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**UNDER THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES
BETWEEN STATES AND NATIONALS OF OTHER STATES AND THE
INSTITUTION RULES AND ARBITRATION RULES OF THE INTERNATIONAL CENTRE FOR
SETTLEMENT OF INVESTMENT DISPUTES,
ANNEX 14-C OF THE AGREEMENT BETWEEN THE UNITED STATES OF AMERICA, THE UNITED
MEXICAN STATES, AND CANADA
AND
CHAPTER 11 OF THE NORTH AMERICAN FREE TRADE AGREEMENT 1994**

**TC Energy Corporation,
TransCanada PipeLines Limited**

Claimants,

v.

**The Government of the
United States of America**

Respondent.

REQUEST FOR ARBITRATION

Counsel for Claimants:

James E. Mendenhall
Jennifer Haworth McCandless
Eric M. Solovy
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005

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REQUEST FOR ARBITRATION

EXECUTIVE SUMMARY

1. On September 19, 2008—more than 13 years ago—TransCanada Keystone Pipeline, L.P. (“Keystone”) submitted an application to the United States Department of State (“State Department”) for a Presidential permit to construct, connect, operate, and maintain the crossborder segment of the Keystone XL Pipeline (“KXL Pipeline” or “the project”), which would have carried oil from an oil supply hub near Hardisty, Alberta to delivery points in Oklahoma and Texas. In the years after Keystone’s application, the United States took Keystone, its parent companies, and its subsidiaries (collectively, “TC Energy,” formerly “TransCanada”¹) on a regulatory roller coaster, first stating that it was “inclined” to approve Keystone’s application, then rejecting the application, then inviting Keystone to apply for a new permit, then issuing the permit (twice), and then, finally, revoking the permit. All of these actions were taken on the basis of essentially the same factual record. The U.S. decision to revoke the permit was unfair and inequitable, discriminatory, expropriatory, and violated U.S. obligations under Chapter 11 of the North American Free Trade Agreement (“NAFTA 1994”). TC Energy hereby submits its claims to arbitration in accordance with Section B of Chapter 11 of NAFTA 1994 and Annex 14-C of the Agreement between the United States of America, the United Mexican States, and Canada (“USMCA”).

2. The evidence substantiating TC Energy’s claims is overwhelming and well documented in the administrative record, media reports, and U.S. Government statements. TC Energy Corporation and TransCanada PipeLines Limited (collectively “Claimants”) will elaborate on the details in due course, but the basic facts are straight-forward. The drama leading to the U.S. decision to revoke the permit unfolded in three acts.

¹ In May 2019, Keystone’s ultimate parent, TransCanada Corporation, formally changed its name to TC Energy Corporation. *See* Annex 1, TC Energy Corporation – Name Change Documentation, May 3, 2019. When referring to the corporate group, we will refer to TC Energy and TransCanada interchangeably.

**ACT ONE: THE UNITED STATES REJECTS KEYSTONE’S PERMIT
APPLICATION IN ORDER TO PROMOTE THE PERCEPTION THAT THE
UNITED STATES IS A LEADER ON CLIMATE CHANGE, PROMPTING TC
ENERGY TO FILE A NAFTA ARBITRATION**

3. The KXL Pipeline is arguably the most closely scrutinized pipeline project in U.S. history. Between 2008 and 2015, the State Department prepared five environmental impact statements (in draft, final, or supplemental form), each of which is hundreds of pages long and backed up by countless environmental and engineering studies, field surveys, and technical assessments, many conducted by independent third parties. These assessments all concluded that the KXL Pipeline would not result in increased production and consumption of crude oil, and therefore would not significantly increase global greenhouse gas (“GHG”) emissions. In October 2010, six months after the State Department issued the very first of these assessments, then-Secretary of State Hillary Clinton publicly stated that the State Department was “inclined” to approve the permit. Despite the findings in these assessments, activist opponents of the project zealously sought to make opposition to the KXL Pipeline a symbolic centerpiece for the climate change protest movement in the United States and a litmus test for Democratic politicians.

4. In July 2011, faced with the threat that the U.S. Congress would pass legislation imposing a deadline for action on the application, the State Department committed to reach a decision before December 31, 2011. The State Department failed to meet its commitment.

5. In November 2011, the State Department said it would try to reach a decision by 2013. Unsatisfied with this timeline, in December 2011, the U.S. Congress passed, and President Barack Obama ultimately signed, legislation that required the President to decide within 60 days whether to approve the application. In January 2012, the Administration announced that it needed more time to assess the application, but that in the face of the legislated timeline for a determination, it had decided to deny the permit without prejudice. It also concurrently stated that if TransCanada reapplied for the permit, it would consider TransCanada’s application as though it were a completely new application.

6. The United States' treatment of the KXL Pipeline contrasted sharply with the Obama Administration's policy at that time—announced just two months after it denied Keystone's first application for the KXL Pipeline—to embrace and expand domestic oil production. In March 2012, President Obama declared that domestic oil production “will continue to be[] a critical part of an all-of-the-above energy strategy” and boasted that, “[n]ow, under my administration, America is producing more oil today than at any time in the last eight years. ... [T]hat's important to know ... We've added enough new oil and gas pipeline to encircle the Earth and then some ... [Y]es, we are going to keep on drilling. Yes, we're going to keep on emphasizing production. Yes, we are going to make sure that we can get oil where it's needed.” On the same day, he issued a Presidential memorandum to expedite review and approval of domestic pipeline infrastructure. He also stressed that he was “directing [his] administration to cut through the red tape, break through the bureaucratic hurdles, and make [a domestic segment of the KXL Pipeline Project] a priority, to go ahead and get it done.” And his administration did exactly that, permitting only the domestic segment of the project on an expedited basis.

7. Keystone submitted its second application for a Presidential permit for the KXL Pipeline in May 2012. Three years later, following submission of comprehensive assessments and extensive review—and seven years after Keystone's first application—the State Department issued a Record of Decision on November 3, 2015 (“2015 ROD”) that once again recognized that the KXL Pipeline would be unlikely to affect the rate of extraction of, or U.S. demand for, oil. However, notwithstanding that determination, it concluded that the pipeline was not in the U.S. national interest. Accordingly, on November 6, 2015, President Obama announced that the United States would once again deny Keystone's application on grounds unrelated to the substantive merits of the project. After admitting that “for years, the Keystone Pipeline has occupied what I, frankly, consider an overinflated role in our political discourse,” President Obama declared that “approving this project would have undercut ... global leadership [on climate change].” At the same time, