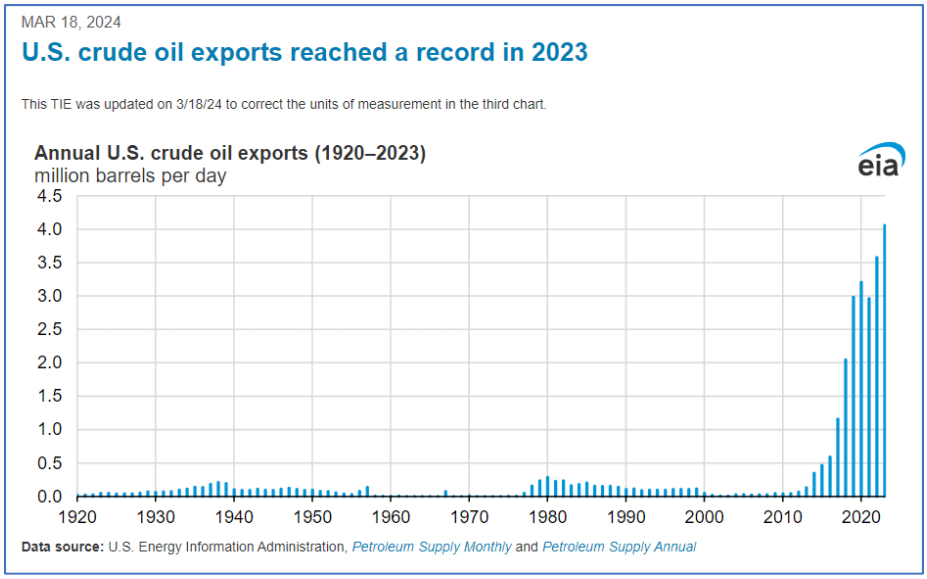
[14] U.S. Energy Information Administration, United States produces more crude oil than any country, ever, dated 11 March 2024 (emphasis added) (C-11).

[15] *See, e.g.,* X, Karine Jean-Pierre ("*2. U.S. production of natural gas and oil is rising and approaching record levels: More natural gas than ever this year, more oil than ever next year, and, even with a global pandemic, more oil production this past year than during the previous administration's first year*.") (6 March 2022) (C-12); The White House Archives, Reducing America's Dependence on Foreign Oil As a Strategy to Increase Economic Growth and Reduce Economic Vulnerability, dated 29 August 2013 (C-13); U.S. Department of the Interior, Responsible Domestic Oil and Gas Production (C-14); E&E News Politico, Biden administration oil drilling permits outpace Trump, dated 30 January 2024 ("*Oil and natural gas were still needed for the immediate future while investments were being made for renewable energy, an Interior Department spokesperson said*.") (C-15); *Obama Takes Credit for U.S. oil-and-gas boom: 'That was me, people'*, ASSOCIATED PRESS (28 November 2018) (C-16); U.S. Dep't of Energy, The Economic Benefit of Oil and Gas (C-17); Independent Petroleum Ass'n of America, FAQ: Crude Oil and Condensate Exports (C-18).

across at least one of either the Presidency or majority control of the House of Representatives or the Senate.[16]

16. As the United States' oil production has increased, so too have its levels of oil exports.[17] Following President Barack Obama's lifting of crude oil export restrictions in December 2015,[18] the United States has become the fourth largest oil exporter in the world, exporting more oil than any member of the Organization of the Petroleum Exporting Countries ("**OPEC**") countries, except Saudi Arabia.[19] In 2023, U.S. crude oil exports reached a record high, averaging 4.1 million bpd:[20]



[16] The Presidency of course changed office-holder and party affiliation twice in this period, in 2016 and 2020. The House of Representatives has changed party-majority affiliation in elections in 2010, 2018 and 2022, while the Senate changed majority party affiliation twice in the period, in 2014 and 2020.

[17] U.S. Energy Information Administration, U.S. crude oil exports reached a record high in first half of 2023, dated 20 December 2023(C-19).

[18] U.S. Government Accountability Office, Crude Oil Markets: Effects of the Repeal of the Crude Oil Export Ban, dated 21 October 2020 (C-20).

[19] *See* The Observatory of Economic Complexity, Crude Petroleum (C-21).

[20] U.S. Energy Information Administration, U.S. crude oil exports reached a record in 2023, dated 18 March 2024 (C-22).

17. Notwithstanding these significant volumes of crude oil exports, the United States is still a net *crude oil* importer.[21] This is due to logistical and regulatory considerations, as well as variations in the properties of crude oil.[22] Crude oil is not homogenous and, depending on where it is produced, varies in density (heavier or lighter) and sulfur content (sweet or sour).[23] These characteristics determine which type of refining[24] is needed to refine the crude oil into the different products that people use every day to power vehicles and airplanes, heat buildings, generate electricity, and to manufacture materials used in electronics, textiles, medical supplies, pharmaceuticals, cosmetics, and other household products.[25] Of these, transportation needs make up the largest sector of consumption, as compared to residential, commercial, or industrial uses.[26]

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[21] U.S. Energy Information Administration, Oil and petroleum products explained: Oil imports and exports, last updated 19 January 2024 ("*The United States remained a net crude oil importer in 2022, importing about 6.28 million b/d of crude oil and exporting about 3.58 million b/d.*") (C-23); *see also* U.S. Energy Information Administration, How much oil consumed by the United States comes from foreign countries?, last updated 22 September 2023 (C-24).

[22] U.S. Energy Information Administration, Annual Energy Outlook: AE02023, dated March 2023 at 24 ("*Because of logistical, regulatory, and quality considerations, both exporting and importing petroleum often makes economic sense*.") (C-25).

[23] *See* CAPP, Petroleum 101: Heavy Crude Oil, dated 13 October 2020 (C-26); U.S. Energy Information Administration, The United States produces lighter crude oil, imports heavier crude oil, dated 11 October 2022 (C-30).

[24] *See* Draft Environmental Impact Statement - Keystone XL Oil Pipeline Project Applicant for Presidential Permit: TransCanada Keystone Pipeline, L.P., dated 16 April 2010 at 1-4 ("*On the demand side of the market, each refinery can be thought of as a crude oil consumer. Each refinery makes decisions as to which crude oil to buy based on the characteristics of the crude (point of delivery, density, sweetness, and price) and the refinery's unique ability to transform the crude oil into a refined petroleum product that can be profitably sold*.") (C-27).

[25] CAPP, Petroleum 101: Heavy Crude Oil, dated 13 October 2020 ("*Heavy oil is not bad — it's just different. In fact, it's a preferred type of oil for creating a number of end products such as asphalt, fuel oil and certain petrochemical feedstocks*.") (C-26); U.S. Energy Information Administration, Oil and petroleum products explained: Use of oil, last updated 22 August 2023 (C-8); U.S. Energy Information Administration, U.S. petroleum flow, 2022 (C-28).

[26] U.S. Energy Information Administration, U.S. petroleum flow, 2022 (C-28).

18. While the United States typically produces lighter crude oils, its refineries were designed to process heavier crude oils.[27] The United States therefore exports the lighter crude oil it produces,[28] and imports heavier crude oil from Canada, Mexico, Venezuela, and OPEC, with Canada supplying the majority of the United States' foreign oil needs.[29]

2. Cross-Border Pipelines Facilitate the U.S.- Canada Bilateral Energy Trade

19. The United States and Canada share the longest international border in the world and enjoy an integrated energy partnership that bolsters the security and economic prosperity of both nations,[30] with each country serving as the other's primary foreign energy supplier.[31] For example, in 2021, Canada supplied the United States with over 61% of its crude oil imports, 98% of natural gas imports, 93% of electricity imports, and 28% of its uranium imports,[32] while the United States supplied Canada with 66% of its foreign crude oil imports.[33] Energy trade between

[27] U.S. Energy Information Administration, Changing quality mix is affecting crude oil price differentials and refining decisions, dated 21 September 2017 (C-29); CAPP, Petroleum 101: Heavy Crude Oil, dated 13 October 2020 (C-26); U.S. Energy Information Administration, The United States produces lighter crude oil, imports heavier crude oil, dated 11 October 2022 ("*The U.S. refining complex is advanced and capable of refining heavier, more sour crude oils, which generally cost less than lighter, sweeter grades of crude oil.*") (C-30).

[28] U.S. Energy Information Administration, U.S. crude oil exports reached a record high in first half of 2023, dated 20 December 2023 (C-19).

[29] *Id*. ("*U.S. crude oil imports come primarily from historical trading partners such as Mexico and Canada. . . . Most U.S. crude oil imports take place when it is more profitable for U.S. refiners to process discounted heavier grades because those refineries have already invested in the additional complexity required to refine them*.").

[30] U.S.-Canada Cross-Border Petroleum Trade: An Assessment of Energy Security and Economic Benefit, dated March 2021 (C-31); Connect 2 Canada, Partners in Energy and Climate, dated October 2023 (C-32); Connect 2 Canada, Mapping the Canada-U.S. Energy Relationship, dated 13 April 2022 (C-33); U.S. Canada Energy Trade Map 2020 (C-34).

[31] Connect 2 Canada, Partners in Energy and Climate, dated October 2023 (C-32).

[32] *Id*.; *see also* U.S. Energy Information Administration, Executive Summary, dated 12 July 2022 (C-35); Connect 2 Canada, Mapping the Canada-U.S. Energy Relationship, dated 13 April 2022 (C-33).

[33] Canada Energy Regulator, Market Snapshot: Crude oil imports declined in 2021, while refined petroleum product imports rose modestly, dated 30 March 2022 (C-36); *see also* U.S. Energy Information Administration, Executive Summary, dated 12 July 2022 (C-35).

the two countries reached a record high of US$ 190 billion in 2022, with crude oil accounting for the majority – **US$ 125 billion** – of that sum.[34]

20. A 2019 Report by the American Petroleum Institute noted the increasingly integrated nature of the U.S. and Canadian crude oil and refining markets, which has reduced North America's dependence on overseas crude oil imports.[35]

21. Critical to the success of this bilateral energy partnership is a network of over 70 oil and natural gas pipelines crossing the shared border between the United States and Canada.[36] Crude oil from Canada is sent, largely via pipelines, to U.S. refineries to be processed into products indispensable for the day-to-day functioning of modern society.[37] And within the United States, a sprawling network of over 2.6 million miles of oil and gas pipelines – more than any other country in the world[38] – transports unrefined petroleum to refineries and then safely delivers the refined products for distribution to consumers.[39] (The U.S. pipeline infrastructure also connects to Mexico via 25 oil and natural gas border crossings,[40] facilitating trade, promoting economic growth, and fostering cooperation among the United States, Canada, and Mexico).

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[34] U.S. Energy Information Administration, Higher energy prices push United States energy trade with Canada to record-high value, dated 14 August 2023 ("*The value of U.S. imports of crude oil from Canada increased 38% in 2022 to $113 billion.* [. . .] *U.S*[.] *crude oil exports increased by 43% in 2022, totaling $11.9 billion*.") (C-37); Connect 2 Canada, Partners in Energy and Climate, dated October 2023 (C-32).

[35] U.S.-Canada Cross-Border Petroleum Trade: An Assessment of Energy Security and Economic Benefit, dated March 2021, at 10 ("*Canadian crude oil from Western and Eastern Canada has flowed south to refining markets in every region of the United States, and [] U.S. crude oil from the Gulf Coast and Bakken regions have flowed north and east, respectively, to the refining markets in Eastern Canada*.") (C-31).

[36] Connect 2 Canada, Powering Our Nations (C-38); U.S. Canada Energy Trade Map 2020 (C-34).

[37] CAPP, Uses for Oil (C-39); U.S. Energy Information Administration, Oil and Petroleum Products Explained: Uses of Oil (C-8).

[38] U.S. Dep't of Transportation, Pipeline and Hazardous Materials Safety Administration, General Pipeline FAQs: Question 6, last updated 6 November 2018 (C-40).

[39] *Id*.

[40] Note that a border crossing can represent more than one pipeline. *See* U.S. Energy Information Administration, Border Crossings – Liquids (C-41); U.S. Energy Information Administration, Border Crossings – Natural Gas (C-42).

22. By volume, pipelines are the most common method for long-distance transportation of oil in the United States. In 2022, refineries within the United States received 87% of domestic crude oil and 57% of foreign crude oil from pipelines.[41] Pipelines can transport large volumes of crude oil consistently and efficiently, which is crucial for meeting the demands of refineries and end consumers.[42] Pipelines are generally regarded as the safest method for transporting oil over long distances. Additionally, transporting oil by pipeline requires less energy, thereby reducing GHG emissions.[43]

23. The U.S. Department of Transportation describes pipelines as "*literally fueling our economy and way of life*",[44] explaining:

> *The nation's more than 2.6 million miles of pipelines safely deliver trillions of cubic feet of natural gas and hundreds of billions of ton/miles of liquid petroleum products each year. They are essential: the volumes of energy products they move are well beyond the capacity of other forms of transportation. It would take a constant line of tanker trucks, about 750 per day, loading up and moving out every two minutes, 24 hours a day, seven days a week, to move the volume of even a modest pipeline. The railroad-equivalent of this single pipeline would be a train of 225, 28,000*

[41] U.S. Energy Information Administration, Petroleum & Other Liquids: Refinery Receipts of Crude Oil by Method of Transportation (C-43).

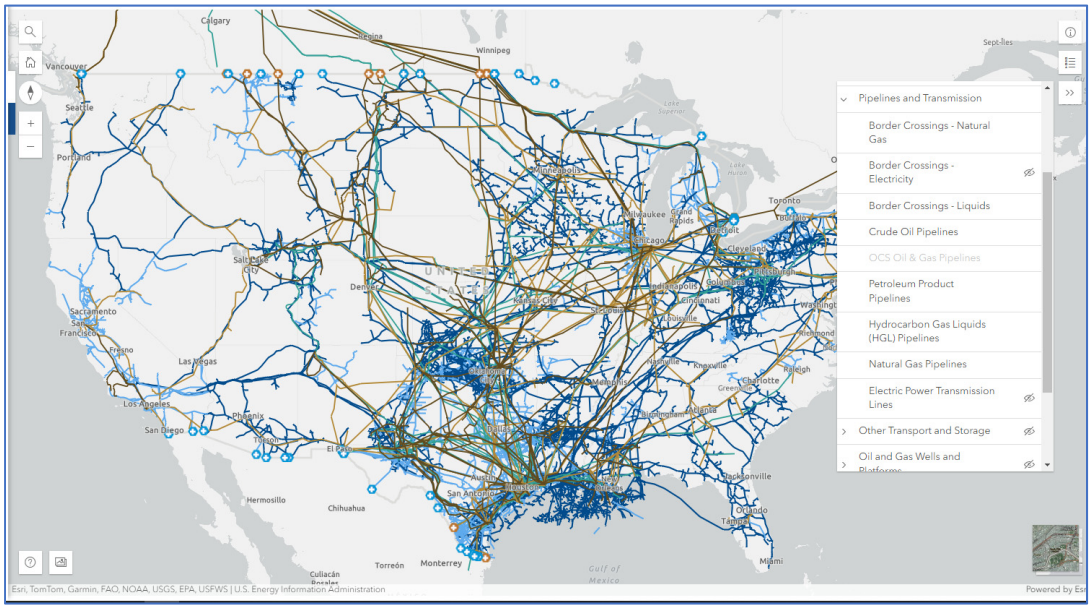
[42] U.S. Dep't of Transportation, Pipeline and Hazardous Materials Safety Administration, General Pipeline FAQs (C-44).

[43] *See, e.g.,* U.S. Department of State, Final Supplemental Environmental Impact Statement for the Keystone XL Project, dated 31 January 2014 ("**2014 Final EIS**"), at ES-34 &Table ES-6 (finding that sending crude oil via rail instead of the proposed Keystone XL pipeline would result in GHG emissions "*28 to 42% greater*" than if they were sent via the Project) (C-45); *see also* University of Alberta, Pipelines easier on the environment than rail, dated 13 December 2016 (C-46) (estimating that pipelines reduce GHG emissions by an estimated 61-71% when compared to GHG emissions from rail transport).

[44] U.S. Dep't of Transportation, Pipeline and Hazardous Materials Safety Administration, General Pipeline FAQs. ("*Pipelines enable the safe movement of extraordinary quantities of energy products to industry and consumers, literally fueling our economy and way of life. The arteries of the Nation's energy infrastructure, as well as one of the safest and least costly ways to transport energy products, our oil and gas pipelines provide the resources needed for national defense, heat and cool our homes, generate power for business and fuel an unparalleled transportation system*.") (C-44).

gallon tank cars. Pipeline systems are the safest means to move these products.[45]

24. The following figure was generated from an interactive atlas on the EIA website, and sets out, *inter alia,* domestic and border-crossing crude oil pipelines, petroleum product pipelines, natural gas pipelines, and hydrocarbon gas liquids pipelines:[46]



3. The Presidential Permitting Process for Cross-Border Pipelines

25. Pipelines are regulated by various different authorities. Within Canada, pipelines that cross provincial or international borders are regulated federally by the Canada Energy Regulator ("**CER**").[47] Within the United States, pipelines are regulated by a combination of federal, state, and local regulations. Whereas the CER has oversight of a pipeline through all phases of its lifecycle (from application and construction to abandonment) and continues to

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45 *Id*. (emphasis added).

46 U.S. Energy Information Administration, All Energy Infrastructure and Resources, https://atlas.eia.gov/apps/5039a1a01ec34b6bbf0ab4fd57da5eb4/explore (C-47); *see also* CAPP, Canadian and U.S. Crude Oil Pipelines and Refineries – 2023, (C-48).

47 CAPP, Oil and Natural Gas Pipelines, Pipeline Safety (C-49); Canada Energy Regulator, Pipeline Regulation in Canada (C-50). The CER was formerly the National Energy Board ("**NEB**") from November 1959 to August 2019. *See* Canada Energy Regulator, Our History (C-51).

monitor, assess, and review the pipeline's operations while in service,[48] the United States divides these functions amongst different federal agencies, such as Federal Energy Regulatory Commission ("**FERC**"), the U.S. Department of Transportation, the U.S. Environmental Protection Agency, the U.S. Army Corps of Engineers (the "**USACE**"), and others.[49] In addition to federal regulations, pipeline projects may be subject to state-level permitting and oversight;[50] tribal consultation to assess potential impacts on tribal resources, cultural sites, and treaty rights;[51] and local zoning ordinances and land use regulations.[52]

26. Of critical relevance to this case, U.S. Presidents have also asserted the authority to intervene in cross-border conveyances like pipelines and electrical transmission lines by way of a Presidential permitting process.[53]

27. As Professor Prakash explains in his Expert Report,[54] the authority of the executive branch to review applications and issue Presidential Permits for cross-border pipelines has been asserted since the 19th century, and was refined in a series of Executive Orders (previously defined as "**E.O.s**") in the 20th century. In 1968, President Lyndon Johnson issued E.O. 11423,

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48 Canada Energy Regulator, Fact Sheet: Full Lifecycle Pipeline Oversight (C-52).

49 *See, e.g.,* U.S. Dep't of Transportation, Pipelines and Hazardous Materials (C-53); Federal Energy Regulatory Commission, Home Page (C-54).

50 *See, e.g.,* Montana DEQ, Energy Permitting and Operator Assistance (C-55).

51 *See, e.g.,* FERC, Tribal Relations (C-56).

52 *See, e.g.,* Montana Public Service Commission, Pipeline Safety Program ("*The mission of the Montana Public Service Commission Pipeline Safety Program is to ensure the safe construction, operation, and maintenance of intrastate gas pipelines in Montana*.") (C-57).

53 Like Canada, there are different procedures within the U.S. for permitting domestic crude oil pipelines. Within the Department of Transportation, the Pipeline and Hazardous Materials Safety Administration ("**PHMSA**"), "*has the primary responsibility for the issuance of DOT special permits and approvals for hazardous materials and for natural gas and hazardous liquid pipelines*." U.S. Dep't of Transportation, Pipeline and Hazardous Materials Safety Administration, PHMSA Approvals and Permits (C-44). There are also different departments that govern the permitting of other cross-border conveyances, such as rail. *See* U.S. Dep't of Transportation, Federal Railroad Administration, FRA Legislation and Regulations (C-58).

54 Expert Report of Professor Saikrishna B. Prakash, dated 16 April 2024 (previously referred to as "**Prakash Expert Report**"), sec. IV.A; *see also* Expert Report of James W. Coleman, dated 16 April 2024 (previously referred to as "**Coleman Expert Report**"), paras. 16-17.

which asserted that "*proper conduct of the foreign relations of the United States requires that executive permission be obtained for the construction and maintenance at the borders of the United States of facilities connecting the United States with a foreign country*[.]"[55] E.O. 11423 further delegated authority to the Secretary of State to determine whether any applications for cross-border conveyances "*would serve the national interest*[.]"[56] The Secretary of State was also mandated to request the views of several other executive agencies,[57] and given the option to consult other Federal departments, state, and local government officials, to publish notice of a pending application in the Federal Register, and to call for public comment on the same.[58]

28. In 2004, President George W. Bush issued E.O. 13337 to expedite the Presidential Permitting process.[59] Although the power to issue or deny Presidential Permits was still delegated to the Secretary of State, E.O. 13337 required that any Federal Government officials consulted "*shall provide their views and render such assistance*" within 90 days of receipt of a request.[60]

29. In addition to the requirements imposed by the E.O.s, the National Environmental Policy Act ("**NEPA**")[61] requires an environmental review before the government takes "*major Federal actions*" that "*significantly affect*[] *the quality of the human environment*[.]"[62] The

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55 Exec. Order No. 11423 (16 August 1968), 33 Fed. Reg. 11741 (20 August 1968) (C-59).

56 *Id*., § 1(d).

57 The Secretary of the Treasury, the Secretary of Defense, the Attorney General, the Secretary of the Interior, the Secretary of Commerce, the Secretary of Transportation, the Interstate Commerce Commission, and the Director of the Office of Emergency Planning. Exec. Order No. 11423 (16 August 1968), § 1(b), 33 Fed. Reg. 11741 (20 August 1968).

58 Exec. Order No. 11423, § 2(a) (16 August 1968), 33 Fed. Reg. 11741 (20 August 1968) (C-59); *see also* Prakash Expert Report, para. 14.

59 Exec. Order No. 13337 (30 April 2004), 69 Fed. Reg. 25299 (5 May 2004) (C-60).

60 *Id*., § 1(c); *see also* Prakash Expert Report, para. 15.

61 National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 *et. seq*. (1970) ("**NEPA**") (C-61).

62 *Id*., § 4332.

Secretary of State has therefore carried out an environmental review of cross border permit applications, resulting in a document known as an Environmental Impact Statement[63] (or "**EIS**").[64]

30. Professor Coleman explains that,[65] in practice, under the NEPA regime the Secretary of State's environmental review and agency consultation process has culminated in EIS reports, while under the various E.O. regimes over time in a document, commenting and (at least ostensibly) relying on such EIS reports, called a U.S. Department of State ("**Department of State**") Record of Decision and National Interest Determination ("**Record of Decision**"), which sets out whether a proposed project would "*serve the national interest*[.]"[66] The Secretary of State then issues or denies a Presidential Permit based on that assessment.[67] (As discussed *infra* **Section II.B.2** and by Professor Prakash, the Presidential permitting Process was further amended in April 2019, which did not impact the events described herein.[68])

B. The United States Thoroughly Reviewed the Keystone Pipeline System and Keystone XL Project

31. Most of the crude oil Canada exports to the United States originates in the Province of Alberta. Alberta has the fourth largest oil reserves in the world, following Saudi

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63 National Environmental Policy Act Implementing Regulations, Environmental Impact Statement, 40 C.F.R. § 1502.9 (C-62); *see also* Coleman Expert Report, paras. 19-24.

64 Further regulations adopted under the NEPA require agencies reviewing federal funding or permitting requests to prepare a draft EIS, (40 C.F.R. § 1502.9(b)) and invite comments on it from agencies and the public. *See* National Environmental Policy Act Implementing Regulations, Commenting on Environmental Impact Statements, 40 C.F.R. § 1503.1 (C-63). The agency must "*consider*" and "*publish*" all substantive comments, before issuing a Final EIS. *Id*. § 1503.4. The agency must also prepare a Supplemental Draft and Supplemental Final EIS if: "(*i) The agency makes substantial changes to the proposed action that are relevant to environmental concerns; or (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts*." National Environmental Policy Act Implementing Regulations, Environmental Impact Statement, 40 C.F.R. § 1502.9(d) (C-62).

65 Coleman Expert Report, paras. 19-24.

66 Exec. Order No. 13337, § 1(g) (30 April 2004), 69 Fed. Reg. 25,299 (5 May 2004) (C-60).

67 *Id*., § 1(g)-(i).

68 Prakash Expert Report, para. 17.

Arabia, Venezuela, and Iran.[69] The proposed Keystone XL Project would have facilitated the safe and economic transportation of Albertan oil to satisfy the demand from refineries on the U.S. Gulf Coast.

32. As discussed below and examined in Professor Coleman's Expert Report, during a rigorous environmental review processes conducted under multiple U.S. Presidential administrations, the Department of State has repeatedly found *inter alia*: 1) the Keystone XL Project would have a limited effect on the environment during construction and operation; 2) that the Project would not significantly impact the rate of Alberta's oil production; and 3) that rejecting the Project would likely lead to *increased* GHG emissions because it would result in more oil being transported by rail.[70]

1. The United States Determined that the Original Keystone Pipeline System Served the National Interest

33. As described above in **Section II.A.3**, the U.S. Government has required a Presidential Permit for border crossing pipeline projects since the 1960s. On 19 April 2006, TC Energy[71] applied for a Presidential Permit for the border-crossing segment of a proposed 2,045-mile pipeline that would transport crude oil from Hardisty, Alberta to refining markets in Missouri, Illinois, and Oklahoma (the original "**Keystone Pipeline System**").[72] The proposed

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69 Government of Alberta, Oil sands facts and statistics, (C-64).

70 *See* Coleman Expert Report, sec. V(1) (The Robust U.S. Environmental Review Consistently Concluded That Rejecting the Pipeline Would Increase Greenhouse Gas Emissions).

71 As previously noted, TransCanada Corporation/TC Energy Corporation entities are collectively referenced herein as TC Energy unless otherwise stated.

72 U.S. Dep't of State, Record of Decision and National Interest Determination, dated 28 February 2008, at 4 ("[I]*ncluding 767 miles in Canada and 1,382 miles within the U.S.*") (C-65).

Keystone Pipeline System was to have an initial nominal transport capacity of 435,000 bpd, with the ability to increase pumping capacity to 591,000 bpd, if market conditions so warranted.[73]

34. Approximately two years later, upon completion of the EIS review process the Department of State issued a Record of Decision in February 2008, finding that the "*Construction and Operation of the Keystone Pipeline Serves the National Interest* […] *for the following reasons*:

- "*It increases the diversity of available supplies among the United States' worldwide crude oil sources* […]";
- *"It shortens the transportation pathway for a portion of United States*['] *crude oil imports* […]";
- "*It increases crude oil supplies from a … stable and reliable trading partner … and does not require exposure of crude oil in high seas transport and railway routes that may be affected by heightened security and environmental concerns* […]"; and
- *"It provides additional supplies of crude oil to make up for the continued decline in imports from several other major U.S. suppliers*."[74]

35. The Record of Decision also addressed the parameters of the Department of State's remit, noting that: "[the] authority to issue Presidential permits derives, in large part, from its authority over the conduct of the foreign relations of the United States"[75] and that "the Department does not believe that the scope of the permit it issues in this case should extend any further than necessary to protect that foreign relations interest."[76] The Department of State therefore limited the scope of the Presidential Permit from the U.S. border up to the first mainline

[73] *Id*. at 2.
[74] *Id*. at 22.
[75] *Id*.
[76] *Id*. at 23.

shutoff valve in the United States.[77] The Presidential Permit for the original Keystone Pipeline System was issued on 11 March 2008.[78]

36. Construction on the Keystone Pipeline System began shortly thereafter.[79] In Canada, construction activities included the conversion of 537 miles of an existing natural gas pipeline in Saskatchewan and Manitoba to crude oil pipeline service; construction of approximately 232 miles of new pipeline and 16 pump stations; and construction of the Keystone Hardisty Terminal.[80] In the United States, Phase I construction activities included 1,084 miles of pipeline installation in North Dakota, South Dakota, Nebraska, Kansas, Missouri and Illinois; the construction of 23 pump stations; and construction of delivery facilities in Illinois.[81] Commercial deliveries of crude oil via the Keystone Pipeline System began on 30 June 2010.[82]

37. Phase II construction activities involved a 298-mile extension from Steele City, Nebraska to Cushing, Oklahoma and an increase in the Keystone Pipeline System's nominal capacity to 591,000 bpd,[83] with commercial deliveries on the Phase II segment beginning on 8 February 2011.[84]

38. The completion of the Keystone Pipeline System demonstrated the ability of a cross-border pipeline to be approved in the United States in a reasonable timeframe, and for the

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77 *Id*.

78 Permit Presidential Permit Authorizing TransCanada Keystone Pipeline, L.P. to Construct, Connect, Operate, and Maintain Pipeline Facilities at the International Boundary Between the United States and Canada, dated 11 March 2008 (C-66).

79 TC Energy, TransCanada Corporation: Keystone Oil Pipeline Receives Presidential Permit, dated 14 March 2008 (C-67).

80 TC Energy, Press Release, Keystone Pipeline Starts Deliveries to U.S. Midwest, dated 30 June 2010, (C-68).

81 *Id*.

82 *Id*.

83 *Id*.

84 TC Energy, Press Release, Keystone's Cushing Extension Begins Deliveries to Oklahoma, dated 8 February 2011 (C-69).

planning and construction by TC Energy to be completed efficiently and in a timely fashion – less than 2 years from the Presidential Permit application to Record of Decision, and approximately 2 more years to completion and operation.

2. The United States Determined that the Keystone XL Project Served the National Interest

39. On 19 September 2008, TC Energy submitted an application for a second pipeline, called the Keystone XL pipeline (previously defined as "**Keystone XL**" or "**Project**") to deliver 830,000 bpd of oil from Hardisty, Alberta to locations in the United States.[85] The original Keystone XL proposal planned to add a second pipeline from Alberta to an existing hub on the Keystone Pipeline System in Steele City, Nebraska, as well as the construction of a southern pipeline connecting the existing Keystone Pipeline System to refineries on the U.S. Gulf Coast. However, Professor Coleman explains that, in 2012, this southern pipeline, dubbed the "**Gulf Coast Project**" was separated from the original Project proposal because it was entirely domestic – and therefore deemed as not subject to the Presidential Permitting process – and was built during Phase III of construction.[86]

40. The figure below shows the original Keystone Pipeline System (Phases I and II) in orange, the Gulf Coast Project (Phase III) in purple, and the amended Keystone XL Project (Phase IV) in blue and yellow – for Canada and the United States, respectively:[87]

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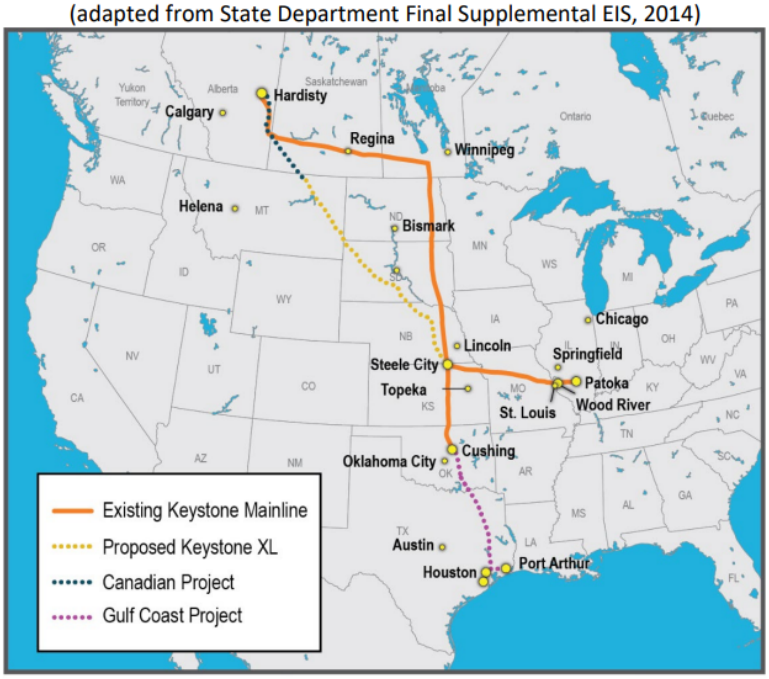
[85] *See* Application of TransCanada Keystone Pipeline L.P. for a Presidential Permit Authorizing the Construction, Operation, and Maintenance of Pipeline Facilities for the Importation of Crude Oil to be Located at the United States-Canada Border, dated September 19, 2008 (C-70).

[86] *See* Coleman Expert Report, paras. 33-35; *see also* TC Energy, Gulf Coast Project Begins Delivering Crude Oil to Nederland, Texas, dated 22 January 2024 (C-71). The Gulf Coast Project began operating on 22 January 2014 and involved construction of 487 miles of pipeline connecting Cushing, Oklahoma to Gulf Coast refineries.

[87] U.S. Dep't of Energy, Keystone XL Extension Permit Revocation: Energy Costs and Job Impacts, dated December 2022, at 5 (C-72).

Figure 2 – Map of Existing Keystone Pipeline and Proposed Expansions
(adapted from State Department Final Supplemental EIS, 2014)



41. Professor Coleman's Expert Report details the environmental review process conducted by the U.S. Department of State,[88] which culminated in a 31 January 2014 Final Supplemental EIS ("**2014 Final EIS**").[89] The 2014 Final EIS contained a total of 7,500 pages. As Professor Coleman explains, the Department of State's analysis was "*uniquely sophisticated*"[90]:

> *This type of causal analysis of the impact of an individual transport project on global energy markets and thus global greenhouse gas emissions is state of the art and I am unaware of any other such analysis that approaches the sophistication of the State Department's lengthy market analysis.*[91]

42. The 2014 Final EIS affirmed the Department of State's previous environmental assessments of the Project and made a number of key conclusions. ***First***, the 2014 Final EIS found that the Keystone XL Project was unlikely to impact Alberta's rate of crude oil production (and

88 Coleman Expert Report, paras. 27-40.
89 2014 Final EIS (C-45).
90 Coleman Expert Report, para 62.
91 Coleman Expert Report, para. 63; *see also id.* paras. 64-69.

therefore would not increase GHG emissions): "*approval or denial of any one crude oil transport project, including the proposed Project, is unlikely to significantly impact the rate of extraction in the oil sands or the continued demand for heavy crude oil at refineries in the United States* […]."[92]

43. ***Second,*** the 2014 Final EIS found that, given the continued U.S. refinery demand for heavy crude oil,[93] in the absence of the proposed Project, the crude oil would be transported through less environmentally sound means.[94] For example, one of the alternatives would require "*up to 14 unit trains (consisting of approximately 100 cars carrying the same material. . .) per day*. . . ."[95] A second "*Rail and Tanker*" alternative would require up to 14 unit trains per day and construction of "*a new marine terminal encompassing approximately 4,200 acres and capable of accommodating two Suezmax tankers.*"[96]

44. ***Third,*** the 2014 Final EIS also addressed the Project's potential effects on climate change, concluding that climate changes "*are anticipated to occur regardless of any potential effects from the proposed Project*."[97] Moreover, the 2014 Final EIS found that the Project would have lower annual GHG emissions than the alternatives.[98] Professor Coleman explains: "*the likely impact of rejecting the pipeline would be to send oil by rail,* ***which would result in greenhouse gas emissions '28 to 42 percent greater than' the pipeline***."[99]

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92 *See* 2014 Final EIS at ES-16 (C-45); *see also id.* at 1.4-1 - 1.4-8; *see also* Coleman Expert Report, para 38.

93 *See* 2014 Final EIS at ES-16 (C-45); *see also id.,* § 1.4.2.6; *id.* at 1.4-27 ("*U.S. refinery demand for* [Albertan] *heavy crude import is likely to remain robust given expected global trends*. . . .").

94 *See* 2014 Final EIS, § 1.4.1.3 (C-45); *see also* Coleman Expert Report, paras. 38, 54, 59, 62. And indeed, Canadian oil exports have only increased since the 2014 Final EIS was published. *See* U.S. Energy Information Administration, Petroleum & Other Liquids (C-73).

95 2014 Final EIS at ES-28 (C-45); *see also id.* at 5.3-3 ("*An increased number of unit trains along the scenario rail routes could affect communities through increased noise as well as congestion and delays where at-grade tracks cross roads*.").

96 *Id*. at ES-28.

97 *Id*. at ES-17.

98 *Id*. at ES-34.

99 Coleman Expert Report, para. 38 (emphasis added) (quoting 2014 Final EIS at ES-34 & Table ES-6).

45. Notwithstanding these technical conclusions, the Department of State issued a Record of Decision on 3 November 2015 ("**2015 Record of Decision**") finding that the Keystone XL Project "*would not serve the national interest. Accordingly, the request for a Presidential Permit is denied.*"[100]

46. In discussing the Department of State's paradoxical decision, Professor Coleman notes:

> [I]*t is highly unusual, and likely unique to this case, for the U.S. government to perform years of painstaking environmental and economic analysis and adopt a decision based on acceptance of a premise that is directly contradicted by its analysis. I cannot think of another example where a government, concluded, "after careful study, we have determined this Project is either neutral or good for the climate, the environment, and public health, but it will be perceived as bad, so we must not take it."*[101]

47. On 15 July 2016, TC Energy filed a Notice of Arbitration against the United States for breaches of NAFTA Chapter 11 regarding the U.S. Government's rejection of the Project's Presidential Permit application.[102]

48. The arbitration was proceeding when, on 24 January 2017, newly elected U.S. President Donald Trump issued E.O. 13766 which was intended to, *inter alia*, expedite the approval of both the Keystone XL pipeline along with another pipeline project, the Dakota Access pipeline, which is discussed *infra* in **Section II.G**.[103]

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[100] U.S. Dep't of State Record of Decision and National Interest Determination, dated 3 November 2015 at 3 (C-74).

[101] Coleman Expert Report, para. 76; *see also id.* paras. 42-43, 70-75.

[102] *See TransCanada Corp. and TransCanada PipeLines Ltd. v. United States of America*, ICSID Case No. ARB/16/21(C-75).

[103] Exec. Order No. 13766 (24 January 2017), 82 Fed. Reg. 8,657 (30 January 2017) (C-76); *see also* The White House Archives, President Trump Takes Action to Expedite Priority Energy and Infrastructure Projects, dated 24 January 2017 (C-77).

49. That same day, President Trump also issued a Presidential Memorandum "*invit*[ing]" TC Energy "*to promptly re-submit its application to the Department of State for a Presidential permit for the construction and operation of the Keystone XL Pipeline* [. . . .]"[104] The Memorandum further directed the Secretary of State to "*reach a final permitting determination* [. . .] *within 60 days of [TC Energy's] submission of the permit application*."[105]

50. Two days later, a subsidiary of TC Energy applied for a Presidential Permit for the Keystone XL Project.[106] On 23 March 2017, three major developments occurred. ***First***, the Department of State issued a Record of Decision ("**2017 Record of Decision**") finding that the issuance of a Presidential Permit for the Project "*would serve the national interest*."[107] This determination cited a number of factors, including, *inter alia*, the importance of crude oil for U.S. energy security and national security, as well as the importance of "*maintaining strong bilateral relations*" with Canada.[108] This 2017 Record of Decision further responded to the 2015 Record of Decision's stated concern that approving the Project would harm the United States' "*credibility and influence*" as a leader on climate change:

> [s]*ince then there have been numerous developments related to global action to address climate change* [….] *In this changed global context, a decision to approve this proposed Project at this time would not undermine U.S. objectives in this area.*[109]

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104 Memorandum on Construction of the Keystone XL Pipeline, dated 24 January 24 2017, 82 Fed. Reg. 8663 (January 30, 2017) (emphasis added) (C-78).

105 *Id*. (emphasis added).

106 Application of TransCanada Keystone Pipeline L.P. for a Presidential Permit Authorizing the Construction, Operation, and Maintenance of Pipeline Facilities for the Importation of Crude Oil to be Located at the United States-Canada Border, dated 26 January 2017 (C-79).

107 U.S. Dep't of State Record of Decision and National Interest Determination, dated 23 March 2017 at 31 (C-80).

108 *Id*. at 26-31.

109 *Id*. at 29; *see also* Coleman Expert Report, para. 61.

51. ***Second***, in accordance with the conclusions of the 2017 Record of Decision, the Department of State issued a Presidential Permit ("**2017 Presidential Permit**") authorizing TC Energy to "*construct, connect, operate, and maintain pipeline facilities at the International border of the United States and Canada at Morgan, Montana, for the import of crude oil from Canada to the United States*."[110]

52. *And* ***third***, the parties *jointly* requested the discontinuance of the NAFTA arbitration TC Energy had filed against the United States.[111]

53. The route for the Keystone XL Project in the United States extends across multiple States, including passing near Indian tribal reservation lands and waterways. After the 2017 Presidential Permit was issued, various indigenous and environmental organizations commenced litigation in the U.S. District Court for the District of Montana, including *Indigenous Environmental Network v. United States Department of State.* Through 15 August 2018 and 8 November 2018 Orders, the Montana District Court ordered supplemental environmental studies be undertaken, temporarily enjoining construction and operation of Keystone and associated facilities until the Department of State completed a supplement to the 2014 SEIS.[112]

54. In response to the Montana District Court's orders and other issues regarding alternative route proposals for the Keystone XL Project in Nebraska, the Department of State engaged in further environmental analysis and public comment in 2018 and 2019.[113]

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110 Presidential Permit Authorizing TransCanada Keystone Pipeline, L.P. to Construct, Connect, Operate, and Maintain Pipeline Facilities at the International Boundary Between the United States and Canada, dated 23 March 2017 (C-81).

111 Letter from Counsel to ICSID, dated 23 March 2017 (C-82).

112 *Indigenous Envtl. Network v. US Dept of State,* 317 F. Supp. 3d 1118 (D. Mont. 2018) (C-83); *Indigenous Envtl. Network v. US Dept of State,* 347 F. Supp. 3d 561 (D. Mont. 2018) (C-84); *see also* Coleman Expert Report, para. 48.

113 *See* U.S. Dep't of State, Releases – Keystone XL Pipeline (C-85).

55. On 29 March 2019, President Trump executed a Presidential Permit ("**2019 Presidential Permit**") under his own authority, granting permission for TC Energy "[t]*o Construct, Connect, Operate, and Maintain Pipeline Facilities at the International Boundary Between the United States and Canada*[.]"[114] This Permit superseded and revoked the 2017 Presidential Permit previously issued by the Department of State, granted TC Energy permission to begin constructing the Keystone XL Project, and required that construction commence within 5 years from the issuance of the Permit.[115]

56. As discussed by Professor Prakash, on 10 April 2019, President Trump issued E.O. 13867 further revising the Presidential Permitting process.[116] Under E.O. 13867, the Secretary of State still evaluates applications and advises the President in writing whether the application "*serve*[s] *the foreign policy interests of the United States*[.]"[117] However, the final decision-making function has explicitly reverted back to the President and "[a]*ny decision to issue, deny, or amend a permit shall be made solely by the President* [of the United States]."[118]

57. Notwithstanding the issuance of the 2019 Presidential Permit under the President's executive authority, the Department of State issued a Final Supplemental EIS in December 2019 ("**2019 Final EIS**").[119] The Department clarified that the 2019 Final EIS had no

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[114] Presidential Permit Authorizing TransCanada Keystone Pipeline, L.P. to Construct, Connect, Operate, and Maintain Pipeline Facilities at the International Boundary Between the United States and Canada, dated 29 March 2019, 84 Fed. Reg. 13,101 (3 April 2019) (C-86); *see also* Prakash Expert Report, para. 16.

[115] Presidential Permit Authorizing TransCanada Keystone Pipeline, L.P. to Construct, Connect, Operate, and Maintain Pipeline Facilities at the International Boundary Between the United States and Canada, dated 29 March 2019, art. 10, 84 Fed. Reg. 13101 (April 3, 2019) (C-86).

[116] Prakash Expert Report para. 17; Exec. Order No. 13867 (10 April 2019), 84 Fed. Reg. 15,491 (15 April 2019) (C-87).

[117] Exec. Order No. 13867, § 2(h) (10 April 2019), 84 Fed. Reg. 15,491 (15 April 2019) (C-87).

[118] *Id.*, § 2(i).

[119] Final Supplemental Environmental Impact Statement for the Keystone XL Project dated December 2019 ("**2019 Final EIS**") (C-88).

authority over the border crossing facilities and explained that it had completed its environmental analysis because it was "*useful and efficient*" to do so:

> *The Department, in cooperation with other agencies, completed this SEIS because it began work on the SEIS before the Presidential Permit issued on March 29, 2019 and it was useful and efficient for the Department to complete its work as applied to the "Facilities" defined in the March 29, 2019 Presidential Permit. Finally, nothing in this SEIS should be construed as the Department exercising authority over the "Border Facilities" as defined in the March 29, 2019 Presidential Permit. The construction, connection, operation, and maintenance of the Keystone XL Project's "Border Facilities" are governed by the authority of the March 29, 2019 Presidential Permit*.[120]

58. The 2019 Final EIS affirmed the key conclusions of the 2014 Final EIS. Professor Coleman explains:

> *The 2019 final supplemental environmental impact statement incorporated by reference the 2014 final supplemental impact statement's conclusions that rejecting the pipeline would not reduce oil sands production, would lead to more oil-by-rail transport, and thus increase emissions. It also updated the market analysis that formed the basis of the 2014 conclusion and again concluded that "Thus, even in the absence of the proposed Project, crude oil that would have been transported on Keystone XL is still being and will be produced and transported to market by rail."*[121]

59. Further lines of litigation relating to Indian reservations were commenced in 2018 and 2019 in Montana District Courts including *Rosebud Sioux Tribe and Fort Belknap Indian Community v. U.S. Department of State et. al.*, *Northern Plains Resource Council et. al. v. U.S. Army Corps of Engineers et. al.*, and *Indigenous Environmental Network and North Coast Rivers Alliance v. President Donald J. Trump et al*.[122] However, in each of the Montana District Court

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120 *Id*. at S-4 (emphasis added).

121 Coleman Expert Report, para. 51 (quoting 2019 Final EIS at 1-22) (emphasis added); *see also id.* para. 60.

122 *Rosebud Sioux v. U.S. Dep't of State,* No. 18-cv-00118-BMM, Complaint (D. Mont. 1 September 2018) (C-89); *Rosebud Sioux v. U.S. Dep't of State,* No. 18-cv-00118-BMM, First Amended Complaint (D. Mont. 8 May 2019)

cases, U.S. Government entities were co-Defendants alongside TC Energy,[123] or even the sole defendants,[124] and argued vigorously for the validity of the 2019 Presidential Permit and frivolous nature of the Plaintiffs' challenges. For example, in *Indigenous Environmental Network et. al. v. Trump et. al.*, the U.S. Government argued:

> *Plaintiffs' challenge is based on a blatant mischaracterization of what the Permit actually does (and what it does not do), joined with a grossly lopsided view of the Constitution's allocation of authority between the President and Congress (essentially, that Congress has it all and the President has none). Putting aside Plaintiffs' overstatement, and acknowledging the President's inherent authority as evinced by both precedent and history, this is not a hard case. The President's authority to issue a border-crossing Permit is well-established, that authority is not subject to judicial second-guessing, and Plaintiffs cannot plausibly argue any injury from the issuance of this Permit in any event.*[125]

(C-90); *NPRC v. U.S. Army Corps Eng'rs*, No. 19-cv-00044-BMM, Complaint (D. Mont. 1 July 2019) (C-91); *NPRC v. U.S. Army Corps Eng'rs,* No. 19-cv-00044-BMM (D. Mont. 10 September 2019), First Amended Complaint (C-92); *Indigenous Environmental Network v. President Donald J. Trump,* No. 19-cv-00028-BMM, Complaint (D. Mont. 5 April 2019) (C-93); *Indigenous Environmental Network v. President Donald J. Trump*, No. 19-cv-00028-BMM, First Amended Complaint (D. Mont. D. 18 July 18, 2019) (C-94).

[123] *Indigenous Environmental Network v. U.S. Dep't State*, No. 417-cv-00029-BMM, Order re TCE Motion to Intervene Granted (D. Mont. 25 May 2017) (C-95); *Rosebud Sioux Tribe v. U.S. Dep't of State*, No. 18-cv-00118-BMM, Order re TCE Motion to Intervene Granted (D. Mont. 11 December 2018) (C-96); *Indigenous Environmental Network v. President Donald J. Trump ,* No. 19-cv-00028-BMM, Order re TCE Motion to Intervene Granted (D. Mont. 9 July 2019) (C-97); *NPRC v. U.S. Army Corps Eng'rs*, No. 19-cv-00044-BMM, Order re TCE Motion to Intervene Granted (D. Mont. 23 July 2019 (C-98); *Assiniboine v. U.S. Dep't of Interior*, No. 20-cv-00044-BMM, Order re TCE Motion to Intervene Granted dated. Mont. 4 August 2020) (C-99); *Bold Alliance v. U.S. Dep't of Interior*, No. 20-cv-00059-BMM, Order re TCE Motion to Intervene Granted (D. Mont. 17 September 2020) (C-100).

[124] *Rosebud Sioux Tribe v. U.S. Dep't of Interior*, No. 420-cv-00109-BMM, Complaint (D. Mont. 17 June 2020) (C- 101); *Indigenous Environmental Network v. BLM*, No. 420-cv-00115-BMM, – Complaint (D. Mont. 4 December 2020) (C-102).

[125] *Indigenous Environmental Network v. President Donald J. Trump*, Case No. CV-19-28-GF-BMM, Defendant's Memorandum in Support of Motion to Dismiss Plaintiff's Complaint at 1 (D. Mont. 27 June 2019) (C-103); *see also Indigenous Envtl. Network v. U.S. Dep't. of State*, Case No. 4:17-CV-00029-BMM, Memorandum in Support of Motion to Dismiss (D. Mont. 9 June 2017) (arguing that "*Plaintiffs' claims that the U.S. Department of State* [. . .] *violated the National Environmental Policy Act ("NEPA"), the Migratory Bird Treaty Act ("MBTA"), and the Bald Eagle and Golden Eagle Protection Act ("Eagle Act") - which claims rely on the APA as the sole basis for invoking this Court's jurisdiction - must be dismissed. Plaintiffs' claims against the U.S. Fish and Wildlife Service ("FWS") should similarly be dismissed*.") (C-104); *Indigenous Environmental Network v. U.S. Department of State*, Case No. 4:17-CV-00029-BMM, Memorandum in Support of Supplemental Motion to Dismiss (D. Mont. 18 August 2017) (arguing that "[s]*ince the only jurisdictional basis for Plaintiffs' new claim is the ESA citizen-suit provision, which does not include the President in its waiver of sovereign immunity, see 16 U.S.C. § 1540(g)(1)(A), Plaintiffs' Third Claim for Relief must also be*

60. Moreover, the litigation typically sought relief regarding narrow or specific issues regarding the U.S. Government's conduct, not any conduct on the part of TC Energy, the permit holder. For example, in *Northern Plains Resource Council et. al. v. U.S. Army Corps of Engineers et. al.* the Plaintiffs complained about the USACE's reliance on the 12 February 2012 Nationwide Permit 12 in the context of the Keystone XL Project, a general permit that allowed many domestic oil pipelines to be built without any individualized federal environmental review.[126]

61. Thus, with the 2019 Presidential Permit issued under the President's authority and the U.S. Government advocating on behalf of its own conduct, the Keystone XL Project had a regulatory path forward to completion.

C. Claimant's Investment in the Keystone XL Project

1. APMC's Role and Decision to Invest in the Keystone XL Project

62. APMC is a statutory corporation formed under the Alberta Petroleum Marketing Act ("**PMA**")[127] and was created in 1974 to act as an arm's length commercial agent of the Government of Alberta.[128]

63. Historically, APMC's role has been to maximize the value of Alberta's petroleum resources. Specifically, APMC markets Alberta's conventional crude oil royalty, develops the pricing for royalty calculations, and manages Alberta's royalty share in the public interest.[129]

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dismissed for lack of jurisdiction, pursuant to Fed. R. Civ. P. 12(b)(1). Alternatively, this claim must be dismissed for lack of standing.") (C-105).

126 U.S. Army Corps of Eng'rs, Nationwide Permit 12, dated 13 February 2012 (C-106).

127 Petroleum Marketing Act, RSA 2000 c P-10 ("**PMA**"), sec. 2(1) (C-107). APMC has the rights, powers, and privileges of a natural person. *Id.,* sec. 2(1.1); *see also* Alberta Petroleum Mining Commission, Historic Timeline (C-108).

128 PMA, sec. 8(1) ("*APMC is for all purposes an agent of the Crown in right of Alberta*. . . .") (C-107); Witness Statement of Adrian Begley, dated 16 April 2024 ("**Begley Witness Statement**"), para. 9.

129 PMA, sec. 15 (C-107).

After legislative reform in 2013,[130] APMC's mandate expanded to include making investments and providing support in developing "value added" activities within Alberta's petroleum sector. This included the development of new energy markets and transportation infrastructure,[131] transforming APMC into a commercial vehicle for Alberta's strategic projects.[132]

64. Since its mandate was expanded, APMC has played a significant role in Alberta's energy sector. For instance, Mr. Begley discusses how APMC helped to develop the Sturgeon Refinery, the first refinery built in Canada in over 35 years.[133] APMC also developed a rail transportation project between 2017 and 2019 to accommodate increased demand for Albertan oil sands production, but then switched to supporting and investing in the Keystone XL Project.[134]

65. As described in Mr. Begley's witness statement, Alberta initially began negotiations to directly invest in the Keystone XL Project in September 2019.[135] By this time, President Trump had already issued a Presidential Permit in March 2019 granting TC Energy permission to start construction of Keystone XL[136] – and TC Energy had nearly complete capacity use commitments under a suite of transportation service agreements ("**TSAs**") – so demand for the use of the pipeline was effectively assured.[137]

66. APMC took over negotiations with TC Energy as the actual corporate vehicle to engage in the Project in early 2020.[138] The primary motive for the investment was APMC's goal

130 Building New Petroleum Markets Act, SA 213, c. 16 (C-109).
131 PMA, sec. 15(c) (C-107); *see also,* Alberta Petroleum Mining Commission, Historic Timeline (C-108).
132 Begley Witness Statement, para. 11.
133 *Id*., paras. 8, 12.
134 *Id*., paras. 8, 12-13.
135 *Id*., para. 14.
136 Presidential Permit Authorizing TransCanada Keystone Pipeline, L.P. to Construct, Connect, Operate, and Maintain Pipeline Facilities at the International Boundary Between the United States and Canada, dated 29 March 2019 (C-81).
137 Begley Witness Statement, para. 13.
138 *Id*., para. 17.

to accelerate the construction of the Keystone XL pipeline.[139] As confirmed in an Alberta government press release and discussed by Mr. Begley, Alberta as a province also stood to benefit during the construction period with jobs and tax revenues coming straight back from an initial investment.[140] Moreover, as discussed *supra* in **Section II.A.1**, U.S. Gulf Coast oil refinery infrastructure is geared toward refining heavy oil products like that produced from Alberta's oil sands. As Mr. Begley testifies, Alberta and APMC had a motive to better compete for use of that refining capacity with other foreign heavy oil source markets such as Venezuela.[141]

2. Structure of the Investment

67. On 31 March 2020, APMC executed an Investment Agreement with a TC Energy subsidiary, "**TCPL**," under which APMC agreed to provide up to US$ 5.3 billion of financial support for the construction of the Keystone XL Project in the United States and Canada.[142] As Mr. Maguire describes in his Expert Report, the Investment Agreement also outlined various scenarios, including financial movements between special purpose vehicles ("**SPVs**") formed by APMC and TCPL, and from equity to a loan guarantee.[143] The exact structure of the joint venture for the Keystone XL Project is somewhat complex. However, Mr. Maguire explains [redacted]

[redacted]

[redacted]

139 *Id.*, para. 15.
140 *Id.*, para. 15.
141 *Id.*, para. 16.
142 Investment Agreement between TransCanada Pipelines Ltd. and APMC, dated 31 March 2020 ("**Investment Agreement**") (C-110).
143 [redacted]; *see also* Begley Witness Statement, sec. IV.B.

[redacted]

68. [redacted]

[redacted]

69. APMC and TCPL structured their U.S. investment through an SPV formed in Delaware, United States (**181531115 Limited Partnership** or "**US SPV**") that was responsible for administering the costs, revenues and management related to the Keystone XL Project in the United States. US SPV consisted of one general partner and two limited partners:

- The general partner **181531115 LLC** or "**US SPV GP**", a Delaware company. US SPV GP was jointly owned by a subsidiary of TCPL and **2254753 Alberta Ltd.** ("**APMC US Member**"), a wholly-owned subsidiary of APMC. Various decisions required to be made by US SPV GP and US SPV required the approval of APMC US Member; and

- The two limited partners, a subsidiary of TCPL and **2254746 Alberta Sub Ltd.**, ("**APMC US Partner**"), a Delaware company indirectly wholly owned by APMC (through **2254746 Alberta Ltd.** or "**Canadian Holdco**," an Alberta subsidiary wholly owned by APMC).

70. The Keystone XL Project was conducted in the United States by TransCanada Keystone Pipeline, L.P. ("**US Carrier**"), the holder of the Keystone XL Presidential Permit. US Carrier ownership and control consisted of:

- One general partner, TC Keystone Pipeline G.P. LLC ("**US Carrier GP**"), a Delaware company. US Carrier GP consisted of two members, an indirect subsidiary of TCPL called TransCanada Oil Pipelines Inc ("**TCOPI**"), and **181541115 LLC** (previously defined as "**US SPV GP**"). Various decisions required to be made by US Carrier GP, as the general partner of US Carrier, required the approval of US SPV GP; and

- Two limited partners, a subsidiary of TCPL (which had no rights or obligations in respect of the Project) and **181531115 Limited Partnership** (previously defined as "**US SPV**").

144 [redacted]

145 *See also* [redacted].

71. A similar structure existed for Canadian investment and assets, with a managing partnership involving a sister entity to the US SPV called 2249158 Investments L.P. ("**Canadian SPV**") and an operating vehicle partnership.

72. There is thus a direct chain of ownership and control from APMC in Canada to the SPV investment structure in the United States through to US Carrier:

- APMC US Member, a wholly-owned subsidiary of APMC, is a member of US SPV GP;
- US SPV GP and Enterprise, a wholly-owned indirect subsidiary of APMC, are general and limited partners of US SPV;
- US SPV is a limited partner of US Carrier, the holder of the Presidential Permit; and
- US SPV GP is a member of US Carrier GP, the general partner of US Carrier.

73. [redacted]

[redacted]

74. As discussed above and also in Mr. Begley's Witness Statement, this Project was of significant importance to APMC, which had long experience in the industry and was involved in other capital investment projects.[147] Mr. Begley hired a team to lead APMC's monitoring rights for the Keystone XL Project.[148]

3. APMC's Investment Obligations and Benefits

75. APMC and TCPL executed the Investment Agreement on 31 March 2020. [redacted]

[redacted]

[redacted]

146 [redacted]

147 *See* Begley Witness Statement, paras. 8, 12, 15-16.

148 [redacted]

[redacted]

[redacted]

76. [redacted]

[redacted]

[redacted]

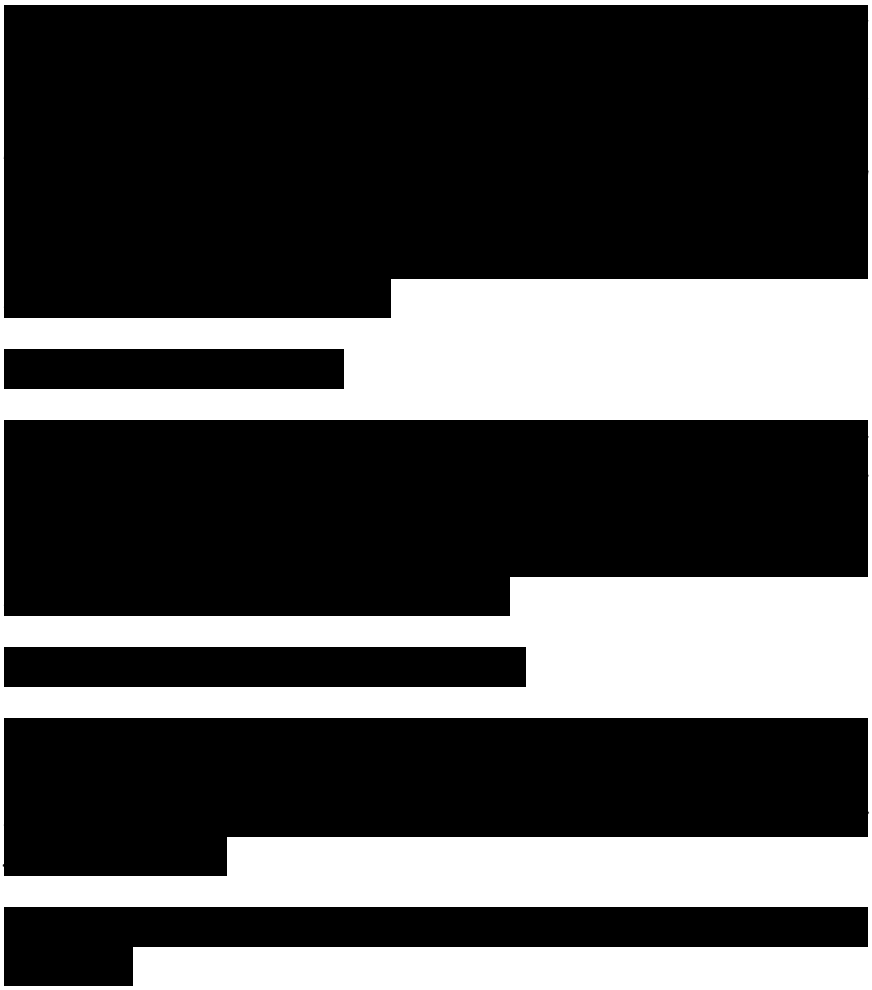
[redacted]

77. [redacted]

[redacted]

149 Investment Agreement, [redacted] (C- 110).

150 *Id.*, [redacted].



78. The broader benefits of the Keystone XL Project for APMC, in potentially being able to sell the Crown's oil royalty share into higher priced international oil markets, are clear. But in the context of the direct investment under the Investment Agreement, in exchange for the above capital and loan guarantee investments, APMC was to receive Class A limited partnership interests through the SPVs in the United States and Canada in proportion to its actual equity contributions made.[152]

151 *Id.*, .

152 ; Begley Witness Statement, para. 20.

79. An Accretion mechanism was included in the Investment Agreement which provided: (i) a 6% per annum quarterly return on APMC's Class A interests contributions to the SPV entities to 1 September 2023, then (ii) at 10% per annum quarterly return thereafter if the Project's in-service date had not been reached by that time, and, (iii) all subject to termination of such accrual at 1 April 2026.[153] In other words, APMC earned a deferred return on investment for making its equity contributions.

80. [redacted]

81. [redacted] a separate Class A repurchase right which allowed TC Energy to buy back APMC's US Class A rights after 1 January 2021.[158] Under the Investment Agreement, [redacted]

153 [redacted]; Begley Witness Statement, para. 20.

154 Investment Agreement, [redacted] (C-110); [redacted]; Begley Witness Statement, paras. 20-21, sec. IV.A.

155 [redacted]; Begley Witness Statement, [redacted].

156 Begley Witness Statement, [redacted].

157 *Id.*, [redacted].

158 [redacted]; Begley Witness Statement, para. 24.

[redacted] That exercise did take place,[160] but two further points arise:

- Although the equity contribution in the United States was returned to APMC with the accretion owed to date, the value of a continuing Class A accretion based on APMC's total equity contribution in the United States which had been bought back would thereafter be factored into the Canadian SPV Class A rights buy back price.[161] Thus, APMC's fact of equity contribution in the United States would continue to profit it up to the time of the event of Keystone XL [redacted] even after return of capital in January 2021; and
- [redacted] (with consequences discussed in **Sections II.E and V.B** *infra*).[163]

82. [redacted]

83. [redacted]

84. In the case of events of Project abandonment and similar scenarios, any amounts paid by APMC under the Guarantee would be converted, on a dollar-for-dollar basis, to Class C interests.[166] Conversion of such payments to Class C interests broadly provided a mechanism for APMC to share the risks of demobilizing and liquidating APMC's and TC Energy's capital and

159 Investment Agreement, [redacted] (C-110).
160 [redacted]; Begley Witness Statement, para. 24.
161 [redacted]; Begley Witness Statement, para. 24.
162 [redacted] (C-111); [redacted]; Begley Witness Statement, [redacted].
163 Begley Witness Statement, [redacted].
164 [redacted].
165 Investment Agreement, [redacted] (C- 110).
166 [redacted].

ownership contributions in the circumstances of Project abandonment.[167] APMC had a right to convert its Class A Interests and Class C Interests issued [redacted] (in which case, it would be entitled to receive profits in the Project).[168]

D. Construction for the Keystone XL Project was Executed According to Plan and the Anticipated In-Service Date was on Schedule

85. The construction plan for the Keystone XL Project was detailed and precise. Mr. Begley's Witness Statement describes the construction plan for the Keystone XL Project, which was proceeding according to a pre-established schedule.[169]

86. According this schedule, bringing the Keystone XL Project to commercial operations after the In-Service Date would have proceeded in stages [redacted] and would reach a delivery capacity of 830,000 bpd[173] [redacted] By this date, APMC and TC Energy expected that all construction for underground pipe and pump stations would have been finished; the Project would have been fully operational with oil flowing at full nominal delivery capacity; [redacted]

167 *Id.*, para. 51.
168 Investment Agreement, [redacted] (C-110).
169 Begley Witness Statement, [redacted].
170 *Id.*, [redacted].
171 [redacted]
172 [redacted]
173 [[830 kbbl/d equals 830,000 bpd.]]
174 Begley Witness Statement, [redacted].
175 *Id.*
176 *Id.*

87. [redacted]

88. Construction activities began in early April 2020, immediately following the 31 March 2020 execution of the Investment Agreement, with the border-crossing facility relevant to the Presidential Permit.[178] Pursuant to the Presidential Permit, the border crossing ran for 1.4 miles from the Canadian-U.S. border to the first pump station, located in Phillips County, Montana.[179] Construction on the border crossing was scheduled to begin on 1 April 2020 and be structurally complete without oil flowing [redacted].[180] In actuality, construction on the border crossing completed by 12 May 2020 – more than one month ahead of schedule.[181]

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177 [redacted] Investment Agreement between TransCanada Pipelines Ltd. and APMC, dated 31 March 2020 ("**Investment Agreement**"), [redacted].

178 TC Energy, Press Release, U.S./Canada border crossing completed, dated 25 May 2020 (C-112).

179 Begley Witness Statement, para. 37.

180 *Id.*, para. 37.

181 Keystone XL, U.S./Canada border crossing completed, dated 25 May 2020 (C-112); Begley Witness Statement, para. 37.

89. As discussed *supra* in **Section II.B.2**, there was some litigation initiated by tribal communities and environmental groups regarding the U.S. Government's handling of the Keystone XL Project. In April 2020, in *Northern Plains Resource Council et. al. v. U.S. Army Corps of Engineers et. al.*, a Montana District Court issued an Order vacating the USACE's issuance of Nationwide Permit 12 ("**NWP 12**") (a general permit issued for pipelines and other utility projects).[182] The Montana District Court determined that the USACE's decision to issue NWP 12 instead of conducting a review under the Endangered Species Act was in error.[183] The Court remanded NWP 12 to the USACE for compliance with the Act.[184] The Court's prohibition against any dredge or fill activities under NWP 12 until completion of the alternative consultation process and compliance with all environmental statutes and regulations had the effect of halting the installation of new pipeline in the United States.[185]

90. [redacted], after the border crossing segment was completed, construction within the United States focused on building pump stations (the majority of which were located in the United States), while in Canada, construction progressed for both pump stations and pipeline.[186]

91. Construction proceeded as planned and closely followed the construction schedule, with pipeline and pump station construction in Canada, and pump station construction

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182 *Northern Plains Resource Council et al. v. U.S. Army Corps of Engineers et. al.,* No. 4:19-cv-00044, Order at 21 (D. Mont. 15 April 2020) (C-113); *see also Northern Plains Resource Council et al. v. U.S. Army Corps of Engineers et. al.*, No. 4:19-cv-00044, Order Amending Summary Judgment Order (D. Mont. 11 May 2020) (confirming vacatur of NWP 12 pending completion of the consultation process and compliance with all environmental statutes and regulations) (C-114).

183 *Northern Plains Resource Council et al. v. U.S. Army Corps of Engineers et. al.,* No. 4:19-cv-00044, Order at 21 (D. Mont. 15 April 2020). (C-113).

184 *Id*.

185 *Id.* at 26; *see* also Begley Witness Statement, para. 40.

186 Begley Witness Statement, para. 40.

in the United States.[187] APMC monitored TC Energy's incurred costs closely and diligently, and there was "*sustained construction progress with each passing month*."[188]

92. By mid-January 2021, and at the time of the Revocation, construction activities in both the United States and Canada remained aligned with the construction schedule [redacted]

93. The Keystone XL Project successfully obtained the required Canadian permits,[190] and nearly all the required United States federal permits, which related to environmental and waterway issues; in particular, the USACE renewed permit approvals arising from the April 2020 Montana District Court Order.[191] At the time of the Revocation, the remaining authorizations were in progress and expected to be issued.[192] Necessary state and local permits were also largely acquired, with some to be submitted and issued in accordance with construction dates.[193] APMC fully expected that the remainder of the work would be completed according to plan.[194]

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187 *Id*., para. 42.

188 *Id*.

189 *Id*., paras. 28-31, 44.

190 *Id*., para. 44.

191 *See* U.S. Army Corps of Eng'rs, Public Notice: Joint Notice of Permit Pending, dated 14 August 2020, Table B-1 (C-115); *see also Northern Plains Resource Council et al. v. U.S. Army Corps of Engineers et. al.,* No. 20-35432, Order at 3 (9th Cir. 11 August 2021) ("*The U.S. Army Corps of Engineers' issuance of a new nationwide permit supersedes the agency action that is the subject of these appeals*.") (C-116).

192 *See, e.g.,* U.S. Army Corps of Eng'rs Omaha District, Keystone XL Project (confirming receipt of complete Section 10/404 application in July 2020 and virtual public hearings on 28 September 2020, 29 September 2020, and 1 October 2020) (C-117); Habitat Conservation Plan and Draft Environmental Assessment, Keystone XL Pipeline: Incidental Take Permit Application for American Burying Beetle; Tripp County, South Dakota, and Antelope, Boyd, Brown, Cherry, Holt, and Keya Paha Counties, Nebraska, 85 Fed. Reg. 50,043 (17 August 2020) (confirming receipt of incidental take permit application and requesting public comments) (C-118); *see* also Begley Witness Statement, para. 44.

193 *See* U.S. Army Corps of Eng'rs, Public Notice: Joint Notice of Permit Pending, dated 14 August 2020, Table B-1 (C-115).

194 Begley Witness Statement, para. 44.

E. The U.S. Government Revoked the Presidential Permit for the Keystone XL Project, Destroying APMC's Investment

94. Notwithstanding that the cross-border pipeline segment relevant to the Presidential Permit had been built 8 months prior, on 20 January 2021, in the first hours of his Presidency, President Biden issued E.O. 13990 "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," which, *inter alia,* revoked the March 2019 Presidential Permit (previously defined as the "**Revocation**").[195] As noted at the outset of this Memorial, White House Press Secretary Jen Psaki confirmed that the Biden White House clearly understood the performative nature of the Revocation.[196]

95. As explained in **Sections II.F and II.G**, and in Professor Sourgens' Expert Report, the Revocation was: (i) not linked to the United States' position regarding the Paris Agreement; (ii) not related to President Biden's stated plans to combat climate change; and (iii) nor was it consistent with past or future policy toward oil pipelines and hydrocarbon supply infrastructure domestically and at the U.S. border. Instead, the Keystone XL Project was sacrificed for the sake of public perception, and APMC's substantial investment was destroyed without formal notice or due process.[197]

96. To the best of Claimant's knowledge, this Revocation is unprecedented. Both Professors Coleman and Prakash indicate that the Revocation is the only time they are aware of

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[195] Exec. Order No. 13990, § 6(d) (20 January 2021), 86 Fed. Reg. 7,037 (25 January 2021) ("*Leaving the Keystone XL pipeline permit in place would not be consistent with my Administration's economic and climate imperatives*.") (emphasis added) (C-3).

[196] Press Briefing by Press Secretary Jen Psaki, dated March 7th, 2022 ("*I actually don't think it would. The Keystone was not an oilfield; it's a pipeline.* [. . .] [T}*he oil is continuing to flow in, just through other means. So it actually would have nothing to do with the current supply imbalance*.") (C-1).

[197] Prakash Expert Report, para. 50.

that a President has revoked an existing permit for a cross-border pipeline project.[198] Professor Prakash states:

> *To my knowledge, never before has the U.S. executive revoked a pipeline permit, much less in such a precipitous manner. Having issued the revocation hours into swearing his oath, there was neither notice of a potential revocation nor a hearing to hear the Permittee's side.*[199]

97. Counsel for APMC has sought to independently confirm whether a permit revocation of this nature has previously occurred, but such information is not ascertainable from public sources. Counsel therefore submitted a Freedom of Information Act ("**FOIA**") request to the Department of State on 14 December 2022, seeking records of all other cross-border Presidential permits granted under E.O.s 11423, 13337, and 13867, and any amendments, transfers, or revocations of those permits.[200] The Department of State has indicated that it will not respond to Claimant's FOIA request until 30 June 2025.[201]

98. Counsel has likewise sought to understand the formal process (or lack thereof) through which the decision to revoke the Keystone XL Presidential Permit was made. In December 2022, Claimant submitted 13 FOIA requests to the Department of State and other U.S. agencies and departments seeking any records and communications pertaining to the Revocation of the Keystone XL Presidential Permit that may have been generated in the months leading up President Biden's Inauguration on 20 January 2021.[202] The Department of State has indicated

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198 Coleman Expert Report, para. 79; Prakash Expert report, para. 61.

199 Prakash Expert Report, para. 61.

200 Series of emails between U.S. Department of State and Crowell and Moring, dated 14 December 2022-22 February 2023 (C-119).

201 *Id*.

202 Email from U.S. Department of State to Crowell and Moring, dated 15 December 2022 (C-120); Email from U.S. Department of Commerce, Office of the Secretary to Crowell and Moring, dated 14 December 2022 (C-121); Email from U.S. Department of the Interior, Fish and Wildlife Services to Crowell and Moring, dated 14 December

that it will not respond to this FOIA request until 30 June 2025;[203] five agencies continue to process Claimant's FOIA requests and have either not provided an anticipated response date,[204] or have indicated they will respond around the time of this submission;[205] four agencies concluded the FOIA process indicating that they had no documents to produce;[206] and three agencies produced documents that were not substantively relevant to this dispute.[207] Thus far, nothing produced by the United States in Claimant's year and a half long effort to understand the U.S. Government's actions contradicts Claimant's contention that the Revocation was anything more than an arbitrary and discriminatory destruction of Claimant's substantial investment without notice or due process.

2022 (C-122); Email from U.S. Environmental Protection Agency to Crowell and Moring, dated 14 December 2022 (C-123); Email from U.S. Department of Homeland Security, Customs and Border Protection to Crowell and Moring, dated 15 December 2022 (C-124); Letter from U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration to Crowell and Moring, dated 15 December 2022 (C-125); Letter from U.S. Department of Justice, Office of Legal Counsel to Crowell and Moring, dated 21 December 2022 (C-126); Letter from U.S. Department of Justice, Office of Information Policy to Crowell and Moring, dated 12 January 2023 (C-127); Email from U.S. Department of the Interior, Office of the Secretary to Crowell and Moring, dated 22 March 2023 (C-128); Letter from U.S. Department of Energy to Crowell and Moring, dated 15 December 2022 (C-129); Email from U.S. Department of Defense, Army Corps of Engineers to Crowell and Moring, dated 31 March 2023 (C-130), Email from U.S. Department of Justice, Civil Division to Crowell and Moring, dated 13 April 2023 (C-131); Email from U.S. Department of Justice, Environment and Natural Resources Division to Crowell and Moring, dated 15 December 2022 (C-132).

[203] Email from U.S. Department of State to Crowell and Moring, dated 25 January 2023 (C-133).

[204] Email from U.S. Department of Energy to Crowell and Moring, dated 8 May 2023 (C-134); Email from U.S. Department of Commerce, Office of the Secretary to Crowell and Moring, dated 16 November 2023 (C-135); Email from U.S. Department of Justice, Office of Legal Counsel to Crowell and Moring, dated 23 February 2023 (C-136).

[205] Email from U.S. Department of Interior, Office of the Secretary to Crowell and Moring, dated 22 November 2023 (C-137); Email from U.S. Department of Justice, Civil Division to Crowell and Moring, dated 13 April 2023 (C-131).

[206] Letter from U.S. Department of Defense, Army Corp of Engineers to Crowell and Moring, dated 15 May 2023 (C-139); Letter from U.S. Department of Justice, Environment and Natural Resources Division to Crowell and Moring, dated 13 February 2023 (C-140); Letter from U.S. Department of Justice, Office of Information Policy to Crowell and Moring, dated 17 January 2023 (C-141); Email from U.S. Department of Homeland Security, Customs and Border Protection to Crowell and Moring, dated 15 November 2023 (C-142).

[207] Letter from U.S. Environmental Protection Agency to Crowell and Moring, dated 8 May 2023, attaching production (C-143); Letter from U.S. Department of the Interior, Fish and Wildlife Services to Crowell and Moring, dated 6 June 2023, attaching production (C-144); Letter from U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration to Crowell and Moring, dated 28 February 2023, attaching production (C-145).

99. On 20 January 2021, the same day as the Revocation, TC Energy announced the suspension of the Keystone XL Project's construction activities.[208]

100. As part of obtaining funding for the Keystone XL Project, TC Energy had solicited commitments from companies who wished to transport crude oil on the Keystone XL Project. As noted above in **Section II.C.1**, these commitments were memorialized in various TSAs. [redacted]

101. [redacted]

208 TC Energy, TC Energy disappointed with Expected Executive Action revoking Keystone XL Presidential Permit, dated 20 January 2021 (C-146).

209 Investment Agreement, [redacted] (C-110).

210 Begley Witness Statement, [redacted].

211 *See, inter alia*, Investment Agreement, [redacted] (C-110).

212 Begley Witness Statement, [redacted].

213 *See* [redacted] (C-237); [redacted] (C-284).

102. Over the next few months APMC and TC Energy worked to wrap up the Keystone XL Project's affairs.[214] [redacted]

103. That same day, 9 June 2021, TC Energy publicly confirmed the termination of the Project.[217]

F. The United States' International Relations and Greenhouse Gas Emissions Policies Do Not Contemplate Pipeline Permit Revocation

104. The purported reason for the Revocation is expressed in E.O. 13990 as follows:

> *(b) 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.*
>
> *(c) Climate change has had a growing effect on the U.S. economy, with climate-related costs increasing over the last 4 years. Extreme weather events and other climate-related effects have harmed the health, safety,*

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214 Begley Witness Statement, sec. VI.

215 *Id.*, [redacted].

216 *Id.*, [redacted].

217 TC Energy, TC Energy confirms termination of Keystone XL Pipeline Project, dated 9 June 2021 ("*after a comprehensive review of its options, and in consultation with its partner, the Government of Alberta, it has terminated the Keystone XL Pipeline Project (the Project). Construction activities to advance the Project were suspended following the revocation of its Presidential Permit*….") (C-147).

> *and security of the American people and have increased the urgency for combatting climate change and accelerating the transition toward a clean energy economy. The world must be put on a sustainable climate pathway to protect Americans and the domestic economy from harmful climate impacts, and to create well-paying union jobs as part of the climate solution.*
>
> *(d) The Keystone XL pipeline disserves the U.S. national interest. . . .*[218]

105. In short, the purported basis for the Revocation was its alleged coherence with broader climate change policy grounded in the 2015 Record of Decision. It is therefore critical that one understand the basis of the United States' climate change policy in the 2015 time period, and specifically the alleged development of the "*climate leadership*" that ostensibly continued to justify its national interest conclusion and the ultimate revocation of the Keystone XL Presidential Permit in 2021.[219]

106. As further developed in the expert report of Professor Sourgens, the reality is that U.S. international climate policy (whether looking at 2015 or the present) has never involved any stance on oil pipelines, let alone their destruction, as a basis for establishing international leadership toward "*combatting climate change*" or to putting the United States "*on a sustainable climate pathway to protect Americans and the domestic economy from harmful climate impacts*[.]"[220] In summary, that policy was primarily driven by plans, through regulation, to decarbonize electricity production in the United States, and to alter transportation infrastructure

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218 Exec. Order No. 13990, § 6(b)-(d) (20 January 2021), 86 Fed. Reg. 7,037 (25 January 2021) (C-3).
219 *Id.*, § 6(b).
220 *Id.*, § 6(c).

use of oil products – not to retard development of, or even undo, American cross-border and domestic oil production infrastructure.[221]

107. Since 1992, the United States has been a member of the United Nations Framework Convention on Climate Change ("**UNFCCC**").[222] Although the United States had rejected involvement in the Kyoto Protocol to the UNFCCC in the early 2000s,[223] it remained part of the root treaty. In 2013, at Warsaw, UNFCCC member states had agreed to formulate intended nationally determined contributions ("**INDCs**") to mitigate climate change.[224]

108. The United States' climate policy was and is not some amorphous, undefined system based on aspiration and best wishes, but rather a well formulated and thought out policy. As Professor Sourgens argues, the United States was motivated in 2014 and 2015 to attract stakeholder "buy-in" for a new UNFCCC agreement at Paris from partners such as China and Canada.[225] And so, following on this momentum toward further international engagement in the UNFCCC system, President Barack Obama and President Xi Jinping of China held a public press conference on 12 November 2014. The United States at this point signaled through a press statement a commitment regarding domestic GHG emissions to "*achieve an economy-wide target of reducing its emissions by 26%-28% below its 2005 level in 2025 and to make best efforts to reduce its emissions by 28%*."[226]

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221 Expert Report of Professor Frédéric G. Sourgens, dated 9 April 2024 (previously referred to as "**Sourgens Expert Report**"), paras. 41-59.

222 *Id*., para. 15.

223 *Id*.

224 UNFCCC, Report of the Conference of the Parties on its nineteenth session, held in Warsaw from 11 to 23 November 2013, Decision 1/ CP.19, para. 2 (C-148).

225 Sourgens Expert Report, paras. 19, 23, 54, 59.

226 The White House Office of the Press Secretary, U.S.-China Joint Announcement on Climate Change', dated 12 November 2014 (C-149).

109. On 31 March 2015, the United States issued its INDC.[227] This 5-page document represents the roadmap of United States policy contemplated within the UNFCCC framework. It reiterated a policy for the United States to reach a GHG reduction target of "*26-28 per cent below its 2005 level in 2025 and to make best efforts to reduce its emissions by 28%*."[228] At the end of the document, it lists conducted and intended governmental action to achieve this goal. None of these intended governmental actions mention pipelines, let alone anything specific about curtailing oil supply infrastructure. Instead, the targets are:

- "*fuel economy standards for . . . vehicles*[;]"[229]
- "*buildings sector emissions. . .*[;]"[230]
- "*alternatives to high*-[global warming potential hydrofluorocarbons;]"[231]
- "*to cut carbon pollution from new and existing power plants* [;]"[232] and
- "*standards to address methane emissions from landfills and the oil and gas sector*."[233]

110. As discussed *supra* in **Section II.A**, oil's functions are diverse, but in the United States oil is primarily utilized as an energy source for various modes of transportation,[234] with only a miniscule amount being used for electricity generation.[235] While the above topics

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227 UNFCCC U.S. cover note INDC and accompanying information (C-150); UNFCCC, US Submits its Climate Action Plan Ahead of 2015 Paris Agreement, dated 31 March 2015, (C-151).

228 UNFCCC, U.S. cover note INDC and accompanying information at 1 (C-150).

229 *Id*. at 5.

230 *Id*.

231 *Id*.

232 *Id*.

233 *Id*.; UNFCCC, US Submits its Climate Action Plan Ahead of 2015 Paris Agreement, dated 31 March 2015, (C-151).

234 U.S. Energy Information Administration, Oil and petroleum products explained: Use of oil, last updated 22 August 2023 (transportation accounted for 66.6% of petroleum consumption by major end-use sectors in 2022) (C-8).

235 *Id*. (electricity generation only accounted for 0.6% of petroleum consumption by major end-use sectors in 2022).

implicate oil use in the economy, they largely focus on demand-side reform. Insofar as the focus is on production impacts, it is in electricity production, not oil as an input.

111. Also, by March 2015, plans had developed for an international conference to negotiate an update to the UNFCCC system with a new agreement, with talks to take place in Paris in December 2015.[236] This particularly contextualizes the March 2015 INDC, as the document showing American priorities leading into renewed climate treaty negotiations.

112. Leading up to that conference, a further presidential joint statement between the United States and China in September 2015 reiterated existing policy.[237] This coincided with the issuance of the United States Quadrennial Energy Review chapter, which also was released in September 2015.[238] Again, these policy documents did not discuss a pipeline cancelation policy, nor any reference to the Keystone XL Project, as integral to an internationally-facing GHG emissions strategy for the United States Government. If the United States were to ground its climate policy in pipelines and curtailing oil infrastructure, one would have expected some mention in these key documents as the Paris negotiations approached.

113. This was the context of the 2015 Record of Decision by which the Department of State determined the Keystone XL Project "*would not serve the national interest*" owing to the alleged perception of the Project, rather than following the actual 2014 Final EIS results, and that:

> *Such a decision* [to approve the Keystone XL Project cross border permit] *would be viewed internationally as inconsistent with the broader U.S. efforts to transition to less-polluting forms of energy and would undercut the credibility and influence of the United States in urging other countries*

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236 UNFCCC, US Submits its Climate Action Plan Ahead of 2015 Paris Agreement, dated 31 March 2015 (C-151).

237 The White House Office of the Press Secretary, Joint Statement by President Obama and President Xi Jinping of China on Climate Change, 2015 DAILY COMP. PRES. DOC. 649 (25 September 2015) (C-152).

238 U.S. Dep't of Energy, Quadrennial Technology Review: An Assessment Of Energy Technologies and Research Opportunities, Chapter 8: Advancing Clean Transportation and Vehicle Systems and Technologies, dated September 2015 at 281, (C-153).

> *to put forward ambitious actions and implement efforts to combat climate change, including in advance of the December 2015 climate negotiations*.[239]

114. Ultimately, the Paris Agreement was adopted by 196 parties to the UN Climate Change Conference ("**COP21**") in Paris on 12 December 2015. At its Article 4(2) it was declared:

> *Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions*.[240]

115. On 3 September 2016 the United States issued its first Nationally Determined Contribution ("**NDC**") in accordance with Article 4 of the Paris Agreement.[241] That document was identical to the INDC issued 18 months previously. It was unaffected by the November 2015 Record of Decision about the Keystone XL Project, and in no way indicated that the decision about this pipeline signaled a new or alternative approach to achieving GHG-related objectives within the UNFCCC structure. Nor had the 2015 Record of Decision even mentioned the INDC, or indicated whether its recommendation was actually in harmony with the policy proposals the United States was offering its global partners as indicative of its intentions for GHG emissions policy. Accordingly, the denial of the Keystone XL Presidential Permit did not have the impacts alleged in the 2015 Record of Decision. While the Department of State had declared the perception of the Keystone XL Project permit denial as a relevant aspect of the Paris Agreement negotiations, it had in fact played no role in framing actual United States policy under the UNFCCC

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[239] U.S. Dep't of State Record of Decision and National Interest Determination, dated 3 November 2015 at 31, (C-74).

[240] Paris Agreement to the United Nations Framework Convention on Climate Change, 12 December 2015, *entered into force* 4 November 2016, art. 4(2) (C-154).

[241] UNFCCC U.S. cover note INDC and accompanying information (C-150).

regime leading up to COP21, nor once the Paris Agreement had been completed did it change anything about how the United States intended to set and achieve its NDC:

> *In sum, a review of the INDC / First U.S. NDC and a review of key contemporaneous instruments expressly designed to lead to the successful conclusion and later ratification of the Paris Agreement shows that U.S. climate policy at the time did not target transportation and the oil-based energy value chain. To the contrary, the U.S. understood and acted on the basis of an understanding that transportation (and oil in the transportation sector) are difficult to decarbonize by means of the policy standards included in the First U.S. NDC (fuel efficiency standards).*[242]

116. To paraphrase, the permit denial was not "viewed internationally" as consistent or inconsistent with "the broader U.S. efforts to transition to less-polluting forms of energy", nor did it "undercut the credibility and influence of the United States" one way or the other.

117. In January 2017, the Obama administration was replaced with the Trump administration. For the next four years, U.S. federal government policy shifted, including of course the approval of the Keystone XL Presidential Permit in March 2019. It also included, from 4 November 2019, the United States' withdrawal from the Paris Agreement.[243]

118. On 20 January 2021, the Biden administration replaced the Trump administration and began the process of bringing the United States back into the Paris Agreement on its first day in office, concurrent with the Revocation. The Revocation was not a condition of being able to rejoin the Paris Agreement, which was achieved by 19 February 2021.[244] By E.O. 14008, dated 27 January 2021, the United States declared that it would immediately begin the process of developing its NDC under the Paris Agreement, notably a decision separately set out from E.O.

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242 Sourgens Expert Report, para. 56.

243 U.S. Dep't of State, On the U.S. Withdrawal from the Paris Agreement, dated 4 November 2019 (C-156).

244 U.S. Dep't of State, The United States Officially Rejoins the Paris Agreement, dated 19 February 2021 (C-157); *see also* Sourgens Expert Report, para. 72.

13990, even though that document addressed multiple issues including the Keystone XL Permit.[245]

119. The administration issued a renewed NDC on 21 April 2021.[246] This document is more detailed than the previous NDC issued during the Obama administration. It also sets more robust GHG reduction targets: "*the United States is setting an economy-wide target of reducing its net greenhouse gas emissions by 50-52 percent below 2005 levels in 2030*."[247] Nevertheless, this document again does not mention pipelines at all. In a section entitled "*Sector-by-sector Pathways to 2030*" the headings for emission reduction targets are:

- Electricity;
- Transportation;
- Buildings;
- Industry;
- Agriculture and lands; and
- Non-CO2 Greenhouse Gas Emissions.[248]

120. Again, governmental intervention into oil production infrastructure is not presented as a vector to achieving the NDC goals. Coming so closely after the Revocation in January 2021, one would have expected to see some inclusion if the Revocation was actually linked to this policy space, since there was again a reliance on the same international climate change leadership justification of the 2015 Record of Decision in the Revocation. In a November

245 Exec. Order No. 14008, § 102(e) (27 January 2021), 86 Fed. Reg. 7,619 1 February 2021) (C-158).
246 UNFCCC, The United States of America Nationally Determined Contribution, Reducing Greenhouse Gases in the United States: a 2030 Emissions Target (C-159).
247 *Id*.
248 *Id*.

2021 report issued by the Department of State and the Executive Office of the President, "*THE LONG-TERM STRATEGY OF THE UNITED STATES Pathways to Net-Zero Greenhouse Gas Emissions by 2050*", the word "*pipeline*" is mentioned only once in 65 pages, and only in the context of potential technological improvement of pipelines themselves to reduce associated methane and other emissions.[249] This is another document one would have expected to highlight the importance and purported centrality of the Keystone XL Project permit Revocation to United States' climate change policy.

121. Thus, even after the Revocation and a renewed engagement with the Paris Agreement, the United States' internationally-facing GHG policy paid no more heed to pipelines than it had in its key roadmap documents during the Obama administration. The Revocation's reliance on the 2015 Record of Decision was reliance on a rationale which was, even at the time: (i) not actually connected to international GHG agreement objectives, and (ii) not necessary to the re-engagement later revealed intended for a restored U.S. position within the Paris Agreement architecture.

122. How the U.S. Government has actually engaged with oil production infrastructure, including similarly situated pipeline projects to the Keystone XL Project, in the years since the Revocation will be discussed in the following section.

G. The Revocation of the Keystone XL Presidential Permit Contradicted the United States' Long-established Policy and Practice of Supporting Pipelines

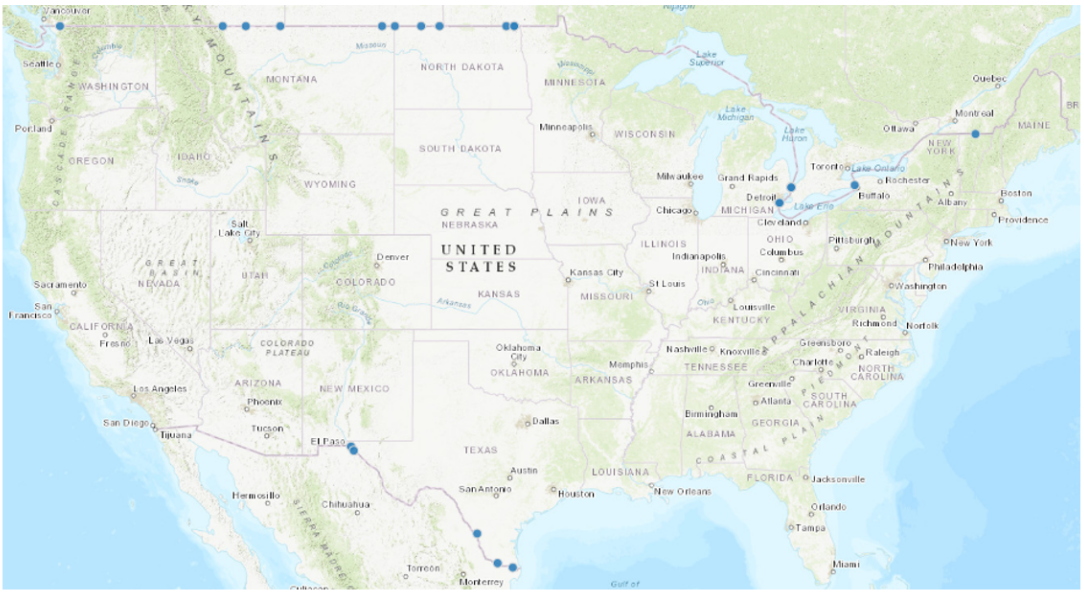
123. Notwithstanding the Revocation of the Keystone XL Presidential Permit, ostensibly due to concerns about climate change, the U.S. Government has allowed other cross-border oil

[249] The White House, The Long-term Strategy of the United States: Pathways to Net-zero Greenhouse Gas Emissions by 2050, dated November 2021 at 38 (C-160).

and gas pipelines to continue operations,[250] including, in several instances, pipelines similar to the Keystone XL Project. The U.S. Government's Revocation of the Keystone XL Presidential Permit contradicts the United States' longstanding policy and practice of establishing cross-border and domestic pipelines to secure the safe transportation of oil and natural gas into and within the country.

124. As described in more detail in **Section II.A.2**, there exist dozens of oil and natural gas pipeline crossings between the borders of the United States with Canada[251] and Mexico,[252] each crossing of which can have more than one pipeline.[253]

U.S. Border crossings of liquids pipelines as of 2017



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250 U.S. Energy Information Administration, Liquid Pipelines Project, Pipeline Projects Worksheet, dated 15 March 2024 (C-161).

251 Center for Strategic & International Studies, U.S.-Canada Energy Trade: Set for a Rebound, dated October 21, 2021 (C-162).

252 *See* U.S. Energy Information Administration, Border Crossings – Liquids (C-41); U.S. Energy Information Administration, Border Crossings – Natural Gas (C-42).

253 U.S. Energy Information Administration, Border Crossings – Liquids ("***Summary*** *. . . A crossing point represents one or more pipelines*.") (emphasis in original) (C-41).

254 *Id*. ("***Summary*** *. . . A crossing point represents one or more pipelines*."); *see also* U.S. Energy Information Administration, Border Crossings – Natural Gas (C-42).

125. Oil production in the United States has also increased, partly due to U.S. Government policies favouring domestic production in recent years.[255] For example, the U.S. Department of the Interior's Bureau of Land Management ("**BLM**"), a federal executive department responsible for the management and conservation of most federal lands and natural resources, has issued over 11,000 drilling permits on Federal Lands in the fiscal years 2021-2023. This represents an annual average increase compared to the previous five years.

	2016	2017	2018	2019	2020	2021	2022	2023
Total	2,184	2,486	3,388	3,181	4,226	4,914	2,852	3,519

[256]

1. The U.S. Government has Permitted other Cross-border Pipeline Projects Similar to the Keystone XL Project

126. Numerous pipelines currently transport liquids between the United States, Canada, and Mexico borders. The Keystone XL pipeline is the only cross-border pipeline that had its Presidential Permit revoked.[257] The following are examples of cross-border pipeline projects that continue to operate:

	Pipeline	Operational Since	U.S. Border
1.	Keystone XL[258]	Cancelled	Canada
2.	Enbridge Line 3[259]	2021	Canada
3.	Burgos (Dos Paises)[260]	2019	Mexico
4.	Nuevo Laredo[261]	2019	Mexico

255 *See, e.g., supra* n. 15.

256 U.S. Dep't of the Interior Bureau of Land Management ("**BLM**"), FY 2023 Application for Permit to Drill Status Report (C-163); FY 2023, Oil and Gas Statistics, Table 7: Number of Drilling Permits Approved by Fiscal Year (C-164).

257 U.S. Energy Information Administration, U.S. Liquids Pipeline Projects, Pipeline projects worksheet, row 204 (C-161).

258 *Id*.

259 *Id*., row 196.

260 *Id*., row 161. The EIA defines "**Conversion**" as "*Pipelines that were converted from transporting one product to another (considered added capacity),*" and "**Expansion**" as "*Projects that expanded mainline capacity and/or mileage, including pipeline twinning (additional pipes along the same right-of way). For expansions, pipeline route information reflects the route of the expansion*." *See id*., rows 6-7.

261 *Id*., row 231.

5.	Utopia[262]	2018	Canada
6.	Nueva Era[263]	2018	Mexico
7.	Alberta Clipper (Line 67)[264]	2017	Canada
8.	Express[265]	2016	Canada
9.	Vantage[266]	2016	Canada
10.	Magellan[267]	2015	Mexico
11.	Mariner West[268]	2014	Canada
12.	Vantage[269]	2014	Canada
13.	Enbridge Bakken[270]	2013	Canada
14.	Alberta Clipper (Line 67)[271]	2010	Canada
15.	Keystone[272]	2010	Canada
16.	Southern Lights[273]	2010	Canada
17.	Burgos[274]	2007	Mexico
18.	Dos Laredos[275]	2004	Mexico
19.	Express[276]	1997	Canada
20.	Cochin[277]	1979	Canada
21.	Enbridge Line 9[278]	1976	Canada
22.	Wascana[279]	1975	Canada
23.	Kiantone[280]	1971	Canada

262 *Id*., row 131.

263 U.S. Dep't State, Application of Borrego Crossing Pipeline, LLC for a Presidential Permit Authorizing the Construction, Operation, and Maintenance of Pipeline Facilities at the International Boundary Between the United States and Mexico, dated 12 August 2016 (C-166).

264 Border Expansion. U.S. Energy Information Administration, U.S. Liquids Pipeline Projects, Pipeline projects worksheet, row 129 (C-161).

265 *Id*., row 105.

266 *Id*., row 111.

267 Application for a new or amended presidential permit for Magellan Pipeline Company, L.P., dated 13 September 2013 (C-167).

268 Conversion. U.S. Energy Information Administration, U.S. Liquids Pipeline Projects, Pipeline projects worksheet, row 41 (C-161).

269 *Id*., row 51.

270 Canada Energy Regulator, Pipeline Profiles: Enbridge Bakken (C-169).

271 U.S. Energy Information Administration, U.S. Liquids Pipeline Projects, Pipeline projects worksheet, rows 83-84 (C-161).

272 *Id*., row 3.

273 Canada Energy Regulator, Pipeline Profiles: Southern Lights (C-170).

274 U.S. Dep't of State, NuStar Burgos Pipelines Environmental Assessment, dated 16 June 2016 (C-171).

275 Intent to Prepare a Supplemental Environmental Assessment (Supplemental EA) and to Conduct Scoping Consistent with the National Environmental Policy Act of 1969 (NEPA) for Proposed Changes to the NuStar Dos Laredos Pipeline, Public Notice 8770, dated 16 June 2014 (C-172).

276 U.S. Dep't of State, Spectra (Express Pipeline) (C-173).

277 Canada Energy Regulator, Pipeline Profiles: Cochin Pipeline (C-174).

278 Canada Energy Regulator, Pipeline Profiles: Enbridge Line 9 (C-175).

279 Canada Energy Regulator, Pipeline Profiles: Wascana (C-176).

280 United Refining Company, Form 10-K (C-177).

24.	Milk River[281]	1970	Canada
25.	Aurora[282]	1962	Canada
26.	Enbridge Line 5[283]	1953	Canada
27.	Trans Mountain[284]	1953	Canada
28.	Enbridge Mainline[285]	1950	Canada
29.	Portland-Montreal[286]	1941	Canada

127. There are also more than 50 border crossings for gas (non-liquid) pipelines between the U.S.-Canada and U.S.-Mexico borders (as noted above, each border crossing can contain more than one pipeline).[287] The vast majority of these pipelines are in operation, and a few are under construction, but none have been cancelled by the U.S. Government.[288]

128. Additionally, the U.S. Government has recently issued several Presidential Permits authorizing the construction, connection, operation, and/or maintenance of various cross-border pipeline infrastructure facilities for transporting oil and gas products across the United States' international borders with Mexico and Canada, including:

- 3 October 2020 Presidential Permit—Authorizing Express Pipeline, LLC, to operate and maintain existing pipeline facilities at the international boundary Between the United States and Canada near Wild Horse, MT.[289]

281 Canada Energy Regulator, Pipeline Profiles: Milk River (C-178).
282 Canada Energy Regulator, Pipeline Profiles: Aurora Pipeline (C-179).
283 State of Michigan, Overview (C-180).
284 Canada Energy Regulator, Pipeline Profiles: Trans Mountain (C-181).
285 Canada Energy Regulator, Pipeline Profiles: Enbridge Mainline (C-182).
286 Canada Energy Regulator, Pipeline Profiles: Montreal (C-183).
287 U.S. Energy Atlas, Border Crossing: Natural Gas (C-42).
288 U.S. Energy Information Administration, U.S. Liquids Pipeline Projects (C-161). On 26 January 2024 the U.S. Department of Energy announced a temporary pause on processing new liquified natural gas export applications to non-Free Trade Agreement countries to update its assessment criteria for determining the public interest of such exports. Notably, this pause does not affect projects that already have permits, whether they are operating or under construction, as was the case of the Keystone XL Pipeline prior to the Revocation. As noted in the statement, the Department of Energy expects already authorized exports and projects under construction to continue. *See* U.S. Dep't of Energy, DOE to Update Public Interest Analysis to Enhance National Security, Achieve Clean Energy Goals and Continue Support for Global Allies, dated 26 January 2024 (C-185).
289 Administration of Donald J. Trump 2020, Presidential Permit – Authorizing Express Pipeline, LLC, To Operate and Maintain Existing Pipeline Facilities at the International Boundary Between the United States and Canada, dated 3 October 2020 (C-186).

- 3 October 2020 Presidential Permit—Authorizing Front Range Pipeline, LLC, to operate and maintain existing pipeline facilities at the international boundary between the United States and Canada at Toole County, MT.[290]

- 3 October 2020 Presidential Permit—Authorizing NuStar Logistics, L.P., to operate and maintain existing pipeline facilities at the international boundary between the United States and Mexico near Laredo, TX.[291]

- 29 July 2020 Presidential Permit—Authorizing NuStar Logistics, L.P., to operate and maintain existing pipeline facilities at the international boundary between the United States and Mexico at Hidalgo County, TX.[292]

- 29 July 2020 Presidential Permit—Authorizing NuStar Logistics, L.P., to construct, connect, operate, and maintain pipeline facilities at the international boundary between the United States and Mexico at Hidalgo County, TX.[293]

129. Of particular relevance, the U.S. Government has allowed and supported the ongoing operation of multiple cross-border pipeline projects that share similar characteristics to the Keystone XL Project. Below are examples of some of these pipeline projects, which, unlike Keystone XL, are currently operating:

a. Enbridge Alberta Clipper (Line 67)

130. The Alberta Clipper Pipeline (Line 67) transports crude oil from Edmonton, Alberta to Superior, Wisconsin.[294] Line 67 is operated by Enbridge Energy, Limited Partnership, a Delaware entity.[295]

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290 Presidential Permit, 85 Fed. Reg. 63985 (8 October 2020) (C-187).

291 Administration of Donald J. Trump, 2020, Presidential Permit – Authorizing NuStar Logistics, L.P., To Operate and Maintain Existing Pipeline Facilities at the International Boundary Between the United States and Mexico, dated 3 October 2020 (C-188).

292 Administration of Donald J. Trump, 2020, Presidential Permit – Authorizing NuStar Logistics, L.P., To Operate and Maintain Existing Pipeline Facilities at the International Boundary Between the United States and Mexico, dated 29 July 2020 (C-189).

293 Administration of Donald J. Trump, 2020, Presidential Permit – Authorizing NuStar Logistics, L.P., To Operate and Maintain Existing Pipeline Facilities at the International Boundary Between the United States and Mexico, dated 29 July 2020 (C-190).

294 Enbridge, Infrastructure Map, https://www.enbridge.com/map#map:infrastructure (C-191).

295 Enbridge Energy, Limited Partnership is a Delaware-based subsidiary of Enbridge Inc. a Canadian corporation headquartered in Calgary, Alberta, Canada. *See* Enbridge, 2023 Annual Report (C-192).

296

131. In August 2009, the U.S. Department of State issued a Presidential Permit to Enbridge, authorizing it to construct, connect, operate, and maintain facilities at the U.S.-Canada border for the transport of crude oil across the international boundary.[297] In its determination, the U.S. Department of State stated that increasing crude oil pipeline capacity between Canada and the United States would advance several strategic interests of the United States. It also emphasized that robust domestic policies in each country, along with a strong international agreement, were the best ways to address the reduction of greenhouse gas emissions, as follows:

> *The National Interest Determination took many factors into account, including greenhouse gas emissions. The administration believes the reduction of greenhouse gas emissions are best addressed through each country's robust domestic policies and a strong international agreement.*
>
> *The United States is taking unprecedented steps at home to transform how we produce and consume energy. The president is*

296 Enbridge, Infrastructure Map, https://www.enbridge.com/map#map:infrastructure (C-191).

297 U.S. Dep't of State, Notice of Issuance of a Presidential Permit for the Proposed Enbridge Energy Alberta Clipper Pipeline Project, 74 Fed. Reg. 43212 (26 August 2009) (C-193).

> *committed to reducing overall emissions and leading the global transition to a low-carbon economy.*
>
> *The United States will continue to reduce reliance on oil through conservation and energy efficiency measures, such as the recently increased Corporate Average Fuel Economy (CAFE) standards, as well as through the pursuit of comprehensive climate legislation and an ambitious global agreement on climate change to include substantial emission reductions for both the United States and Canada.*
>
> *The State Department will continue to work to ensure that both the United States and Canada take ambitious action to address climate change, and will cooperate with the Canadian government through the U.S.-Canada Clean Energy Dialogue, the pursuit of comprehensive climate legislation, the United Nations Framework Convention on Climate Change and other processes to reduce greenhouse gas emissions*.[298]

132. In October 2017, the U.S. Department of State granted a new Presidential Permit to Enbridge, authorizing it to increase the pipeline's capacity from 450,000 bpd to 890,000 bpd on the existing three-mile cross-border segment of Line 67.[299]

133. Alberta Clipper's Line 67 has been operating since 2010 and has an average capacity of 800,000 bpd.[300]

b. Enbridge Line 3

134. The Line 3 ("**L3X**") pipeline project is a 337-mile upgrade and replacement of an existing underground pipeline[301] that transports oil sands-derived crude oil from Alberta, Canada to Superior, Wisconsin.[302] The replacement project was designed to address pipeline integrity

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298 U.S. Dep't of State, Permit for Alberta Clipper Pipeline Issued, dated 20 August 2009 (C-194).

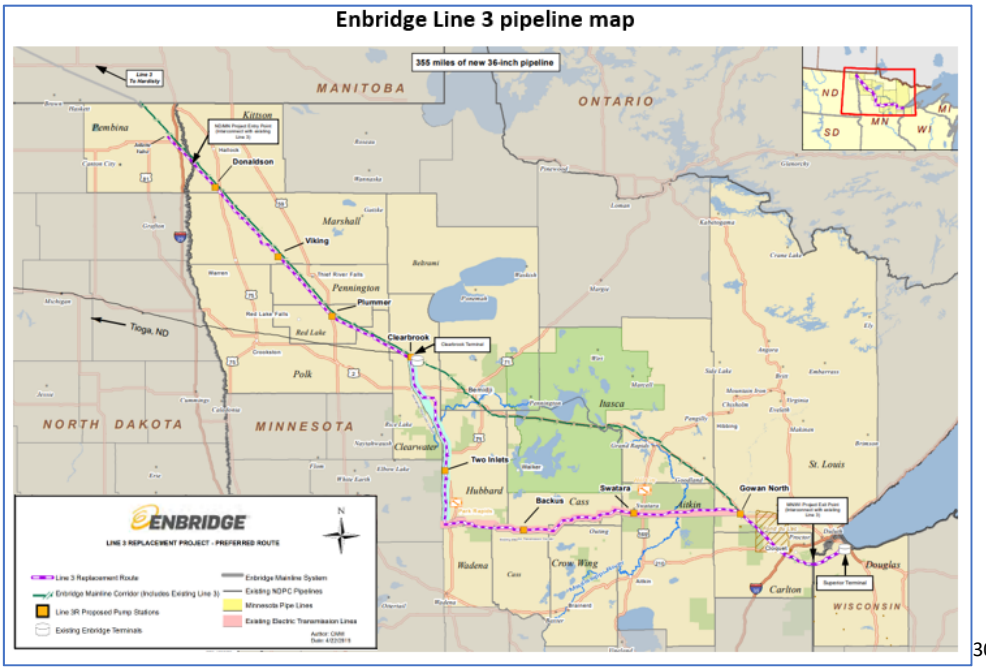
299 U.S. Dep't of State, Notice of Issuance of a Presidential Permit to Enbridge Energy, Limited Partnership, 82 Fed. Reg. 53553 (16 November 2017) (C-195); Enbridge, Interim Report to Shareholders: For the nine months ended September 30, 2017 (C-196).

300 Enbridge, Infrastructure Map, https://www.enbridge.com/map#map:infrastructure (C-191).

301 Enbridge, Line 3 Newsroom (C-197).

302 Enbridge, Line 3 Replacement Project Substantially Completed and Set to be Fully Operational, dated 29 September 2021 (C-198).

and safety concerns related to the previous pipeline and restore the throughput of the line to its original operating capacity of 760,000 bpd.[303] L3X has been in operation since October 2021,[304] under a cross-border Presidential Permit issued in 1968[305] originally granted to Enbridge's Lakehead Pipe Line Co. (a Delaware corporation),[306] along with additional federal permits granted in 2020 for its construction.[307]



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303 Minnesota Pollution Control Agency, Enbridge Line 3 pipeline replacement project (C-199).

304 Enbridge, Line 3 Newsroom (C-197); *see also* Enbridge, Line 3 is replaced (C-201).

305 In 2014, the Department of State determined that the project did not require a new Presidential permit for the replacement project. *See* S&P Global Commodity Insights, Enbridge says Line 3 oil sands pipeline won't need new presidential permit, dated 26 August 2014 (C-202).

306 Presidential Permit Authorizing Lakehead Pipe Line Company to Connect, Construct, Operate and Maintain a Pipeline at the International Boundary Line Between the United States and Canada, dated 22 January 1968 (C-138).

307 Letter from the Corps of Engineers to Enbridge Energy, dated 23 November 2020 (C-203); *see also* U.S. Army Corps of Eng'rs St. Paul District, Enbridge Line 3 (C-204).

308 Minnesota Public Utilities Commission Appendix A, Line 3 Replacement Project: Application for Certificate of Need, Project Overview Map (C-200).

135. The U.S. Government has publicly supported the project by filing briefs in favour of L3X before U.S. federal courts.[309] The U.S. Government could have revoked the 1968 Presidential Permit or the other federal permits it granted for the pipeline's construction, similar to what it did to the Keystone XL pipeline. Yet, unlike the case of Keystone XL, the U.S. Government has chosen to support the L3X project.

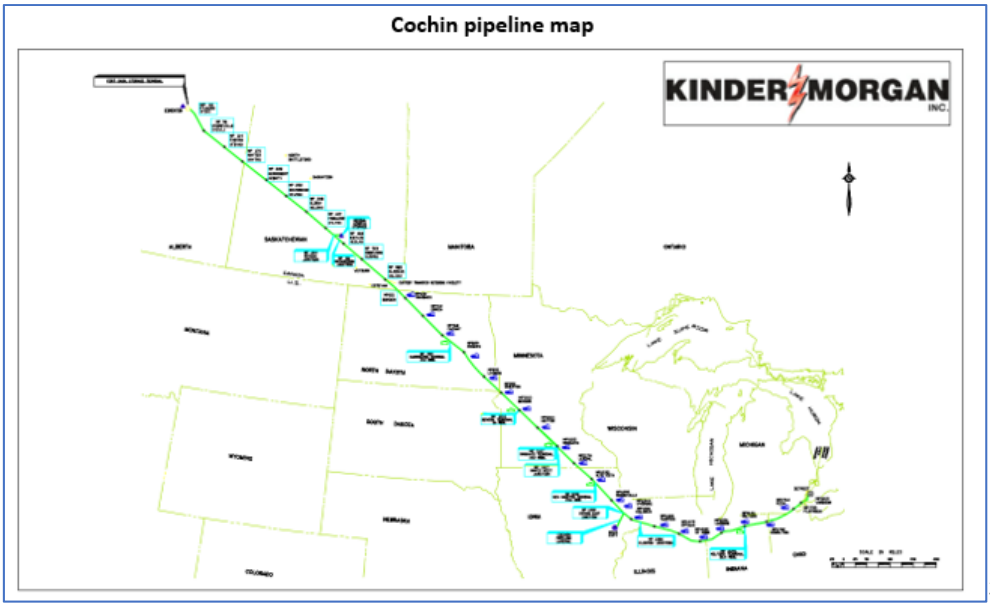
c. Cochin

136. The Cochin pipeline extends from Canada into the United States near Sherwood, North Dakota. It connects with several terminals and pipelines that facilitate the storage and delivery of condensate to oil sands production sites in Alberta.[310] The Cochin pipeline was originally owned by Kinder Morgan Cochin, LLC, a Delaware subsidiary of Kinder Morgan, Inc., and subsequently acquired by Pembina Pipeline Corporation in 2019.[311]

309 *Red Lake Band of Chippewa Indians, et. al. v. U.S. Army Corps of Eng'r*s, Civil Action No. 20-cv-03817 (CKK), Memorandum in Support of Federal Defendants' Cross-Motion for Summary Judgment and Response in Opposition to Plaintiff's Motion for Summary Judgment (D.D.C. 23 June 2021) (C-206).

310 Canada Energy Regulator, Pipeline Profiles: Cochin Pipeline (C-174).

311 *See* Kinder Morgan, Kinder Morgan Announces Closing of Pembina Transactions, dated 16 December 2019 (C-207). *see also* U.S. Dep't of State, Diplomacy in Action: Kinder Morgan (Cochin Pipeline) (C-155). Pembina Pipeline Corporation's subsidiary, Pembina Cochin LLC, is also incorporated in Delaware, *see* Pembina Pipeline Corp., Form 40-F for the fiscal year ending 31 December 2023 (C-168).



[312]

137. In November 2013, the U.S. Department of State issued a Presidential Permit authorizing Kinder Morgan to connect, operate, and maintain a pipeline extending from the international border between the United States and Canada at a point near Sherwood in Renville County, North Dakota, to the first block valve in the United States, located at milepost 636 of the pipeline, approximately 14.5 miles south of the international boundary.[313]

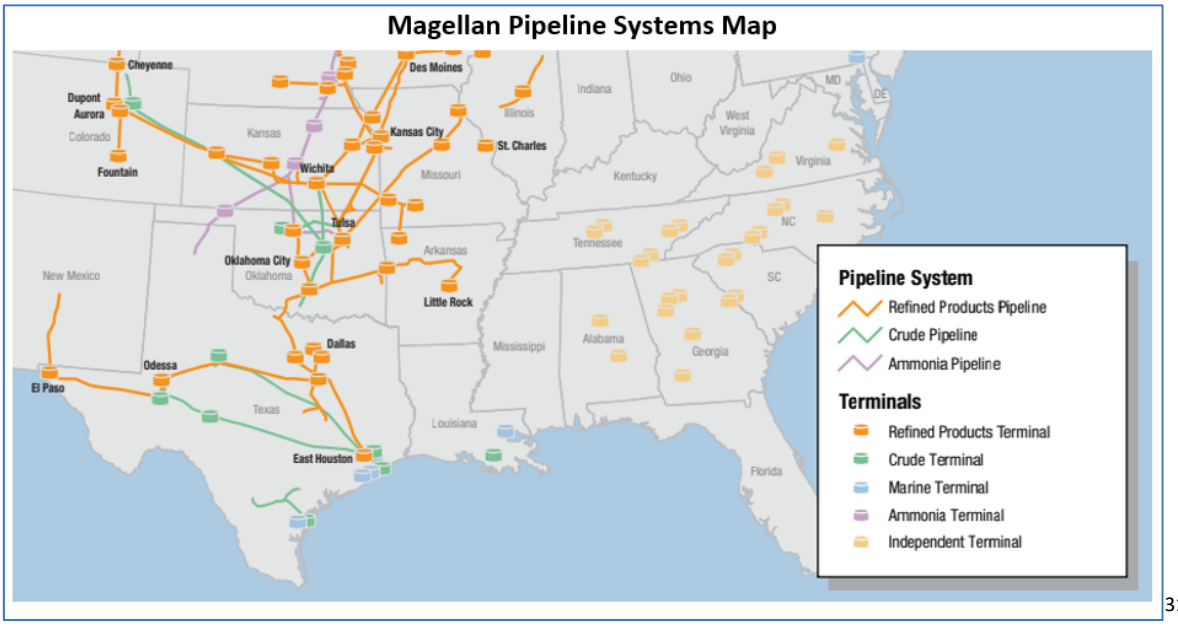
d. Magellan

138. The Magellan Pipeline facilitates the transportation of crude oil between the United States and Mexico. The pipeline system was originally operated by Magellan Pipeline

312 U.S. Department of State, Application for Kinder Morgan Cochin, LLC, dated 14 November 2012 (C-208).

313 Presidential Permit Authorizing Kinder Morgan Cochin, LLC, to Connect, Operate, and Maintain Pipeline Facilities at the International Boundary Between the Unites States and Canada, dated 27 November 2013, 78 Fed. Reg. 73582 (6 December 2013) ("*The Department of State issued a Presidential Permit to Kinder Morgan Cochin, LLC ("KM Cochin") on November 19, 2013, authorizing KM Cochin to connect, operate, and maintain existing pipeline facilities it acquired at the border of the United States and Canada at a point in Renville County, North Dakota, as a common carrier, for the transport of light liquid hydrocarbons between the United States and Canada. The Department of State determined that issuance of this permit would serve the national interest. In making this determination and issuing the permit, the Department of State followed the procedures established under Executive Order 1337, and provided public notice and opportunity for comment*.") (C-209).

Company, L.P., a Delaware[314] subsidiary of Magellan Midstream Partners, L.P., and recently acquired by ONEOK Inc.,[315] in 2023.[316]



[317]

139. In 2015, the U.S. Department of State issued a Presidential Permit to Magellan Pipeline Company, L.P., authorizing it to connect, operate and maintain the cross-border crude oil pipeline extending approximately 600 feet from the United States' boundary with Mexico to the vicinity of El Paso, Texas.[318]

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[314] U.S. Department of State, 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, dated 14 July 2015 (C-212).

[315] ONEOK, Inc, is Oklahoma-based company. *See* ONEOK, 2023 Annual Report (C-205); *see* also ONEOK, K-1 Tax Information (C-235).

[316] *See* ONEOK, Acquisition of Magellan Brings Together Two Premier Energy Infrastructure Businesses (C-210); ONEOK, Refined Products and Crude (C-211).

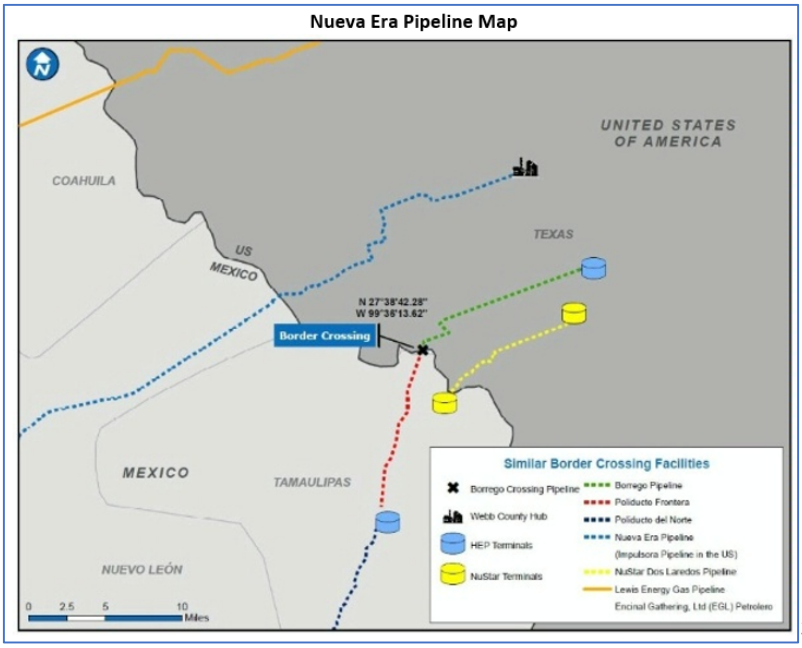
[317] Minnesota Public Utilities Commission, Line 3 Replacement Project Application for Certificate of Need Appendix A (C-200).

[318] U.S. Dep't of State, 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, dated 14 July 2015 (C-212).

140. The Magellan Pipeline initially operated under a Presidential Permit issued in 1995,[319] and later under the amended Presidential Permit issued in 2015.

e. Nueva Era

141. The Nueva Era Pipeline supplies gas from Webb County, Texas to Monterrey, Mexico.[320] This pipeline project is a collaboration between Howard Midstream Energy Partners, LLC, a Delaware midstream service provider based in Texas,[321] and Grupo CLISA, S. de R.L. de C.V., a Mexico-based company,[322] with each entity holding a 50% interest.[323]



[324]

[319] Application for a new or amended presidential permit for Magellan Pipeline Company, L.P., dated 13 September 2013 (C-167).

[320] Howard Energy Partners, Howard Energy Partners Announces Successful Open Season On Nueva Era Pipeline, dated 12 August 2015 (C-214).

[321] U.S. SEC, Howard Midstream Partners, L.P., Amendment No. 2 to Form S-1 (C-215).

[322] Grupo Clisa, Security & Privac[]y (C-213).

[323] Howard Energy Partners, Howard Energy Partners Announces Successful Open Season On Nueva Era Pipeline, dated 12 August 2015 (C-214).

[324] U.S. Dep't State, Application of Borrego Crossing Pipeline, LLC for a Presidential Permit Authorizing the Construction, Operation, and Maintenance of Pipeline Facilities at the International Boundary Between the United States and Mexico, dated 12 August 2016 (C-166).

142. On 14 May 2015, Impulsora Pipeline, LLC,[325] was granted a Presidential Permit authorizing it to site, construct, operate, and maintain border-crossing facilities to export natural gas.[326]

143. Construction started in early 2016, and the pipeline became operational in 2018.[327] The pipeline has a daily transport capacity of at least 504 million cubic feet.[328]

2. The U.S. Government has also Supported various Domestic Pipeline Projects with Characteristics Similar to Keystone XL

144. As described in **Section II.A.2**, there are more than 2.6 million miles of U.S. domestic oil and gas pipelines.[329] Of particular relevance, the U.S. Government has supported domestic pipeline projects with characteristics similar to Keystone XL.

a. Mountain Valley Pipeline

145. The Mountain Valley Pipeline ("**MVP**") project is a natural gas pipeline system currently under construction, designed to transport natural gas to markets in the Mid-Atlantic

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325 On 14 July 2015, Nueva Era Pipeline, LLC was formed as a wholly owned subsidiary of Howard Energy Partners to engage in the transportation and marketing of natural gas supplies. On 22 July 2015, Nueva Era Pipeline, LLC's limited liability company agreement was amended to admit Impulsora RF, S.A. de C.V. with a 50% membership interest. In connection with this amendment, a contribution agreement was entered into requiring Howard Energy Partners to contribute its interests in Impulsora Pipeline, LLC and cash consideration and Impulsora RF, S.A. de C.V. to contribute its interests in Impulsora TS9, S.A. de C.V., Impulsora LT, S.A.P.I. de C.V. and Midstream de Mexico, S.A.P.I. de C.V. Howard Midstream Partners, L.P., Amendment No. 2 to Form S-1 Registration Statement, dated 21 November 2017 (C-215).

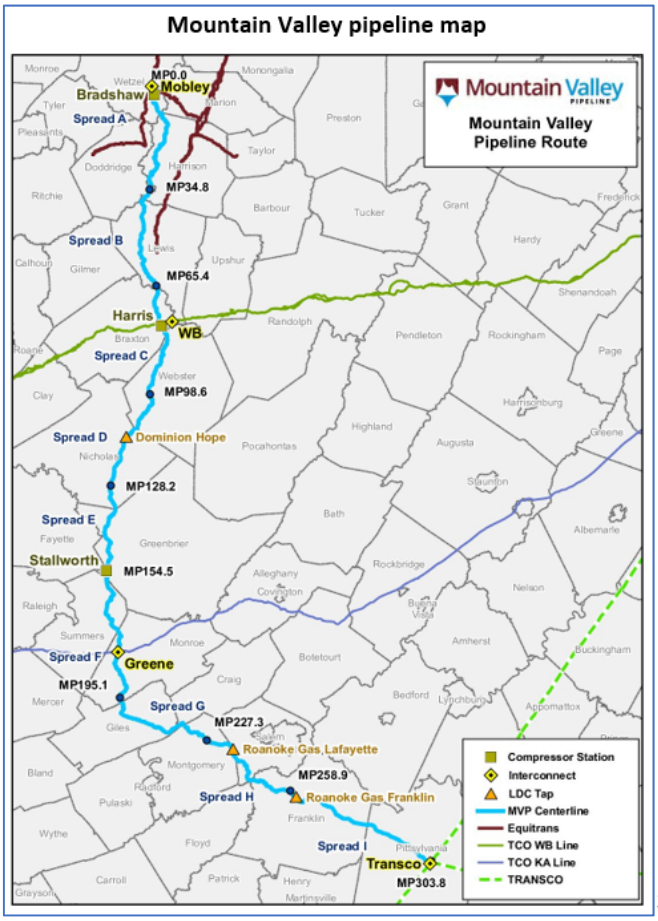
326 *Impulsora Pipeline, LLC*, 151 FERC ¶ 61,117, at 1 (2015) (order granting NGA section 3 authorization and Presidential Permit for border-crossing facilities) (C-216); *Impulsora Pipeline, LLC*, 153 FERC ¶ 61,204, at 1, n.3 (2015) (order on rehearing amending Impulsora's NGA section 3 authorization and Presidential Permit to clarify that only 1,400 feet of the border-crossing facilities will be located on the U.S. side of the international boundary) (C-217); *Impulsora Pipeline, LLC*, 155 FERC ¶ 61,265, at 2 (2016) (order granting Impulsora's request to further amend its NGA section 3 authorization and Presidential Permit to remove one of the previously-authorized parallel pipelines (border-crossing facilities) at the international boundary from the proposed project) (C-218); Pursuant to Section 3 of the Natural Gas Act ("**NGA**"), "*the FERC is responsible for authorizing the siting and construction of onshore and near-shore LNG import or export facilities under Section 3 of the Natural Gas Act* ." *See* FERC, LNG (C-219).

327 U.S. Energy Information Administration, Overview, last updated 31 March 2023 (C-220).

328 Howard Energy Partners, Howard Energy Partners Announces Successful Open Season On Nueva Era Pipeline, dated 12 August 2015 (C-214).

329 U.S. Dep't of Transportation, General Pipeline FAQs: Question 6, last updated 6 November 2018 (C-40).

and Southeastern United States. It covers approximately 303 miles from northwestern West Virginia to southern Virginia, traversing rugged terrain, including mountainous areas and water bodies.[330] The MVP is owned and being constructed by Mountain Valley Pipeline LLC, a joint venture formed by several affiliates in the United States.[331]



[332]

146. On 13 October 2017, the FERC granted a certificate of public convenience and necessity[333] authorizing the construction and operation of the MVP.[334] Construction began in

330 Mountain Valley Pipeline, Home (C-221).

331 *Id*.

332 *Id*.

333 A certificate of public convenience and necessity issued by FERC allows the recipient to engage in the transportation and/or sale for resale of natural gas in interstate commerce or to acquire and operate related facilities. *See* FERC, Glossary: Certificate of Public Convenience and Necessity (C-223).

334 *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 (2017) (C-224).

early 2018, but the MVP has since encountered legal and regulatory challenges, including opposition from environmental groups and local communities. In contrast to Keystone XL, the MVP has garnered considerable support from the U.S. Government. On 3 June 2023, President Biden signed the Fiscal Responsibility Act of 2023, which included language in section 324 approving the pipeline:

> *This section ratifies and approves all authorizations, permits, verifications, extensions, biological opinions, incidental take statements, and other approvals or orders issued for the construction and initial operation of the Mountain Valley Pipeline (a natural gas pipeline located in Virginia and West Virginia*).[335]

147. Further, on 21 April 2023, Secretary of Energy Jennifer Granholm wrote a letter to FERC expressing support for the "*view that the MVP project will enhance the Nation's critical infrastructure for energy and national security*." Secretary Granholm also pointed out that "*[…] new pipeline infrastructure is needed to support the rapid growth of hydrogen as an emissions-free fuel, and to transport carbon dioxide from its point of capture to the location of its use or sequestration*."[336]

148. On 10 and 11 July 2023, the U.S. Fourth Circuit Court of Appeals granted motions to halt MVP construction through the Jefferson National Forest.[337] However, on 27 July 2023, the U.S. Supreme Court granted an emergency application to vacate the Fourth Circuit's stays, allowing construction to resume.[338]

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335 Fiscal Responsibility Act of 2023, H.R. 3746, 118th Congress (2023) (C-225).

336 Letter from the Secretary of Energy to Federal Energy Regulatory Commission, dated 1 April 2023 (C-226).

337 *Wilderness Society v. United States Forest Service, et. al.*, No. 23-1592 (L), Order (4th Cir. 10 July 2023) C-227); *see also Appalachian Voices, et al. v. United States Dep't of the Interior, et. al.*, Order (2023) (C-228).

338 *Mountain Valley Pipeline, LLC v. Wilderness Society, et al.*, Order in Pending Case (2023) (C-229).

149. On 18 December 2023, FERC granted a three-year extension, until 18 June 2026, to complete the construction of the MVP project.[339] As of the date of this submission, the MVP was expected to be completed in the second quarter of 2024.[340]

b. Dakota Access

150. Dakota Access is an underground pipeline that transports crude oil from the Bakken oil fields in North Dakota to a terminal in Patoka, Illinois. The Dakota Access Pipeline is owned by Dakota Access LLC, a non-wholly owned subsidiary of Energy Transfer L.P.[341]

342

339 Oil & Gas Journal, Southgate natural gas pipeline granted 3-year extension, dated 20 December 2023 (C-230).

340 RBN Energy LLC, MVP Delayed Until 2nd Quarter, dated 20 February 2024 (C-231).

341 Energy Transfer is a Delaware limited partnership with common units publicly traded on the New York Stock Exchange. *See* Energy Transfer L.P., Form 10-K For the fiscal year ended December 31, 2023 at 6 (C-232); *see also* Energy Transfer, Dakota Access LLP, dated 30 March 2024 (C-233).

342 Dakota Access Pipeline, Overview (C-234).

151. On 24 January 2017, however, President Trump issued E.O. 13766 Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects,[343] and subsequently, on 8 February 2017, the USACE granted an easement to Dakota Access LLC, allowing the installation of a thirty-inch diameter light crude oil pipeline under federal lands managed by the USACE at the Oahe Reservoir, in North Dakota.[344]

152. The Dakota Access pipeline has been operating since 2017, and has a capacity of up to 570,000 bpd.[345]

III. THE UNITED STATES' BREACHES OF NAFTA CHAPTER 11

153. The United States has acted inconsistently with its obligations Chapter 11 of NAFTA, with respect to the following provisions:

a. Article 1105: Minimum Standard of Treatment

b. Article 1102: National Treatment

c. Article 1103: Most Favoured Nation Treatment

d. Article 1110: Expropriation and Compensation

154. Claimant hereby explains the significance of these provisions and describes Respondent's wrongful conduct by applying them to the facts outlined above.

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[343] Administration of Donald J. Trump, 2017, Memorandum on Construction of the Keystone XL Pipeline, dated 24 January 2017 (C-78).

[344] The easement, covers approximately 1.25 miles of the pipeline that runs under the Missouri River along federally owned land. *See* U.S. Army Corps Eng'rs, Corps Grants Easement to Dakota Access, LLC, dated 8 February 2017 (C-236). On 27 July 2016, the Standing Rock Sioux Tribe and other Native American tribes filed a lawsuit in the U.S. District Court for the District of Columbia challenging permits issued by the USACE permitting Dakota Access to cross the Missouri River at Lake Oahe in North Dakota. The case was subsequently amended to challenge an easement issued by the USACE. The District Court vacated the easement and ordered USACE to prepare an EIS, but the pipeline was subsequently allowed to continue operation during environmental review. On 8 September 2023, USACE published the Draft EIS, and anticipated that a Final EIS and Record of Decision would be issued in 2024. *See* Energy Transfer L.P., Form 10-K For the fiscal year ended 31 December 2023 at 64-65 (C-232).

[345] U.S. Army Corps of Engineers, Dakota Access Pipeline (C-238).

A. NAFTA Article 1105: The United States' Conduct Breached the Minimum Standard of Treatment Obligations

155. Under NAFTA Article 1105(1), the United States guaranteed to "*accord to investments of investors of another Party [such as APMC] treatment in accordance with international law, including Fair and Equitable Treatment ("**FET**") and full protection and security*." The "*Minimum Standard of Treatment*" (or "**MST**"), as Article 1105 is titled, is a reference to general principles and rules of customary international law that, together, comprise a standard of treatment for aliens, foreign investors, and traders below which governmental conduct should never fall. In other words, the MST represents a "floor."[346]

156. In 2001, NAFTA's Free Trade Commission[347] issued a joint "*Notes of Interpretation*" regarding certain Chapter 11 provisions, which provided in relevant part:

> *1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment . . . of another Party*[;]
>
> *2. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment . . . to or beyond that which is required by the customary international law minimum standard of treatment. . . .*[348]

157. The MST referenced in the title of Article 1105 is not static, but rather evolves with the development of international law, including State practice.[349] The *Chemtura v. Canada*

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[346] *See*, *e.g.*, *S.D. Myers, Inc. v. Government of Canada*, Partial Award (Merits), dated 13 November 2000 ("*S.D. Myers*"), para. 259 (CLA-1).

[347] The Free Trade Commission (also known as the "**FTC**") comprised ministerial-level representatives from the three member countries—the United States, Mexico and Canada—and was responsible for supervising the implementation, interpretation and further elaboration of the NAFTA agreement.

[348] NAFTA Free Trade Commission Notes of Interpretation of Certain Chapter 11 Provisions, dated 31 July 2001 (CLA-2).

[349] *ADF Group Inc. v. United States,* ICSID Case No. ARB(AF)/11/1, Award dated 9 January 2003, paras. 179, 181 (CLA-3); *Merrill & Ring Forestry L.P. v. Government of Canada,* UNCITRAL, Award dated 31 March 2010, para. 204 (CLA-4); *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada,* UNCITRAL, Award on Jurisdiction and Liability dated 17 March 2015 ("*Clayton*"), paras.

Tribunal stated, for example, that "*the scope of Article 1105 of NAFTA must be determined by reference to customary international law. Such determination cannot overlook the evolution of customary international law, nor the impact of BITs on this evolution*."[350]

158. Following the release of the Free Trade Commission's Note of Interpretation, NAFTA tribunals have consistently cited a passage from *Waste Management v. USA*, which outlines the scope and content of the fair and equitable standard under NAFTA Article 1105, as follows:

> [T]*he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.*[351]

159. In *Clayton v. Canada*, the tribunal regarded the *Waste Management* formulation as setting a high threshold for the conduct of a host state to rise to the level of a NAFTA Article 1105 breach, but with the caveat that the challenged conduct need not reach the level of "*shocking*" or "*outrageous*" behaviour. Further, the tribunal observed that any construction of

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434-35 (CLA-5); *Gami Investments, Inc. v. United Mexican States,* UNCITRAL, Final Award dated 15 November 2004, para. 95 (CLA-6); *Pope & Talbot, Inc. v. Government of Canada,* UNCITRAL, Award in Respect of Damages dated 31 May 2002, para. 60 (CLA-7).

350 *Chemtura Corp. v. Government of Canada* (UNCITRAL), Award dated 2 August 2010 ("***Chemtura***"), para. 121 (CLA-8).

351 Waste Management Inc. v. United Mexican States, ICSID Case No. ARB(AF)00/3, Award dated 30 April 2004 ("**Waste Management II**"), paras. 98-99 (quoted in *Mobil Investments Canada Inc. & Murphy Oil Corp. v. Government of Canada*, ICSID Case No. ARB(AF)/07/04, Decision on Liability and on Principles of Quantum dated 22 May 2012, para. 141, *Cargill Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award dated 18 September 2009 ("**Cargill**"), para. 283, and more recently, in *Clayton*, PCA Case No. 2009-04, Award on Jurisdiction and Liability dated 17 March 2015, paras. 427, 432) (CLA-9).

the MST requires tribunals to be sensitive to the facts of each case, conscious of the potential relevance of reasonably relied-on representations by a host State, and "*a recognition that injustice in either procedures or outcomes can constitute a breach.*"[352] A tribunal must be mindful of the fact that manifest unfairness or inequity can be found in either or both of the procedural application of a measure or in the substantive outcome sought or obtained through its operation.

160. Here, the Revocation breached two general principles of international law embedded in NAFTA 1105: due process and good faith.

1. The United States Failed to Follow Due Process

161. Host States fail to accord due process by failing to provide foreign investors and their investments who will be directly affected by a decision issued without notice or an opportunity to make meaningful representations about the decision before it is adopted. This same obligation can also be framed either as a matter of fundamental procedural fairness or as a failure to abide by the principle of transparency, which has also been recognized by as forming part of the FET standard.[353]

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[352] The *Clayton v. Canada* tribunal, drawing upon the *Waste Management* case, concluded that there had been a breach of the international minimum standard based on several findings: firstly, the Investors were led to believe they could obtain environmental permission if they met the legal requirements of federal Canada and Nova Scotia. Secondly, they reasonably relied on specific encouragements from political and technical levels for their project's site. Thirdly, these encouragements significantly influenced their decision to invest substantial resources in an Environmental Impact Statement. Fourthly, the Joint Review Panel (JRP) adopted an unprecedented approach, disadvantaging the proponents. Fifthly, the JRP's "community core values" approach was problematic and not properly communicated to the Investors. Sixthly, this approach was the decisive factor, with the JRP failing to fulfill its analysis mandate under the CEAA. As a result, the tribunal found that the Investors were misled into participating in a costly and ultimately unwinnable regulatory approval process, despite specific encouragements from government officials and the laws of federal Canada, leading to the breach of Article 1105. *Clayton*, PCA Case No. 2009-04, Award on Jurisdiction and Liability dated 17 March 2015, paras. 444-54 (CLA-5).

[353] *Id.*, para. 443; *Metalclad Corp. v. United Mexican States,* ICSID Case No. ARB(AF)/97/1, Award dated 30 August 2000, para. 99 (addressing transparency and candor requirements under NAFTA, noting that Mexico failed to fulfill its MST obligations when it "*failed to ensure a transparent and predictable framework for Metalclad's business planning and investment*" to such an extent that "[t]*he totality of these circumstances demonstrates a lack of orderly process and timely disposition in relation to an investor of a Party acting in the expectation that it would be treaty fairly and justly in accordance with the NAFTA*.") (CLA-10); *Tecnicas Medioambientales Tecmed S.A. v.*

162. In *Abengoa* v. *Mexico*, the tribunal found significant procedural deficiencies in the Host State's actions, particularly in the cancellation of an operating license on two occasions. The tribunal viewed the first cancellation as a complete lack of due administrative process, as the decision was made without notifying the investor of the proceedings, thereby depriving it of its right to defend itself.

> *The City Council also cancelled the Operating License on two occasions, the first in complete disregard of administrative due process (since the decision was adopted without having notified SDS of the process, preventing it from exercising its right to a defense),[] and the second based on frivolous or merely formalistic reasons [].*
>
> *The Arbitral Tribunal therefore considers that the actions of the CMI and the City Council against the Plant from 2009 have been arbitrary and totally contradictory with the positions previously taken by the competent municipal, state and federal authorities.*
>
> *The Arbitral Tribunal concludes, based on the foregoing, that the Respondent violated its obligation to provide the minimum level of fair and equitable treatment under customary international law*.[354]

163. In revoking the Keystone XL Presidential Permit, the U.S. Government manifestly failed to accord treatment consistent with its procedural fairness and transparency obligations reflected in the general international law principle of due process. Being issued in the first hours of President Biden's Administration (as discussed in **Section II.E**), the Revocation was adopted

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United Mexican States, ICSID Case No. ARB(AF)/00/2, Award dated 29 May 2003 ("***Tecmed***"), para. 154 (finding that "*in light of the good faith principle established by international law* [. . .] [t]*he foreign* [Claimant] *expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign* [Claimant]. . . .") (CLA-11); *Champion Trading Co., Ameritrade Int'l, Inc. v. Arab Republic of Egypt,* ICSID Case No. ARB/02/9, Award dated 27 October 2006, para. 164 (CLA-12); *Saluka Investments BV (The Netherlands) v. Czech Republic,* UNCITRAL, Partial Award dated 17 March 2006, para. 307 (CLA-13); *Siemens A.G. v. Argentine Republic,* ICSID Case No. ARB/02/8, Award dated 17 January 2007 ("***Siemens***"), para. 308 (CLA-14); *Emilio Agustín Maffezini v. Kingdom of Spain,* ICSID Case No. ARB/97/7, Award dated 13 November 2000, para. 83 (CLA-15).

[354] *Abengoa, S.A. y COFIDES, S.A. v. United Mexican States,* ICSID Case No. ARB(AF)/09/2, Award dated 18 April 2013 ("***Abengoa***"), paras. 649-52 (CLA-16).

without any vestige of due process. The timing of this measure's adoption did not allow for any consultation, renewed analysis or an opportunity to be heard from investors whose investments would be destroyed by it. Indeed, providing prior notice was not even feasible because the new Administration responsible for the Revocation had only assumed functions a few hours earlier.

164. APMC was entitled to expect that as a matter of MST the U.S. Government would act in a manner consistent with customary international law under NAFTA Article 1105. At the very least, APMC was entitled to expect that it would receive formal notice and for its investment to have an opportunity to engage with the U.S. Government before a measure ruining a multi-billion-dollar infrastructure project could be adopted.

165. As Professor Prakash comments, the 2019 Presidential Permit represented a type of domestic law property right upon which investors in the Project it permitted could be reasonably expected to rely. At bottom, such expectations began with an anticipation that due process would be accorded consistent with international due process norms incorporated in domestic law.[355] More so when at the time of the Revocation, construction on the border-crossing area relevant to the Presidential Permit had already been completed eight months before, in May 2020. The Revocation did not stymie a proposed investment project – it terminated an extant, operational enterprise. The project covered by the Presidential Permit was already complete and ready for use, not merely a right to act.[356]

[355] Prakash Expert Report, para. 48.

[356] Press Release, TC Energy, U.S./Canada border crossing completed, dated 25 May 2020 (C-112); *see also* Begley Witness Statement, paras. 37-38.

2. The United States Acted in an Arbitrary Manner

166. The principle of good faith is a fundamental aspect of public international law and intrinsic to the MST under NAFTA Article 1105.[357] A host State's obligation to exercise sovereign authority in good faith has frequently appeared in arbitrations where the customary international law prohibition against *arbitrariness* has been at issue.

167. For example, in *ELSI v. USA*, the International Court of Justice defined the term "*arbitrary*" as "*wil*[l]*ful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety*."[358] The *ELSI* decision, a case involving the United States, has been repeatedly relied upon by international courts and tribunals in the decades since as reflecting a baseline for the MST.[359] The tribunal in *National Grid v. Argentina* similarly defined the term "*arbitrary*" as "*something done 'capriciously or at pleasure*[.]'"[360]

168. Host State action has also been found to be arbitrary where it is "*made for purely extraneous political reasons*. . . ."[361] In *Lemire* v. *Ukraine*, the tribunal explained that arbitrary

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357 *S.D. Myers*, Partial Award dated 13 November 2000, para. 134 (CLA-1); *Waste Management II*, Award dated 30 April 2004, para. 138 ("*A basic obligation of the State under Article 1105(1) is to act in good faith and form, and not deliberately to set out to destroy or frustrate the investment by improper means*.") (CLA-9); *Tecmed*, para. 154 (finding that "*in light of the good faith principle established by international law* [. . .] [t]*he foreign* [Claimant] *expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign* [Claimant.]") (CLA-11).

358 *Elettronica Siluca S.p.A (ELSI*) (U.S. v. Italy), Judgment, [1989] ICJ Rep. 15 (20 July), para. 128 (CLA-17).

359 *See, e.g.,* Joshua Dean Nelson v. United Mexican States, ICSID Case No. UNCT/17/1, Final Award dated 5 June 2020, para. 324 ("*With respect to arbitrariness, the International Court of Justice, in the ELSI case, defined this concept as 'something opposed to the rule of law' rather than 'something opposed to a rule of law.' This definition has been accepted by at least two NAFTA Parties and prior NAFTA tribunals*." (citations omitted)) (CLA -18). *See also Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009, para. 625; *Abengoa* 2013, FN 507; *Cargill* 2009, para. 291 (CLA-18).

360 *National Grid P.L.C. v. Argentine Republic,* UNCITRAL, Award dated 3 November 2008, para. 197 (CLA-19).

361 *BP Exploration Co. (Libya) Ltd. v. Government of Libyan Arab Republic,* Ad Hoc Arbitration, Final Award of Arbitrator dated 10 October 1973, para. 111 (CLA-20); *see also Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award dated 18 September 2009, para. 293 (finding that a governmental act is wrongfully arbitrary under Article 1105(1) "*when the State's actions* [. . .] grossly *subvert*[] *a domestic law or policy for an ulterior motive*.") (CLA-21).

government decisions taken against foreign investors are particularly pernicious—and contrary to the FET standard—because "[f]*oreigners, who lack political rights, are more exposed than domestic investors to arbitrary actions of the host State*. . . ."[362] This is particularly true of cases in which public power is exercised for an improper purpose.

169. In *Abengoa* v. *Mexico*, the tribunal also found that the host State's behaviour was driven by political motives rather than grounded in any substantive rationale that could justify any regulatory actions affecting the investor. *Abengoa* was notably also decided within the context of electoral campaigns in which promises for the closure of a plant had been made:

> *The Arbitral Tribunal considers it relevant, in order to assess said actions, that the political party headed by Mr. Lozano ran its two electoral campaigns promising the population that the Plant would be closed. Obviously, after his election, the party pursued that objective for reasons that the Arbitral Tribunal finds totally disconnected from any legitimate consideration pertaining to the environment, public health, or the law.*
>
> *The Arbitral Tribunal therefore considers that the actions of the CMI and the City Council against the Plant from 2009 have been arbitrary and totally contradictory with the positions previously taken by the competent municipal, state and federal authorities.*
>
> *The Arbitral Tribunal concludes, based on the foregoing, that the Respondent violated its obligation to grant the minimum level of fair and equitable treatment under customary international law*.[363]

170. APMC was entitled to expect that, as a foreign investor in the Keystone XL Project, it and its investment would be treated in a fair and equitable manner by any U.S. Presidential administration. APMC was also entitled to expect that, if a subsequent U.S. Presidential

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[362] *Joseph Charles Lemire v. Ukraine,* ICSID Case No. ARB/06/18, Award dated 28 March 2011, para. 57 (CLA-22).

[363] *Abengoa*, Award dated 18 April 2013, paras. 650-52 (machine translation) (CLA-16).

administration were ever to consider revoking the Keystone XL Presidential Permit, the Project would be reviewed on its current merits and fundamental procedural fairness would always prevail over political expedience.

171. But none of this occurred.[364] It is manifest that the basis for adopting the Revocation – in the second hour of the administration – was merely political, and thereby constituted an abuse of the United States' sovereign discretion. As demonstrated *supra* **Section II.B.2** and in the Coleman Expert Report, prior to the Revocation the U.S. Department of State had consistently concluded – through six environmental assessments – that granting, and later maintaining, a cross-border permit for the Keystone XL pipeline would not worsen GHG emissions or carbon pollution, or otherwise have a detrimental impact on climate change.[365] Indeed, contrary to one of the Revocation's stated goals "*to reduce harmful emissions,*" it has consistently been the U.S. Government's own position that the U.S. demand for Albertan oil is such that a lack of pipeline expansion such as the Keystone XL Project will result in the same oil simply being exported via less environmentally sound transportation options (such as by rail, tanker, or truck).[366] The U.S. Department of State has repeatedly determined that these alternatives would lead to greater atmospheric emissions (including GHG), and pose greater safety hazards.[367]

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364 Begley Witness Statement, para. 47.

365 *See, e.g.*, U.S. Dep't of State: (i); Draft Environmental Impact Statement for the Keystone XL Oil Pipeline Project, dated 16 April 2010 (C-27); (ii) Supplemental Draft Environmental Impact Statement, dated 22 April 2011 (C-239); (iii) Final Environmental Impact Statement, dated 26 August 2011 (C-240); (iv) Supplemental Draft Environmental Impact Statement, dated 1 March 2013 (C-241); (v) 2014 Final EIS (C-45); (vi) Background Briefing on the Keystone XL Pipeline, dated 6 November 2015 (C-242).

366 *See* 2014 Final EIS, § 1.4.1.3 (C-45); *see also* Coleman Expert Report, paras. 54-60.

367 2014 Final EIS, § 5.3 (C-45); *see also* Coleman Expert Report, para. 38. And indeed, Canadian oil exports have only increased since the 2014 EIS was published. *See* U.S. Energy Information Administration, Petroleum & Other Liquids (C-43).

172. Despite that prior record, on the first day of his presidency in 2021, President Biden issued E.O. 13990 revoking the 2019 Presidential Permit, citing to 2015 concerns about the perceived perception of Keystone XL and claiming that "[t]*he United States must be in a position to exercise vigorous climate leadership. . . .*"[368]

173. As discussed in **Section II.F** and the Sourgens Report, whatever the goals of the U.S. Government regarding GHG emissions reductions, both historically and under the present Presidential administration, destruction of oil pipeline capacity has not been a stated policy in that regard. Of course, the 2015 U.S. Department of State recommendation was purportedly based on the impending Paris climate treaty talks. By 2021, those talks had long ended, the Paris Agreement had been signed, ratified, and come into force, and the U.S. Government was able to re-enter the agreement without interfering with the Keystone XL Permit which had been granted in the interim.

174. One may even praise the broad-based efforts for international action on climate change during the Obama administration. As Professor Sourgens notes:

> *None of this analysis is intended to take away from the transformative effort of the Obama administration climate diplomacy and policy. The Obama administration's efforts were paradigm altering by successfully navigating away from a failing top-down Kyoto approach to an inclusive – and functioning – bottom-up approach at Paris. The substantive efforts were anchored in existing U.S. law and therefore did not require further action from a potentially hostile Congress. This bottom-up approach relied on a strong U.S. INDC and First U.S. NDC to induce other states to participate.*[369]

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368 Exec. Order No. 13990 (20 January 2021), 86 Fed. Reg. 7037 (25 January 2021) (C-3).

369 Sourgens Expert Report, para. 61.

175. But, as discussed in **Sections II.A.2** and **II.G**, both the historical position across Presidential administrations, and the subsequent course of conduct of the present Presidential administration, in conjunction with congressional legislation, has actively encouraged domestic oil production capacity in the United States, and exhibited no wider policy to curtail cross-border capacity.[370] The U.S. Government has responded to post-Revocation domestic price increases in oil market products, stimulated by increased domestic demand and the external shock to hydrocarbon markets of the Russian invasion of Ukraine, by repeatedly calling for increased production and supply from OPEC.[371] In April, July, and October 2022, the United States released tens of million barrels of oil from the Strategic Petroleum Reserve, which comprised "*the largest release from reserves from both the United States and the rest of the world in history*."[372] And more recently, in 2023, the U.S. Government attempted to boost production of oil in Venezuela.[373]

176. These inconsistent actions taken by the U.S. Government subsequent to the Revocation demonstrate the pretextual nature of the Revocation in the face of the continued need for reliable, continental energy infrastructure, which the Keystone XL Project would have provided. They also show that the Revocation was adopted as a matter of political expediency,

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[370] For example, as discussed in **Section II.G**, the BLM has issued over 11,000 drilling permits on Federal Lands in the fiscal years 2021-2023, representing an annual average increase compared to the previous five years. U.S. Dep't of the Interior Bureau of Land Management ("**BLM**"), FY 2023 Application for Permit to Drill Status Report (C-163); BLM, All Federal Oil and Gas Statistics by Year by State, Summary Tab, Row 10 (C-164).

[371] *See*, *e.g.*, The White House, Statement and Releases: Statement from National Security Advisor Jake Sullivan and NEC Director Brian Deese, dated 5 October 2022 (C-243).

[372] The White House, FACT SHEET: Biden Administration Responds to Putin's Price Hike by Awarding First Barrels from Historic Strategic Petroleum Reserves Release & Deploying Affordable Clean Energy, dated 21 April 2022 (C-244).

[373] Coleman Expert Report, para. 79; *see also, e.g.,* Matt Spetalnick and Marianna Parraga, *US broadly eases Venezuela oil sanctions after election deal*, REUTERS (19 October 2023) (C-245).

realized through an act of performative policymaking rather than as the manifestation of a reasoned and proportionate policy agenda. As Professor Coleman noted in his Expert Report:

> [I]*t is highly unusual, and likely unique to this case, for the U.S. government to perform years of painstaking environmental and economic analysis and adopt a decision based on acceptance of a premise that is directly contradicted by its analysis. I cannot think of another example where a government, concluded, "after careful study, we have determined this Project is either neutral or good for the climate, the environment, and public health, but it will be perceived as bad, so we must not take it."*[374]

177. As Professor Prakash's Expert Report also discusses, the very open-ended discretion invoked in the Revocation is contrary to a good faith understanding of the right to revoke or amend the Keystone XL Presidential Permit granted. Such right should rather be understood to have been exercisable in the context of the conditions for compliance with the Presidential Permit as granted, not a *sui generis* expression of political expedience:

> *In sum, a circumscribed reading of the Permit's discussion of a revocation power is necessary and appropriate. Reading the power to revoke as relevant only when the permittee has violated conditions makes sense of the Permit's text. And this sensible reading also sidesteps complicated questions about unconstitutional conditions and the President's power to take private property in the absence of statutory authority.*[375]

178. But the reasons given for the Revocation in no way complained that any conditions of the Presidential Permit had been breached. Rather, the Revocation claimed to invoke the "*national interest*,"[376] ungrounded in any legally defined test, to extinguish the Presidential

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374 Coleman Expert Report, para. 76.

375 Prakash Expert Report, para. 27.

376 Interestingly, the U.S. Government has invoked national interest in its determinations to grant Presidential Permits for other pipeline projects. This was the case for the Alberta Clipper Pipeline (Line 67), where the U.S. Department of State stated that, *"*[t]he *National Interest Determination took many factors into account, including greenhouse gas emissions. The administration believes the reduction of greenhouse gas emissions are best addressed through each country's robust domestic policies and a strong international agreement."* U.S. Dep't of State, Permit

Permit notwithstanding the permit holder's compliance with its terms. Instead, the U.S. Government's primary justification for adopting the Revocation was merely the citation of the flawed policy position of a prior Presidential Administration, unmoored from contemporaneous context which further discredited the relevance of that prior political action.

B. NAFTA Articles 1102 and 1103: The United States Provided Less Favourable Treatment to APMC and the Keystone XL Project in Comparison to Foreign and Domestic Investors in Like Circumstances

179. Under NAFTA Article 1102, the United States must provide the investor-claimant and its investments with the same best treatment than it accords to its own investors and their investments:

> *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 Investor with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.*

180. Similarly, under NAFTA Article 1103, the United States provided the same guarantees with respect to treatment it accords to "*investors of any other Party or of a non-Party*."

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for Alberta Clipper Pipeline Issued, dated 20 August 2009 (C-194). Similarly, in granting a Presidential Permit to Kinder Morgan Cochin, LLC, authorizing it to operate a cross-border pipeline between the United States and Canada, the U.S. Department of State determined that issuing this permit would serve the national interest. Presidential Permit Authorizing Kinder Morgan Cochin, LLC, to Connect, Operate, and Maintain Pipeline Facilities at the International Boundary Between the Unites States and Canada, dated 27 November 2013, 78 Fed. Reg. 73582 (6 December 2013) (C-209).

181. Tribunals have developed a three-step analysis for examining claims under national treatment or MFN provisions such as NAFTA Articles 1102 and 1103:[377]

1) Identify other investors and/or investments that operated in *like circumstances* with the investor-claimant and/or its investment(s).

2) Determine whether more *favourable treatment* has been provided to the other investor/investment.

3) Consider whether the contemporaneous explanation for providing such treatment provided a *rational, non-discriminatory basis* for the differential treatment.

182. Claimant hereby explains how this three-step analysis applies to the Revocation and how the Respondent breached NAFTA Articles 1102 and 1103.

1. Numerous Other Cross-border and Domestic Pipelines are Currently Active in the United States in Like Circumstances With the Keystone XL Project

183. The tribunal in *S.D. Myers* found that the concept of like circumstances "*invites an examination of whether a non-national investor complaining of less favourable treatment is in the same 'sector' as the national investor . . .* [where] *. . . the word 'sector' has a wide connotation that includes the concepts of 'economic sector' and 'business sector.'*"[378] In *Bilcon*, the tribunal further elaborated that, "*the purpose of national treatment is to protect investors as compared to local producers, and this cannot be done by addressing exclusively the sector in which the*

[377] *See*, *e.g.*, *Pope & Talbot v. Government of Canada*, Award on the Merits for Phase 2 dated 10 April 2001, paras. 31-81 (CLA-7). For a similar BIT test with the same result, *see Parkerings-Compagniet AS v. Lithuania,* ICSID Case No. ARB/05/8, Award on Jurisdiction and Merits dated 14 August 2007 ("*Parkerings*"), para. 371 (CLA-23).

[378] *S.D. Myers*, Partial Award dated 13 November 2000, para. 250 (CLA-1); *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB/(AF)/99/1, Award dated 16 December 2002, para. 172 (applying a similar test, noting, "*the Tribunal holds that the companies which are in like circumstances, domestic and foreign, are the trading companies, those in the business of purchasing Mexican cigarettes for export, which for purposes of this case are CEMSA and the corporate members of the Poblano Group*.") (CLA-24).

particular activity is conducted."[379] And, following the same logic, the tribunal in *ADM* noted that, "*when no identical comparators exist, the foreign investor may be compared with less like comparators, if the overall circumstances of the case suggest that they are in like circumstances*."[380]

184. The *Apotex* tribunal also adopted a similar approach for identifying comparators in like circumstances in finding, inter alia, "*whether those which are said to be comparators: (i) are in the same economic of business sector; (ii) have investment in, or are businesses that compete with the investor or its investments in terms of goods or services; or (iii) are subject to a comparable legal regime or regulatory requirements, as the Claimants and their investments*."[381]

185. As discussed in **Sections II.A** and **II.G** above, dozens of oil pipelines cross the U.S.-Canada and U.S.-Mexico borders. All of these are currently operational or under construction *except* for the Keystone XL Project. These comparators include both those for which an

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[379] *Clayton*, Award on Jurisdiction and Liability dated 17 March 2015, paras. 693, 697 (internal quotations omitted) ("*The Belleoram Project* [a comparable project to that presented by Claimant] *involved developing a quarry and terminal project that would have covered six times the area and produced up to 300% more rock annually than the proposed project at Whites Point* [Bilcon's project]. *An official of Canada itself noted that the Whites Point Quarry and Belleoram Projects were 'very similar.' The Belleoram Project was to be carried out by a Canadian controlled company with the financial support of federal Canada. The Belleoram Project was located one kilometre away from populated areas. It was geared to the export market. It was not subjected to a JRP process. Only the marine terminal was assessed for the purposes of the laws of federal Canada. Many of the issues considered in the review were similar to those at Whites Point. Indeed, federal officials recognized early on in the Bilcon process that 'many of the environmental concerns will be similar' to Belleoram. The comprehensive study route was adopted for the purposes of the laws of Canada and completed in only a year and a half. The report identified a variety of likely significant adverse effects and considered that all of them would be mitigated to a satisfactory extent by the adoption of mitigation measures that could reasonably be applied. The Tribunal emphasizes again that it does not preclude the possibility that different outcomes could still have been reasonably obtained in Whites Point and Belleoram if the same standard had been applied. What is of critical importance here is that the Whites Point project did not receive the expected and legally mandated application, for the purposes of federal Canada environmental assessment, of the essential evaluative standard under the CEAA*.") (CLA-5).

[380] *Archer Daniels Midland and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award dated 21 November 2007, para. 202 (CLA-25).

[381] *Apotex Holdings Inc. and Apotex Inc. v. United States,* ICSID Case No. ARB (AF)/12/1, Award dated 25 August 2014, para. 8.15 (CLA-26).

application was made and those for which approval was granted during the same timeframe Respondent examined, approved, and then revoked the Presidential Permit required to operate Keystone XL.[382]

2. The U.S. Government has Accorded more Favourable Treatment to Other Investors and Investments Compared to APMC and the Keystone XL Project

186. Treatment accorded under a measure will generally be considered less favourable when an investor-claimant demonstrates that a comparable investment – whether domestic or foreign – in like circumstances, enjoyed some form of competitive economic advantage *vis-à-vis* the investor/investment. Through the plainly targeted Revocation of the Keystone XL Presidential Permit, Respondent denied to APMC's investment the same best level of treatment that it has accorded to its own nationals, as well as other foreign investors, and their investments, by allowing numerous other oil and gas pipelines to continue to operate, including in some instances to continue to carry out expansions of a similar nature to the Keystone XL Project.[383] For example, and as further set out in **Section II.G**:

- **Enbridge Alberta Clipper (Line 67):** Operating since 2010, this pipeline carries crude oil from Alberta to the United States' Midwest. Line 67 has received two Presidential permits in recent years. The first, issued in 2009, authorized

[382] U.S. Energy Information Administration, U.S. Liquids Pipeline Projects (C-161).

[383] Additionally, as discussed in **Section II.G**, the U.S. Government has recently issued several Presidential Permits authorizing the construction, connection, operation, and/or maintenance of cross-border pipeline infrastructure facilities for the transporting hydrocarbons and petroleum products across the United States' international borders with Mexico and Canada. *See, e.g.*, Administration of Donald J. Trump 2020, Presidential Permit – Authorizing Express Pipeline, LLC, To Operate and Maintain Existing Pipeline Facilities at the International Boundary Between the United States and Canada, dated 3 October 2020 (C-186); Presidential Permit, 85 Fed. Reg. 63985 (8 October 2020) (C-187); Administration of Donald J. Trump, 2020, Presidential Permit – Authorizing NuStar Logistics, L.P., To Operate and Maintain Existing Pipeline Facilities at the International Boundary Between the United States and Mexico, dated 3 October 2020 (C-188); Administration of Donald J. Trump, 2020, Presidential Permit – Authorizing NuStar Logistics, L.P., To Operate and Maintain Existing Pipeline Facilities at the International Boundary Between the United States and Mexico, dated 29 July 2020 (C-189); Administration of Donald J. Trump, 2020, Presidential Permit – Authorizing NuStar Logistics, L.P., To Operate and Maintain Existing Pipeline Facilities at the International Boundary Between the United States and Mexico, dated 29 July 2020 (C-190).

Enbridge to construct, connect, operate, and maintain its facilities at the U.S.-Canada border.[384] The second, granted in 2017, allowed for an increase in the pipeline's capacity.[385] Line 67 is operated by Enbridge Energy, Limited Partnership, a Delaware entity.[386]

- **Enbridge Line 3 (L3X):** Operating since October 2021, this pipeline transports oil sands-derived crude oil from Alberta to Superior, Wisconsin. In 2020, L3X received federal permits from the U.S. Government for the replacement of a line to restore the pipeline's capacity.[387] This decision followed a U.S. Department of State's determination that the project did not require a new Presidential Permit, aside from the one granted in 1968 to Enbridge's Lakehead Pipe Line Co., a Delaware corporation.[388]

- **Cochin Pipeline:** Operating since 1979, this pipeline extends from Canada into the United States near Sherwood, North Dakota. In 2013, Cochin was granted a Presidential Permit to connect, operate, and maintain its cross-border section.[389] This pipeline was originally owned by Kinder Morgan Cochin, LLC, a Delaware subsidiary of Kinder Morgan, Inc., and subsequently acquired by Pembina Pipeline Corporation in 2019.[390]

- **Magellan Pipeline:** Operating initially under a Presidential Permit issued in 1995,[391] this pipeline facilitates crude oil transportation between the United States and Mexico. In 2015, Magellan Pipeline Company, L.P., a Delaware subsidiary of Magellan Midstream Partners, L.P., received a Presidential Permit authorizing it to connect, operate, and maintain its cross-border pipeline extending approximately 600 feet from the United States' boundary with Mexico

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384 U.S. Dep't of State, Notice of Issuance of a Presidential Permit for the Proposed Enbridge Energy Alberta Clipper Pipeline Project, 74 Fed. Reg. 43212 (26 August 2009) (C-193).

385 U.S. Dep't of State, Notice of Issuance of a Presidential Permit to Enbridge Energy, Limited Partnership, 82 Fed. Reg. 53553 (16 November 2017) (C-195); Enbridge, Interim Report to Shareholders: For the nine months ended 30 September 2017 (C-196).

386 *See* Enbridge, 2023 Annual Report (C-192).

387 Letter from the Army Corps of Engineers to Enbridge Energy, dated 23 November 2020 (C-203); *see also* U.S. Army Corps of Eng'rs St. Paul District, Enbridge Line 3 (C-204).

388 Presidential Permit Authorizing Lakehead Pipe Line Company to Connect, Construct, Operate and Maintain a Pipeline at the International Boundary Line Between the United States and Canada, dated 22 January 1968 (C-138). In 2014, the U.S. Department of State determined that the project did not require a new Presidential permit for the replacement project. *See* S&P Global Commodity Insights, Enbridge says Line 3 oil sands pipeline won't need new presidential permit, dated 26 August 2014 (C-202).

389 U.S. Department of State, Presidential Permit for Kinder Morgan Cochin, LLC, 78 Fed. Reg. 73582 (6 December 2013) (C-209).

390 *See* Kinder Morgan, Kinder Morgan Announces Closing of Pembina Transactions, dated 16 December 2019 (C-207); *see also* U.S. Dep't of State, Diplomacy in Action: Kinder Morgan (Cochin Pipeline) (C-155). Pembina Pipeline Corporation's subsidiary, Pembina Cochin LLC, is also incorporated in Delaware, *see* Pembina Pipeline Corp., Form 40-F for the fiscal year ending 31 December 2023 (C-168).

391 Application for a new or amended presidential permit for Magellan Pipeline Company, L.P., dated 13 December 2013 (C-167).

to the vicinity of El Paso, Texas.[392] In 2023, ONEOK Inc., an Oklahoma company,[393] acquired Magellan Pipeline Company, L.P.'s partner, Magellan Midstream Partners, L.P.[394]

- **Nueva Era Pipeline:** Operating since 2018, this gas pipeline connects Texas to Monterrey, Mexico. In 2015, the Nueva Era Pipeline was granted a Presidential Permit, authorizing the construction, operation, and maintenance of its cross-border facilities.[395] This pipeline is a collaboration between Howard Midstream Energy Partners, LLC, a Delaware midstream service provider based in South Texas,[396] and Grupo CLISA, S. de R.L. de C.V., a Mexico-based entity.[397]

187. At the domestic level, Respondent has also accorded differential and better treatment to other pipeline projects with characteristics similar to Keystone XL. For example, the U.S. Government has supported the following pipeline projects:

- **Mountain Valley Pipeline (MVP):** Currently under construction, the MVP project is a pipeline system designed to transport natural gas to the Mid-Atlantic and Southeastern United States. In 2017, the MVP project received a federal permit from the FERC, authorizing its construction and operation.[398] This permit was extended in 2023 for three years, until 18 June 2026, *i.e.*, by the same Presidential administration responsible for the Revocation.[399] Additionally, in 2023 the U.S. Government provided additional certainty for the MVP project when President Biden signed the Fiscal Responsibility Act of 2023, which included language approving the pipeline (safeguarding a continuing right to operate the MVP from the same arbitrary decision-making to which investors in the Keystone XL Project have been subjected).[400]

- **Dakota Access:** Operating since 2017, this underground pipeline transports crude oil from North Dakota to Patoka, Illinois. In 2017, the Dakota Access Pipeline

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392 U.S. Department of State, 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, dated 14 July 2015 (C-212).

393 ONEOK, Inc, is Oklahoma-based company. *See* ONEOK, 2023 Annual Report (C-205); *see also* ONEOK, K-1 Tax Information (C-235).

394 *See* ONEOK, Acquisition of Magellan Brings Together Two Premier Energy Infrastructure Businesses (C-210); ONEOK, Refined Products and Crude (C-211).

395 U.S. Energy Information Administration, Overview, last updated 31 March 2023 (C-220).

396 U.S. SEC, Howard Midstream Partners, L.P., Amendment No. 2 to Form S-1 (C-215).

397 Grupo Clisa, Security & Privac[]y (C-213).

398 *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 (2017) (C-224).

399 Oil & Gas Journal, Southgate natural gas pipeline granted 3-year extension, dated 20 December 2023 (C-230).

400 Fiscal Responsibility Act of 2023, H.R. 3746, 118th Congress (2023) (C-225).

received an easement to install an oil pipeline under federal lands managed by the USACE at the Oahe Reservoir.[401]

188. As Professor Coleman noted in his Expert Report, the Revocation of the Keystone XL Presidential Permit is the only instance of which he is aware of where a Presidential Permit for a cross-border oil pipeline has been revoked.[402] Professor Prakash agrees,[403] and Claimant is not aware of any others either.[404] In the absence of any revocation of permits for other comparable projects, the Revocation of the Keystone XL Presidential Permit should be considered a targeted measure by the United States. In other words, the Revocation was not itself a measure of general application, nor part of a wider policy applicable to the business of transporting oil and/or gas in the United States. If Respondent had truly sought to reduce GHG emissions through the stranding of oil and gas infrastructure, the list of revocations adopted under that policy would be greater than one. Because its treatment of Keystone XL was targeted directly (and solely) at this Project, the treatment thereby accorded was manifestly "*less favorable*" than treatment accorded by Respondent to all of the above comparators in the normal course of political/administrative business.

3. The U.S. Government's Discriminatory Treatment to APMC and its Investment Could Not be Justified in the Circumstances

189. As the tribunal in *U.S. Trucking Services v. Mexico* cautioned, the "*like circumstances exception*" must not be construed so narrowly as to strip the national treatment

401 U.S. Army Corps Eng'rs, Corps Grants Easement to Dakota Access, LLC, dated 8 February 2017 (C-236). As noted previously, the easement is currently subject to an ongoing legal and environmental review process, initiated by the Standing Rock Sioux Tribe and others in U.S. federal courts. The pipeline was allowed to continue operating during the review process, and the USACE is preparing an EIS with a final decision expected in 2024. *See* Energy Transfer L.P. Form 10-K for the fiscal year ending 31 December 2023, at 64-65 (C-232).

402 Coleman Expert Report, para. 79.

403 Prakash Expert Report, para. 61.

404 *See* **Section II.E.**

obligation of its true meaning, keeping in mind the object and purpose of NAFTA in relation to principles of national treatment and MFN treatment.[405] This last step, *inter alia*, has been further explained by various tribunals. For example, in *Parkerings* v. *Lithuania*, the tribunal stated that for discriminatory treatment to be considered unreasonable or lacking proportionality, it needs to be inapposite or excessive to the achievement of an otherwise legitimate objective of the State:

> *Discrimination is to be ascertained by looking at the circumstances of the individual cases. Discrimination involves either issues of law, such as legislation affording different treatments in function of citizenship, or issues of fact where a State unduly treats differently investors who are in similar circumstances. Whether discrimination is objectionable does not in the opinion of this Tribunal depend on subjective requirements such as the bad faith or the malicious intent of the State: at least, Article IV of the Treaty does not include such requirements. However, to violate international law, discrimination must be unreasonable or lacking proportionality, for instance, it must be inapposite or excessive to achieve an otherwise legitimate objective of the State. An objective justification may justify differentiated treatments of similar cases. It would be necessary, in each case, to evaluate the exact circumstances and the context*.[406]

190. There is no reasonable basis on which the United States can justify the manifestly less favourable treatment it accorded to APMC's investment by adopting the Revocation. If Respondent actually maintained a general policy of reducing oil imports, 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 and non-U.S.-based investors would have seen the cross-border Presidential permits upon which they have relied and operated

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405 *In the Matter of Cross-Border Trucking Services*, NAFTA Arbitral Panel Established Pursuant to Ch. 20 Panel Report dated 6 February 2001, USA-MEX-98-2008-01, paras. 258-60 (CLA-27).

406 *Parkerings*, Award on Jurisdiction and Merits dated 14 August 2007, paras. 368 (emphasis added) (CLA-23).

rescinded as well. This kind of destruction of existing permitted oil and gas transportation infrastructure cannot be found in the U.S. Government's existing climate change plans, much less those in effect when the Revocation was issued. In sum, the discriminatory treatment experienced by the investors in the Keystone XL Project cannot be justified in the circumstances (and violated domestic law constitutional requirements for equal protection[407]), and is accordingly a breach of NAFTA Articles 1102 and 1103.

C. NAFTA Article 1110: The United States Expropriated APMC's Investment Without Compensation in Breach of its Expropriation and Compensation Obligations

191. Under NAFTA Article 1110(1), the United States shall not, with respect to investments of investors such as APMC:

> [T]*ake 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.*

192. The tribunal in *Glamis Gold v. United States* explained that, "*an expropriation does not occur through a formal action such as nationalization. Instead, in an indirect expropriation, some entitlements inherent in the property right are taken by the government or the public so as to render almost without value the rights remaining with the investor.*"[408] This observation echoes the reasoning in *Pope & Talbot v. Canada*, where the tribunal determined indirect

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407 Prakash Expert Report, paras. 37-44.

408 *Glamis Gold, Ltd. v. United States,* UNCITRAL, Award dated 8 June 2009, para. 355 (CLA-28).

expropriation "*requires a 'substantial deprivation*.'"[409] The "*substantial deprivation test*" has since become the accepted benchmark for tribunals.[410]

193. To determine whether a State's conduct constitutes an indirect expropriation, tribunals have focused on "[t]*he actual effect of the measures on the investor's property*."[411] Generally, while the host State's intent may play a role in determining whether its conduct was expropriatory, it is not decisive in terms of serving as the basis for a successful defense.[412] In other words, "[t]*he effects of the host State's measures are dispositive, not the underlying intent, for determining whether there is expropriation*."[413]

194. In considering claims of uncompensated expropriation, "*the practice of NAFTA tribunals has been to follow a three-step approach focusing on (i) whether there is an investment capable of being expropriated, (ii) whether that investment has in fact been expropriated, and (iii) whether the conditions set forth in Article 1110(1)(a)-(d) have been satisfied*."[414]

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409 *Pope & Talbot Inc. v. Government of Canada,* UNCITRAL, Interim Award dated 26 June 2000, para. 102 (CLA-7).

410 *See also Merrill & Ring Forestry L.P. v. Government of Canada*, ICSID Case No. UNCT/07/01, Award dated 31 March 2010, para. 145 ("*The standard of substantial deprivation identified in Pope & Talbot, and followed by many other decisions, both in the context of NAFTA and other investment protection agreements, is the appropriate measurement of the requisite degree of interference.*") (CLA-4); *Fireman's Fund Ins. Co. v. United Mexican States,* ICSID Case No. ARB(AF)/02/01, Award dated 17 July 2006 ("***Fireman's Fund***"), para. 176(c) ("*The taking must be a substantially complete deprivation of the economic use and enjoyment of the rights to the property, or of identifiable distinct parts thereof (i.e., it approaches total impairment).*") (CLA-29).

411 *Compañía del Desarrollo de Santa Elena, SA v. Republic of Costa Rica,* ICSID Case No. ARB/96/1, Final Award dated 17 February 2000, para. 77 ("*There is ample authority for the proposition that a property has been expropriated when the effect of the measures taken by the state has been to deprive the owner of title, possession or access to the benefit and economic use of his property*[.]") (CLA-30).

412 *Tippetts, Abbett, McCarthy, Stratton v. TAMS AFFA,* 6 IRAN-U.S. C.T.R. 219, para. 22 (1984) (CLA-31).

413 *Fireman's Fund*, Award dated 17 July 2006, para. 176(f) (emphasis added) (CLA-29); *see also Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania,* ICSID Case No. ARB/05/22, Award dated 24 July 2008 ("*Biwater Gauff*"), para. 463 (concluding that expropriation is generally measured "'*by reference to the effect of the relevant acts, rather than the intention behind them*.'") (emphasis omitted) (CLA-32).

414 *Chemtura*, Award dated 2 August 2010, para. 242 (CLA-8).

195. There have been numerous cases in which the revocation of, or refusal to grant, a regulatory permit has resulted in a finding of indirect expropriation, including but not limited to:

- In *Tethyan v. Pakistan*, a tribunal determined that the claimant's investment in a yet-to-be-built mine was indirectly expropriated because the relevant licensing authority rejected the investor's mining lease application, noting, "*the Tribunal finds that the denial of* [claimant's lease application] *was a measure having an effect equivalent to expropriation*."[415]

- In *Metalclad v. Mexico*, a NAFTA tribunal found that a Mexican municipality's non-issuance of a permit was a measure tantamount to expropriation in violation of NAFTA Article 1110(1), noting, "[b]*y permitting or tolerating the conduct of Guadalcazar in relation to Metalclad which the Tribunal has already held amounts to unfair and inequitable treatment breaching Article 1105 and by thus participating or acquiescing in the denial to Metalclad of the right to operate the landfill, notwithstanding the fact that the project was fully approved and endorsed by the federal government, Mexico must be held to have taken a measure tantamount to expropriation in violation of NAFTA Article 1110(1)*."[416]

- In *Técnicas Medioambientales Tecmed*, *S.A. v. Mexico*, a tribunal determined that Mexico expropriated an investor's investment when it failed to renew a hazardous waste landfill permit.[417]

- In *Abengoa v. Mexico*, a tribunal determined that Mexico expropriated an investor's investment when it revoked an operating license of a newly built hazardous waste facility.[418]

- In *Bear Creek v. Peru*, a tribunal determined that Peru expropriated an investor's investment when it revoked a concession to operate a silver mine.[419] And,

- In *South American Silver v. Bolivia*, a tribunal determined that Bolivia expropriated an investor's investment when it revoked a series of mining authorizations and transferred them back to the state.[420]

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415 *Tethyan Copper Co. Pty Ltd. v. Islamic Republic of Pakistan,* ICSID Case No. ARB/12/1, Award dated 12 July 2019, para. 156 (CLA-33).

416 *Metalclad*, Award dated 30 August 2000, para. 104 (CLA-10).

417 *Tecmed*, Award dated 29 May 2003, paras. 172-74 (CLA-11).

418 *Abengoa*, Award dated 18 April 2013, para. 673 (CLA-16).

419 *Bear Creek Mining Corp. v. Republic of Peru,* ICSID Case No. ARB/14/21, Award dated 30 November 2017, para. 429 (CLA-34).

420 *South American Silver Ltd. (Bermuda) v. Plurinational State of Bolivia,* PCA Case No. 2013-15, Award dated 22 November 2018, para. 539 (CLA-35).

196. Recently, in *Rockhopper Exploration Plc v. Italy*, the tribunal ordered Italy to compensate the claimant for refusing to grant an oil exploitation license for an offshore oil block, finding that it constituted an expropriation.[421] This dispute, which concerned a permitting decision in an area relevant to energy transition, arose due to stakeholder protests against the project in addition to political tensions within authorities at the regional and national levels.[422] It also led to a finding of breach for merely a refusal to grant a permit, rather than the reversal of a grant without justification for breach of conditions of the granted right.

197. Further, in *Westwater Resources v. Turkey*, the tribunal determined that the revocation of licenses to explore and operate uranium mines constituted expropriation, and that, despite considering the cancellation to be non-discriminatory and having served a public purpose, the host State breached the treaty by failing to provide fair compensation.[423]

198. None of the factors of Article 1110(1)(a)-(d) have been satisfied in this case:

- **Article 1110(1)(a), *for a public purpose***: As discussed in the context of NAFTA Article 1105, the stated reasons for the Revocation were not for a public purpose, but rather in support of a political motive. The purported justification was not even *de novo*, as it merely referenced a conclusory finding made two Administrations previously, based on a prior unsound justification that was no longer relevant in the contemporaneous context. Specifically, (i) in 2021, the 2019 Presidential Permit was an existing grant of rights in reliance of which investments had been made, not for which permission had yet to be granted; and (ii) the pre-textual rationale provided to justify refusing TC Energy's earlier permit application in 2015 was based on Respondent's purported anticipation of its negotiating stance for the Paris Agreement, but such a rationale was no longer relevant in 2021, and Respondent was in no way required to revoke the 2019 Presidential Permit to rejoin the Paris Agreement in 2021; and (iii) the Revocation did not form

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421 *Rockhopper Italia S.p.A, Rockhopper Mediterranean Ltd., and Rockhopper Exploration Plc v. Italian Republic*, ICSID Case No ARB/17/14, Award dated 23 August 2022 ("***Rockhopper***"), para. 199 (CLA-36).

422 *Id.*, para. 114 (CLA-36).

423 *Westwater Resources, Inc. v. Republic of Türkiye*, ICSID Case No. ARB/18/46, Award dated 3 March 2023, paras. 237-74 (CLA-37).

part of an established policy on oil pipelines with respect to climate change policy, either in 2015 or in 2021 and beyond.

- **Article 1110(1)(b), *on a non-discriminatory basis*:** As discussed in the context of Articles 1102 and 1103, whether considering cross-border pipelines, or other domestic oil and gas pipelines and infrastructure, the Revocation stands alone as discriminatory treatment applied to a class of one. No similar measures have since been adopted or maintained by Respondent with respect to other operational infrastructure used for the production or transportation of oil and gas.

- **Article 1110(1)(c), *in accordance with due process of law and Article 1105(1)*:** As discussed above in **Section III.A**, there was no due process nor was the Revocation measure in accordance with treatment under Article 1105(1).

- **Article 1110(1)(d), *on payment of compensation*:** Respondent has not offered, much less paid, any compensation to APMC for its indirect expropriation of APMC's investment in the Keystone XL Project.

199. Finally, the deprivation caused by the Revocation was permanent, necessarily rendering it an indirect expropriation because the loss of investment can no longer be remediated by simple withdrawal of the measure. The adoption of the Revocation erased the entire value of APMC's investment in the Keystone XL Project. Professor Prakash notes that the 2019 Presidential Permit constituted a property right under local law.[424] APMC's equity capitalization and return on investment through the Investment Agreement were dependent on TC Energy's ability to exercise that right. As discussed in more detail in **Section II.E**, the Revocation spelled the end of the Keystone XL Project because it made any continuation of the enterprise impracticable. With no cross-border Presidential Permit, and the Project becoming an impossibility, the Investment Agreement was terminated by June 2021.

200. Accordingly, the U.S. Government breached its NAFTA Article 1110 obligations by indirectly—or otherwise committing acts tantamount to—expropriating APMC's investment

[424] Prakash Expert Report, para. 48.

without a public purpose and due process of law, in a discriminatory manner, and ultimately failing to provide any form of compensation for the damage caused.

IV. JURISDICTION

A. Claimant Has Met the Jurisdictional Requirements of CUSMA and NAFTA

201. This arbitration has been commenced pursuant to paragraph 1 of Annex 14-C of CUSMA, under which the United States consented "*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*" while paragraph 3 of Annex 14-C states the Parties' "*consent under paragraph 1 shall expire three years after the termination of NAFTA 1994*."

202. Annex 14-C further defines the following terms in its paragraph 6:

> *(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;*
>
> *(b) "investment", "investor", and "Tribunal" have the meanings accorded in Chapter 11 (Investment) of NAFTA 1994*

203. ***First***, as set forth in the Notice of Arbitration and in this Memorial, APMC has alleged that the United States breached Articles 1102, 1103, 1105 and 1110 in Section A of Chapter 11 of NAFTA.

204. ***Second***, NAFTA Article 1139 defines "*investment*" as:

> *(a) an enterprise;*
>
> *(b) an equity security of an enterprise;*
>
> *(c) a debt security of an enterprise*
>
> > *(i) where the enterprise is an affiliate of the investor, or*

(ii) where the original maturity of the debt security is at least three years,

but does not include a debt security, regardless of original maturity, of a state enterprise;

(d) a loan to an enterprise

(i) where the enterprise is an affiliate of the investor, or

(ii) where the original maturity of the loan is at least three years,

but does not include a loan, regardless of original maturity, to a state enterprise;

(e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;

(f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d);

(g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and

(h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under

(i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or

(ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise;

205. An "*enterprise*" is defined in NAFTA Article 201 as "*any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or*

governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association[.]"[425]

206. Pursuant to the Investment Agreement and the related transaction agreements, and as discussed more fully in **Section II.C**, APMC agreed to provide financial support for the Keystone XL Project, and ultimately did provide approximately US$ 800 million of equity contributions to the Project through 2020.[426] Thereafter, it continued to guarantee against loans drawn by TC Energy, which loans were first used to execute a return of APMC's capital invested in the United States to APMC shortly before the Revocation. APMC thus continued to maintain its investment in the United States through the guarantee against the loan which had been used to partially repay its capital contribution, retaining its full risk exposure to the Project.

207. APMC would additionally continue to accrue investment gains, pursuant to the terms of the agreements noted above, until Project Completion, at which time APMC would have enjoyed returns from the eventual buyback of its position. Through its interest in the US SPV, which was converted to rights through the Canadian SPV, APMC was entitled to share in the income and profits of US SPV for the full amount of the Class A Accretion attributable to the Class A Interests (and, potentially, to fully share in the income and profits), as well as a share in Project assets upon dissolution up to its net contribution amount (and, in certain cases, to fully share in its assets upon dissolution).

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[425] North American Free Trade Agreement, Can.-Mex.-U.S., 17 Dec. 1992, 32 I.L.M 289 (1993) ("**NAFTA**"), ch. 2, art. 201 (CLA-38).

[426] [redacted].

208. [redacted]

209. Accordingly, APMC established an "*investment*" in the territory of the United States, as the term is defined in NAFTA Article 1139. Moreover, pursuant to NAFTA Article 1121, APMC, is both entitled on its own behalf as well as on behalf of 2254746 Alberta Sub. Ltd. (previously defined as the "**Enterprise**") to consent to arbitration in accordance with the procedures set out in NAFTA Chapter 11.

210. Consistent with the CUSMA Protocol[428] establishing that NAFTA would be superseded when CUSMA came into force, which occurred on 1 July 2020,[429] and as established by the Investment Agreement, all associated companies and contractual structures were in place by the end of March 2020. Therefore, APMC's investment was timely made in accordance with NAFTA's terms and thus constituted a legacy investment for purposes of Annex 14-C.

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427 [redacted]

428 Protocol Replacing the North American Free Trade Agreement with the Agreement Between Canada, the United States of America, and the United Mexican States, dated 30 November 2018, para. 1 (CLA-39).

429 *See, e.g.*, Office of the U.S. Trade Representative, USMCA to Enter into Force July 1 After the United States Takes Final Procedural Steps for Implementation, dated 24 April 2020 (C-246).

211. **Third**, APMC's claim has been submitted "in accordance with Section B of Chapter 11 (Investment) of NAFTA."[430]

212. Pursuant to NAFTA Article 1119,[431] on 9 February 2022, APMC served the U.S. Government with a Notice of Intent to Submit a Claim to Arbitration under NAFTA Chapter 11 in connection with the Revocation.

213. The Parties met on 6 February 2023 to consult on Claimant's claim in accordance with NAFTA Article 1118.[432] These discussions did not result in resolution of the dispute.

214. After more than six months had elapsed since the events giving rise to APMC's claim in accordance with NAFTA Article 1120(1), and more than 90 days had elapsed since APMC submitted its Notice of Intent in accordance with NAFTA Article 1119, and pursuant to NAFTA Article 1120(1)(c) and Article 3 of the United Nations Commission on international Trade Law ("**UNCITRAL**") Arbitration Rules, APMC submitted its claims to arbitration on 22 May 2023.[433] This timing additionally satisfied the stipulation of paragraph 3 of Annex 14-C, insofar as APMC has brought its claim within three years of CUSMA entering into force.

215. In summary:

- APMC's claim relates to a legacy investment in the sense of Annex 14-C, paragraph 6(a): the investments by investors as defined by NAFTA section 201 and 1139 were made between 1 January 1994 and 1 July 2020 and in existence on 1 July 2020.
- The claim alleges breaches of specific obligations of Section A of Chapter 11 of NAFTA as set out in the original Notice of Arbitration and in this Memorial.

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[430] Canada-United States-Mexico Agreement, *entered into force* 1 July 2020 ("**CUSMA**"), Annex 14-C, para. 1 (CLA-40).

[431] NAFTA, ch. 11, art. 1119 (CLA-38).

[432] *Id.*, art. 1118 ("*The disputing parties should first attempt to settle a claim through consultation or negotiation*.").

[433] Terms of Appointment, dated 3 December 2023, para. 2.

- The claim was submitted in accordance with the procedures of Section B of Chapter 11 of NAFTA.
- The claim was submitted within three years after NAFTA's termination, i.e., before 1 July 2023.

B. The Grandfathered Class of Annex 14-C

216. The Tribunal will recall that the United States has intimated an intent to seek bifurcation and challenge this Tribunal's jurisdiction, purportedly on the basis that APMC is not entitled to make a claim under Annex 14-C of CUSMA for breach of NAFTA obligations arising from the Revocation because it is an act after CUSMA entered into force and replaced NAFTA.

217. APMC is of the position that the text of Annex 14-C is clear on its face that the offer to arbitrate extends to events and conduct occurring up to three years after CUSMA came into force. Through paragraphs 1, 3 and 6 of Annex 14-C, the CUSMA Parties consented to investors with legacy investments, as those terms were defined in Annex 14-C and NAFTA, continuing to bring claims for a period of three years for breach of NAFTA Chapter 11 obligations.

218. Respondent would bear the burden of proving its position, should it object to jurisdiction.[434] All discussion which follows should be construed as being provided without prejudice to the primacy of this point.

219. Annex 14-C, paragraph 1 of CUSMA states fully, along with its two footnotes, 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*

[434] *See, e.g., Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12, Award dated 10 December 2014 ("*Fraport v. Philippines II*, Award"), para. 299 ("*Regarding burden of proof, in accordance with the well-established rule of* onus probandi incumbit actori*, the burden of proof rests upon the party that is asserting affirmatively a claim or defense. Thus, with respect to its objections to jurisdiction, Respondent bears the burden of proving the validity of such objections*.") (CLA-41).

> *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. [FN20] [FN21]*
>
> > *[FN20] For greater certainty, the relevant provisions in Chapter 2 (General Definitions), Chapter 11 (Section A) (Investment), Chapter 14 (Financial Services), Chapter 15 (Competition Policy, Monopolies and State Enterprises), Chapter 17 (Intellectual Property), Chapter 21 (Exceptions), and Annexes I-VII (Reservations and Exceptions to Investment, Cross-Border Trade in Services and Financial Services Chapters) of NAFTA 1994 apply with respect to such a claim.*
> >
> > *[FN21] Mexico and the United States do not consent under paragraph 1 with respect to an investor of the other Party that is eligible to submit claims to arbitration under paragraph 2 of Annex 14-E (Mexico-United States Investment Disputes Related to Covered Government Contracts).*

220. Again, paragraph 3 of Annex 14-C indicates that the Parties' "consent under paragraph 1 shall expire three years after the termination of NAFTA 1994."

221. As set out here, the conditions of paragraphs 1 and 3 of Annex 14-C are satisfied in this case and support the jurisdiction of this Tribunal to hear Claimant's claims.

222. Article 70 of the Vienna Convention on the Law of Treaties ("**VCLT**") provides that the termination of a treaty ordinarily releases a party from obligations of performance of a

treaty.[435] But Article 70 is caveated as follows: "[u]*nless the treaty otherwise provides or the parties otherwise agree*." Article 1 of the Protocol replacing NAFTA with CUSMA is express in providing such an exception:

> *Upon entry into force of this Protocol, the CUSMA, attached as an Annex to this Protocol, shall supersede the NAFTA, without prejudice to those provisions set forth in the CUSMA that refer to provisions of the NAFTA.*[436]

223. Manifestly, Annex 14-C is one of those provisions that "*refer to provisions of the NAFTA*". Thus, as set out in paragraphs 1 and 3 of Annex 14-C, the Protocol must contemplate that NAFTA Chapter 11 was not superseded as far as legacy investments were concerned, but was rather maintained in force for such investments for an additional period of three years.

224. The jurisdictional objection apparently being contemplated by Respondent is that the consent of paragraph 1 was for a class of legacy claims, not legacy investments. This

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[435] VCLT, art. 70 (CLA-42):

> *1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:*
>
> *(a) releases the parties from any obligation further to perform the treaty;*
>
> *(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.*
>
> *2. If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.*

[436] Protocol Replacing the North American Free Trade Agreement with the Agreement Between Canada, the United States of America, and the United Mexican States, dated 30 November 2018 (CLA-39).

argument is at odds with operation of the customary rules of interpretation reflected in Articles 28 and 31 of the VCLT, which respectively provide, in relevant part:

- Article 28: "*Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.*"[437]

- Article 31(1): "*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*"[438]

225. Thus, absent any evidence to the contrary, any good faith interpretation of the plain meaning of the relevant CUSMA text must proceed on the premise that its construction is forward-looking, not backward. In other words, if the drafters of Annex 14-C wanted to adopt a "*different intention*" so as to substitute a backward-looking approach for Annex 14-C in place of the default, forward-looking approach, they should have said so. Because they did not, the text must be construed as forward-looking.

226. Paragraph 1 of Annex 14-C does not address temporal aspects of the conduct that could lead to a claim regarding a legacy investment. It would have been easy – and, in fact, necessary – for the drafters to indicate that such claims could only be made in respect of governmental conduct occurring before CUSMA came into force. Instead, the forward-looking nature of the provision is emphasized by the language of footnote 20, as it informs the reader how "[f]*or greater certainty, the relevant provisions in* [. . .] *Chapter 11 (Section A) (Investment)* […] *of NAFTA 1994 apply with respect to such a claim*."

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437 VCLT, art. 28 (CLA-42).

438 *Id*., art. 31. Other references in the VCLT to good faith include as follows: (i) the Preamble states: "*Noting that the principles of free consent and of good faith and the pacta sunt servanda rule are universally recognized …*"; and, (ii) Article 26 - "*Pacta sunt servanda*", states "*Every treaty in force is binding upon the parties to it and must be performed by them in good faith*." *Id.*

227. Absent an express temporal limitation, and with the footnote 20 confirmation that the substantive provisions of NAFTA Chapter 11 (Section A) apply "*to such a claim*" with the presumption that this clarification was, itself, of a forward-looking nature, the plain and ordinary reading of this provision thus must be that substantive NAFTA obligations (as set out in Section A of NAFTA Chapter 11) were retained by CUSMA for the holder of legacy investments to make claims about State conduct occurring within three years of CUSMA's entry into force. That is subject only to the caveat that putative claimants follow the dispute resolution procedural provisions of Section B of Chapter 11 of NAFTA (titled "**Settlement of Disputes between a Party and an Investor of Another Party**").

228. Indeed, the three-year term for consent provided in Annex 14-C paragraph 3 would make no sense if the offer only applied to pre-existing conduct claims. NAFTA Articles 1116(2) and 1117(2) in Section B both state that: "*An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage*." In other words, in Respondent's interpretation, Annex 14-C applies only to pre-termination conduct; but pursuant to NAFTA Articles 1116(2) and 1117(2), claimant-investors must bring their claims within 3 years of when they "*should have first acquired*" knowledge of the breach and damages. In such a scenario, the inclusion of Annex 14-C paragraph 3 would be superfluous because any NAFTA claim concerning governmental conduct Respondent says was intended to be allowed by the Annex 14-C provisions would have *already* been restricted by the 3-year limit in Articles 1116(2) and 1117(2) of NAFTA – which CUSMA says must be followed to submit any such claim.

229. Yet another example of the CUSMA drafters' understanding of the forward-looking default for treaty interpretation can be found in Article 14.2(3) of CUSMA Chapter 14, which provides as follows:

> *For greater certainty, this Chapter, except as provided for in Annex 14-C (Legacy Investment Claims and Pending Claims) does not bind a Party in relation to an act or fact that took place or a situation that ceased to exist before the date of entry into force of this Agreement.*[439]

230. This language appears consistent with the default position reflected in VCLT Article 28. The most natural reading of "*except as provided for in Annex 14-C*" is that it refers to paragraphs 4 and 5 of that Annex, which confirm that existing NAFTA arbitral procedures could continue with the Parties honouring any resulting awards (the "*Pending Claims*" it refers to). Put another way, the Parties explicitly provided a mechanism for application of the new treaty to past events, being NAFTA arbitrations already underway.[440]

231. Article 14.2(3) and paragraphs 4 and 5 of Annex 14-C are entirely consistent with the customary position reflected in these VCLT articles. As such, it is manifest that Annex 14-C provides – and was intended to provide – a sustained right for qualified NAFTA investors to bring claims for the breach of NAFTA obligations, while existing NAFTA claims – being subsisting rights under that treaty – would also continue. It is also possible to analyze article 14.2(3) consistent with existing breaches of NAFTA Chapter 11 Section A rights as engaging crystalized rights to pursue a claim under Chapter 11 Section B regardless of any subsequent termination of NAFTA.

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439 CUSMA, Annex 14-C (CLA-40).

440 Of course, this is really a boot and suspenders approach by the drafters as VCLT article 70(1)(b) states that "[u]*nless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention* [. . .] *does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination*." VCLT, art. 70(1)(b) (CLA-42).

But critically, CUSMA article 14.2(3) makes no express caveat or comment regarding the operation of paragraph 1 of Annex 14-C, let alone an express reversal of the forward-looking presumption of VCLT article 28 regarding a good faith interpretation of its function subject to any analysis of accrued rights along a VCLT article 70(1)(b) basis.

232. Footnote 21 further reinforces the plain and ordinary construction of the "above-the-line" text of Annex 14-C as being of a forward-looking nature. Footnote 21 provides: *"Mexico and the United States do not consent under paragraph 1* [of Annex 14-C] *with respect to an investor of the other Party that is eligible to submit claims to arbitration under paragraph 2 of Annex 14-E (Mexico-United States Investment Disputes Related to Covered Government Contracts)."* Because Annex 14-E is only forward-looking in relation to a specific category of CUSMA claims involving the United States and Mexico (and not Canada), this clarification would make no sense unless it was referencing the forward-looking nature of Annex 14-C. Paragraph 2(a)(i) of Annex 14-E offers an investor an opportunity to bring a claim alleging that "*the respondent* [State] *has breached any obligation under this Chapter* [14 of CUSMA]."[441] Article 14.2(3) provides that there is no sense in which Chapter 14 could be applied to governmental conduct pre-dating entry into force of CUSMA except as provided for by Annex 14-C.

233. Consequently footnote 21 further makes plain to the reader that the sub-class of investors with legacy investments who have a forward-looking claim both for breach of NAFTA obligations under Annex 14-C and such a claim for breach of substantive CUSMA obligations from Chapter 14 under Annex 14-E in fact may only make a claim in accordance with Annex 14-E for breach of CUSMA standards.

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441 CUSMA, Annex 14-E (CLA-40).

C. Alternatively, the Preparatory Work and Circumstances of CUSMA's Conclusion Support Claimant's Interpretation of Annex 14-C

234. Claimant submits that the above analysis, founded on the customary international law rules of interpretation reflected in VCLT Article 31, is determinative as regards its right to pursue its NAFTA claims regarding legacy investments under Annex 14-C of CUSMA. In the interests of legal certainty and comprehensiveness, however, it addresses the application of VCLT Article 32 in the alternative as a confirmation of this interpretation under Article 31.

235. VCLT Article 32 provides:

> *Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:*
>
> > *(a) leaves the meaning ambiguous or obscure; or*
> >
> > *(b) leads to a result which is manifestly absurd or unreasonable.*[442]

236. What constitutes "*the preparatory work of the treaty and the circumstances of its conclusion*" can be a moving target, which is why the International Law Commission has declined to establish a definitive list.[443] What is certain in all investment treaty cases is that the treaty parties have non-party beneficiaries of the treaty at a practical disadvantage because the latter only has public documents to rely upon, save for what can be obtained through the document production process.

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442 VCLT, art. 32 (CLA-42).

443 "*The Commission did not think that anything would be gained by trying to define* travaux préparatoires." Draft Articles on the Law of Treaties with Commentaries, II Y.B. OF THE INT'L LAW COMMISSION at 223, para. 20 (1966) (CLA-43).

237. Recognizing this structural disadvantage, counsel on behalf of APMC previously submitted FOIA requests to the Department of State, USTR and the Department of Commerce in order to obtain documents (or at least knowledge of the existence of documents) that could explain why Respondent has threatened to make a jurisdictional objection that is contradicted by the plain meaning of the treaty text. In the absence of such documentation, the objection would need to be dismissed on the basis that it is unsupported by any contemporaneous documentary evidence.

238. First, those FOIA requests by Claimant have met with, to put it charitably, limited success. As of November 2023, the Department of Commerce estimated that it would provide requested material regarding CUSMA negotiations by 29 May 2024,[444] while the Department of State has suggested that it could provide material by 31 December 2025.[445] Only USTR has provided any material to date, totaling 222 pages. These documents do not support the expected objection, but rather confirm "*the meaning resulting from the application of Article 31*" of the VCLT as set out above. Indeed, the documents disclosed by USTR suggest that the alleged basis for the objection was of a purely *post hoc* character.

239. The USTR disclosure includes comments from Mr. Lauren Mandell, who was the lead U.S. negotiator of the investment chapter of CUSMA.[446] In a typical talking point note circulated by Mr. Mandell internally at USTR on 9 October 2018 (*i.e.* shortly before signature of

444 Email from U.S. Department of Commerce to Crowell and Moring, dated 21 November 2023 (C-247).

445 Email from U.S. Department of State to Crowell and Moring, dated 18 December 2023 (C-248).

446 He has allowed himself to be described as such in public. For example, First Trinational Seminar: Mexico-United States-Canada, dated 21 April 2023, at 3 (C-249), where he is listed as "*Lauren Mandell – Jefe de Mesa de USA para la negociación del capítulo de inversión del T-MEC y consultor especial en WilmerHale*." ("*Head of the USA for the negotiation of the investment chapter of the T-MEC* [CUSMA] *and special counsel at WilmerHale*.")

CUSMA and during the final scrub phase of the treaty), he states in a covering email that "*we prepared*" the following note:

> *Narrow Coverage of the Three-Year ISDS grandfather clause:*
>
> *"Description: Under the ISDS grandfather clause, investors can bring ISDS claims under NAFTA 1994 for three additional years with respect to investments established or acquired between January 1, 1994 and the date of the termination of NAFTA 1994 (i.e., the lifetime of NAFTA 1994). Under the revised approach, investments established or acquired after signature of the USMCA, but before the termination of NAFTA 1994, would be excluded from the grandfather clause.*[447]

240. In another example, again in a USTR talking points note circulated by Mr. Mandell, on 19 October 2018 for an OECD Investment Committee Meeting:

> *First, investors that have established or acquired investments during the lifetime of the NAFTA can continue to bring ISDS claims under the NAFTA rules and procedures with respect to those "legacy investments" for three years after the termination of the NAFTA.*
>
> *"Second, apart from these legacy investment claims and claims that are currently pending under the NAFTA, there will be no ISDS between the United States and Canada.*
>
> *"Third, as between the United States and Mexico, investors in all sectors will have limited access to ISDS as a last resort to provide protection in the case of certain egregious government actions, namely, post-establishment discrimination or direct expropriation. In certain critical sectors, such as oil and gas and telecommunications, investors with government contracts will have broader access to ISDS to protect the long-term, capital intensive investments in these sectors, which are subject to heightened political risks.*[448]

241. These talking points consistently describe how existing investors would enjoy a continuing right to bring claims for three years after termination of NAFTA. No attempt appears

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447 U.S. Trade Representative FOIA package at 1-4 (C-250).

448 *Id*. at 21-23.

to have been contemplated to restrict this right to conduct that occurred before CUSMA came into force. Rather, the discourse is simply about how a continuing right to make claims would be provided to existing NAFTA investors. That is obviously why repeated reference to Annex 14-C as a "*grandfather clause*" is made in the disclosed documents. Grandfather clauses exclude a pre-existing class from a new rule. As discussed above, the class being excluded here is pre-existing "*legacy investments*", being excluded from the effect of CUSMA on NAFTA Chapter 11 for three years. There is no discussion or sense that in fact the class being excluded is more specifically claims based on events at a certain time (whether or not by investors with pre-existing investments).

242. Mr. Mandell left the USTR in May 2019 and joined the law firm WilmerHale. On 18 March 2021, Mr. Mandell co-authored a "*client alert*" issued by the firm entitled "*Three Tips for Investors in Mexico's Energy Sector Regarding Potential USMCA Claims.*"[449] The article discusses the potential for CUSMA claims arising from Mexico's legislative reform of its electricity market on 10 March 2021, *i.e.*, regarding Mexican governmental conduct that occurred only after CUSMA had entered into force.

243. In the article, Mr. Mandell and his co-authors explain:

> *US, Canadian and Mexican investors with "legacy investments" in the territory of another Party—investments established during the lifetime of the NAFTA (January 1, 1994–July 1, 2020)—have full access to ISDS under NAFTA rules for claims brought within three years after the date of the USMCA's entry into force, meaning until July 1, 2023*
>
> [and]

[449] WilmerHale Client Alert, Three Tips for Investors in Mexico's Energy Sector Regarding Potential USMCA Claims, dated 18 March 2021, at 1-2 (Tips 1 and 2) (C-251).

> *The ISDS landscape will change on July 1, 2023, three years after the date of the USMCA's entry into force. Canadian investors will be unable to file new claims against Mexico, though they will still have access to ISDS under the CPTPP. US investors will be able to file new claims, but with notable limitations. Except for those with certain defined government contracts, US investors will lose the ability to lodge some types of claims that might otherwise be viable with respect to the new electricity law, including indirect expropriation and fair and equitable treatment claims. Most US investors will also face requirements to initiate and maintain proceedings in Mexican court for as long as 30 months before they may pursue ISDS. Therefore, US and Canadian investors in Mexico's energy sector should be mindful of their potential change in circumstances on July 1, 2023. To file a claim before that deadline, an investor would need to submit a notice of intent to Mexico by April 1, 2023.*

244. Such comments from Mr. Mandell in the materials currently known to APMC do not support the propositions upon which Respondent's threatened objection would rest. Rather, they suggest that no such objection could be made in good faith, given how even the Respondent's chief negotiator for the CUSMA investment chapter has acted consistently as though he shares Claimant's views as to what constitutes a legitimate claim regarding a legacy investment under Annex 14-C.

245. Another USTR talking points memo dated 28 November 2018 provided to Claimant by USTR concerns the "*scrub*" phase of treaty drafting, which corresponds to the period during which finalization of the treaty text was underway:

> *Article 14.2(3) (Scope): The original text stated that the Investment Chapter does not apply to acts/events that occurred prior to entry into force of the USMCA, consistent with the default Vienna Convention rules. In the scrub, we clarified that there is one exception: Annex 14-C (the grandfather provision) allows investors to bring ISDS claims with respect to legacy investments where the alleged breach took place before entry into force of the USMCA.*[450]

[450] U.S. Trade Representative FOIA package at 168 (C-250).

246. The author of this document is unclear from the USTR disclosure made to Claimant. However, it indicates the belief from the drafting that Annex 14-C is scoped to include pre-CUSMA conduct. Indeed, it is not even clear that it is referencing paragraph 1 of Annex 14-C, rather than paragraphs 4 and 5. It does not say that Annex 14-C is only related to pre-CUSMA conduct. This truncated reference to the "*grandfather provision*" is still focused on the concept of legacy investments rather than legacy claims, and contradicts nothing said above regarding the analysis of VCLT articles 28 and 70(1)(b).

247. Another indication of contemporaneous understanding held by United States Government officials at the time confirms Claimant's interpretation of Annex 14-C as forward-looking. This example arises from the work of the Industry Trade Advisory Committee on Services, which was created by USTR, and continues to liaise with it.[451] On 27 September 2018 the Committee issued a report on the CUSMA negotiations in which it was opined that "*the* [proposed] *transition period for bringing ISDS claims under the original NAFTA is limited to 3 years from the date of NAFTA termination. The 3-year window is short compared to the 10 year period typically provided under terminated BITs*."[452] Examples of U.S. practice with respect to post-termination claim survival being ten years include the United States-Bolivia Bilateral Investment Treaty in which a party's right to unilaterally terminate its obligations is tempered by the inclusion of a ten-year sunset/grandfather clause:

> *For ten years from the date of termination, all other Articles shall continue to apply to covered investments established or acquired prior to the date of termination, except insofar as those Articles*

[451] As explained by the International Trade Administration, this Committee has "*direct access to policymakers at Commerce Department and the Office of USTR. In such capacity advisors assist in developing industry positions on U.S. trade policy and negotiating objectives.*" *See* U.S. Department of Commerce, International Trade Administration, Industry Trade Advisory Center: Become an Advisor, at 2 (C-252).

[452] Report of the Industry Trade Advisory Committee on Services, dated 27 September 2018, at 20 (C-253).

> *extend to the establishment or acquisition of covered investments.*[453]

248. Similar to the concept that "*all other Articles shall continue to apply to covered investments*" for ten years as found in the United States treaty with Bolivia, Annex 14-C does not say that claims averring breach of obligations of NAFTA regarding acts at a specific time may be brought for a further three years regarding legacy investments, but rather that claims could be brought for a further three years: footnote 20 provides "[f]*or greater certainty, the relevant provisions in Chapter 11 (Section A) (Investment)* [. . .] *of NAFTA 1994 apply with respect to such a claim*." If the CUSMA parties intended Annex 14-C to operate in a manner different from existing treaty practice, the Committee would doubtless have commented further concerning how the typical approach to these issues was to grandfather existing investments on a forward-going basis for a limited time (*viz*. in this case 3 years, and typically 10 years).

249. Finally, public statements from Canadian and Mexican officials have echoed the language and sentiments of the U.S. government's talking points.

250. For example, a Canadian government briefing book from November 2019 simply stated: "*NAFTA's existing ISDS mechanism will continue to apply for three years after termination of the Agreement for investments made prior to the entry into force of CUSMA*."[454]

251. Meanwhile, Mr. Romero Martinez, who was part of the Mexican negotiating team for CUSMA,[455] has also since moved to private practice. His name was applied to a similar client alert at his firm of Van Bael & Bellis and RRH Consultadores S.C., to the one issued by Mr. Mandell.

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[453] Bilateral Investment Treaty Between the Government of the Republic of Bolivia and the Government of the United States of America, entered into force 6 June 2001, terminated 10 Jun 2012, S. Treaty Doc. No. 106-26 (2000), art. XVI(3) (C-254).

[454] Government of Canada, Minister of International Trade – Briefing Book (C-255).

[455] First Trinational Seminar: Mexico-United States-Canada, dated 21 April 2023, at 3 (C-249).

It stated "[CUSMA], *which replaced* [NAFTA] *on July 1, 2020, kept alive NAFTA's Investment Chapter (Chapter 11) for a 3-year period allowing investors to subject legacy investment claims to arbitration under NAFTA within that survival period*."[456]

252. These statements are not claiming a restriction on when conduct is relevant to the bringing of a Chapter 11 claim regarding a legacy investment – simply that NAFTA Chapter 11 "*will continue to apply*" or be "*kept alive*" for legacy investments for three years.

253. It is true that Mexico, either in *amicus* submissions or in its own defense of Annex 14-C claims recently on foot, has begun to support the United States' position,[457] but its motives to do so now are similar to that of the United States. Two of the Parties are merely taking litigation positions now that it is convenient to do so.

D. The Context of CUSMA Negotiations Calls into Question Whether Respondent's Potential Objection Could Be Made in Good Faith

254. The CUSMA negotiation history runs parallel to the Keystone XL Project process. While APMC in this case relies upon the March 2019 Permit, the context is clear that the US Government offered TC Energy a new permit in exchange for the end of a prior NAFTA arbitration in 2017.[458] Shortly thereafter, the United States, Canada and Mexico began their negotiations for what ultimately became CUSMA in November 2018. The motive for the United States to now twist the Annex 14-C text to its advantage is obvious – it is desperately seeking to avoid having to defend against claims on the merits arising from President Biden's ill-conceived Revocation

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[456] Van Bael and Bellis, Investors' Right to Bring Investment Claims Under the NAFTA Investment Chapter Expires Soon, dated 13 March 2023, at 2 (C-257).

[457] *See, e.g., Legacy Vulcan, LLC v. United States*, ICSID Case No. ARB/19/1, CounterMemorial dated 19 December 2022 (C-286); *TC Energy Corp. and TransCanada PipeLines Ltd. v. United States*, ICSID Case No. ARB/21/63, Mexico's Submission Pursuant to Article 1128 of NAFTA (C-287).

[458] *See supra* **Section II.B.2**.

decision – which was adopted, and since maintained, on a manifestly arbitrary and discriminatory basis.

255. With Respondent's conduct having given rise to APMC making a substantial investment in the Keystone XL Project, and for TC Energy to proceed with the construction of the pipeline in 2020, APMC relied in good faith to its clear detriment on subsisting legal rights granted in the March 2019 Permit, which was granted in the window between finalization of the CUSMA text by 30 November 2018 and before it entered into force in July 2020. This was a period in which all of the NAFTA Parties, but especially the United States in this situation, had the obligation to be clear about the purported meaning of Annex 14-C to be advocated by the United States, and on the basis which it has indicated it will seek bifurcation of this arbitration. Indeed, it represents a factor to consider when interpreting the treaty given "*the circumstances of its conclusion*", as endorsed by VCLT Article 32. It is also a factor for the Tribunal to consider in its assessment of the factual matrix demonstrating the arbitrary and discriminatory conduct manifest from the Revocation of the Permit in January 2021.

E. In Light of Developments Since Procedural Order No. 1 Was Issued, There is No Basis on Which to Withhold the Documents Produced in the TC Energy NAFTA Arbitration

256. As the Tribunal will recall, Respondent has resisted early disclosure in these proceedings with respect to interpreting the text of Annex 14-C. Procedural Order No. 1 directed this Memorial to be produced before Respondent could further pursue its threatened jurisdictional objection. Procedure increasingly stands against Respondent's stated intent to pursue the threatened objection. Indeed, the prospect of foregoing any bifurcation of this arbitration has grown considerably in light of disclosures made by Respondent in parallel

proceedings involving TC Energy. Developments in the ongoing arbitration between Respondent and TC Energy have rendered untenable the arguments Respondent would pursue in support of its threatened objection. Document disclosure in respect of materials related to the interpretation of Annex 14-C was ordered in those proceedings. Public submissions in that case reveal that the United States Government has produced relevant documents on a confidential basis to TC Energy.[459]

257. In an extensive Rejoinder submission dated 9 February 2024, TC Energy highlights many of those documents, which it calls the "**Produced Documents**." In the public version of its submission, most of the specifics of the discussion of the Produced Documents are redacted. But among the openly available statements is the following characterization of Mr. Mandell's relationship with them:

> *The Produced Documents confirm that Mr. Mandell was the architect of Annex 14-C, the central individual in interagency discussions within the U.S. Government, the person responsible for presenting Annex 14-C to his Mexican and Canadian counterparts, and the person responsible for negotiating those provisions.*[460]

258. As such, it appears beyond question that Mr. Mandell, the person most directly responsible for the drafting of Annex 14-C, has taken positions – both publicly and in contemporaneous memoranda and correspondence drafted by him and circulated between U.S. Government officials during negotiations – at odds with Respondent's position while

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[459] *TC Energy Corp. and TransCanada PipeLines Ltd. v. United States of America*, ICSID Case No. ARB/21/63, Procedural Order No. 3, dated 6 November 2023 (C-258); *TC Energy Corp. and TransCanada PipeLines Ltd. v. United States of America*, ICSID Case No. ARB/21/63, Procedural Order No. 4, dated 11 December 2023 (C-259); *TC Energy Corp. and TransCanada PipeLines Ltd. v. United States of America*, ICSID Case No. ARB/21/63, Claimant's Rejoinder on Respondent's Preliminary Objections, dated 9 February 2024, para. 3 (C-260).

[460] *TC Energy Corp. and TransCanada PipeLines Ltd. v. United States of America*, ICSID Case No. ARB/21/63, Claimant's Rejoinder on Respondent's Preliminary Objections, dated 9 February 2024, para. 177 (C-260).

simultaneously supporting the position of Claimant concerning the interpretation of CUSMA Annex 14-C.

259. Given the breadth of information produced by Respondent during the document production process established by the tribunal hearing TC Energy's Annex 14-C claims, there no longer appears to be any good faith reason for withholding access to those documents from APMC and this Tribunal. One may accordingly ask – what is the reason that the United States Government appears so determined to hide these documents from Claimant and the Tribunal in this case? TC Energy's Rejoinder on Jurisdiction is quite forceful in this regard:

> *Presumably, Respondent resisted document production so vigorously precisely because it knew that its internal documents would confirm Claimants' position. The Produced Documents do exactly that. In fact, the Produced Documents are entirely one sided. They show the truth of Claimants' position, while not a single Produced Document supports Respondent's position.*[461]

260. Given the nature of international arbitration and the quality of counsel representing TC Energy in this other proceeding, it is nothing short of striking how blunt TC Energy has been on this point.

261. Should the United States insist on pursuing bifurcation in these arbitration proceedings, Claimant submits that it will be vital – at a minimum – for the Tribunal to require Respondent to produce in these proceedings all of the documents it has produced in the TC Energy case.

262. It is further submitted, in this regard, that the Tribunal should also put the United States on notice that full costs would be awarded to Claimant for the jurisdictional phase in an

[461] *Id.*, para. 20.

award retaining jurisdiction if TC Energy's characterization of the evidence is borne out, since the evidence is already strong that the United States is threatening an objection on a wholly bad faith basis.

V. QUANTUM

A. The International Law Framework for Reparation

263. As set out above, the United States breached its obligations under NAFTA by (i) failing to accord APMC the minimum standard of treatment (Article 1105), (ii) providing less favourable treatment than to similarly situated nationals and other foreign investors (Articles 1102 and 1103), and (iii) indirectly expropriating APMC's investment in the Keystone XL Project without payment of compensation (Article 1110).

264. The United States is liable to provide reparation for those breaches according to the applicable law, which includes general matters of international law.[462] Indeed, it is well-established in international law that, where an investment treaty such as NAFTA does not expressly provide a standard for calculating compensation in cases of unlawful breaches of international obligations, the appropriate standard is found in customary international law.[463] Indeed, as noted by one commentator:

> [T]*he principles of compensation are the same for any violation of a treaty – it is compensation for the damage caused thereby. What*

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462 NAFTA, art. 1131 ("*A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law*.") (CLA-38).

463 Where a treaty contains applicable compensation provisions, they prevail in principle as *lex specialis* over general rules of international law. *See Phillips Petroleum Co. Iran v. Islamic Republic of Iran*, IUSCT Case No. 39, para. 107, 21 IRAN-U.S. CL. TRIB. REP. 79, 121 (2 June 1989) (CLA-44). However, where no *lex specialis* applies, the rules of customary international law control. *ADC Affiliate Limited et al v. Republic of Hungary*, ICSID Case No. ARB/16/03, Award dated 2 October 2006, paras. 479-500 ("*Since the BIT does not contain any lex specialis rules that govern the issue of the standard for assessing damages in the case of an unlawful expropriation, the Tribunal is required to apply the default standard contained in customary international law in the present case*.") (emphasis added) (CLA-3).

> *varies from case to case and from claim to claim is the nature and scope of the injury*.[464]

265. The principle for reparation of international wrongs to apply was established in the *Chorzów Factory case*:

> *The essential principle contained in the actual notion of an illegal act — a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals — is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.*[465]

266. Thus, the international law principle for awarding compensation for the breach of NAFTA is sufficient damages to put the claimant in the position it would have been in had the breaches not occurred.[466]

267. The international standard in the *Chorzów Factory* case for damages is also confirmed in the Draft ILC Articles on Responsibility of States for Unlawful Acts. The legal consequence of a State's internationally wrongful act is the "*obligation to make full reparation for the injury caused by the internationally wrongful act*[,]" which includes damages.[467] The ILC

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464 Abby Cohen Smutny, Some Observations on the Principles Relating to Compensation in the Investment Treaty Context, 20 *ICSID Review* 1-23, 19 (2007) (CLA-45).

465 Factory at Chorzów (*Ger. v. Pol.*), 1928 P.C.I.J. (ser. A) No. 17 (13 September), at 47 (CLA-46).

466 MARK KANTOR, VALUATION FOR ARBITRATION: COMPENSATION STANDARDS, VALUATION METHODS AND EXPERT EVIDENCE 51-52 (2008) (CLA-47); *see also* Monroe Leigh, *Judicial Decisions*, 82 AM. J. INT'L L. 351, 360 (1988) (summarizing *Amoco Int'l Fin. Corp. v. Islamic Republic of Iran,* Award No. 310-56-3, IRAN-UNITED STATES CL. TRIB. REP. (24 July 1987), which found that under the application of the *Chorzow Factory* principle, claimant is entitled to all damages that would wipe out the consequences resulting from unlawful expropriation, including lost profits) (CLA-48).

467 ILC Articles, art. 31(1) (CLA-49).

Articles require the state "*to compensate* [the injured party] *for the damage caused thereby*," which "*compensation shall cover any financially assessable damage including loss of profits insofar as it is established*."[468] This also includes taking into account all consequential damages, which may be comprised of "*lost commercial opportunities, loss of credit conditions or of other benefits, if this is necessary in order to put the injured party in the same financial position he or she would have been in, if the illegal act had never been committed*."[469]

B. Compensation Due to APMC Stands at CAD 1.6 Billion

268. [redacted]

269. [redacted]

468 *Id*., art. 36.

469 KANTOR at 53 (describing *S.D. Myers v. Canada*, First Partial Award and Separate Opinion, which found that the respondent violated its treaty obligations of fair and equitable treatment when it closed the border, and conducted a detailed analysis of the individual loss to the investor. Those losses included "*calculating the investor's net income stream lost to third party competitors during the temporary closure period, the net income stream lost to third parties after the closure period but attributable to the adverse impact on the investors' position caused by the closure, and the lost net income stream during the closure period for business the investor failed to fulfill by virtue of the closing but not lost to third parties*.") (CLA-47).

470 [redacted].

471 Investment Agreement, [redacted] (C-110).

472 [redacted]]] (C-261); *see also* Begley Witness Statement, [redacted].

[redacted]

270. [redacted]

[redacted]

271. [redacted]

[redacted]

473 *See* **Section II.C.3.**

474 *See* [redacted]; Begley Witness Statement, [redacted].

475 [redacted].

[redacted] By June 2021, this was [redacted] at CAD 1.035 billion.[476] [redacted] APMC has suffered certain administrative costs in continuing to manage the June 2021 [redacted], while its annual reports have recorded its recoveries and projected future recoveries to date from Project liquidation.[478]

272. Given these direct consequences of the Revocation, the model of compensation set out in the Secretariat Report sets out the present value at time of breach, i.e., 20 January 2021, [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

476 [redacted] (C-262); APMC Annual Report for Fiscal years 2020-2021 dated June 2022 at 18 (C-263)

477 [redacted] (C-262); [redacted].

478 *See* [redacted].

[redacted]

273. Thus, the Secretariat Report's calculated conclusion on compensation due to APMC for Respondent's breaches of NAFTA, with pre-award interest to date, stands at **CAD 1,553.7 million**:

[redacted]

VI. RELIEF SOUGHT AND DAMAGES CLAIMED

274. Without prejudice to its rights to amend, supplement or restate the relief sought, APMC respectfully requests the arbitral tribunal to:

1) Declare that the U.S. Government has breached the terms of CUSMA and NAFTA;

479 [redacted]

2) Award damages of not less than CAD 1,553,700,000.00 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) Order Respondent to pay all costs associated with this arbitration, including Claimant's legal fees and expenses;
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.

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Respectfully Submitted,

For and on behalf of Claimant:

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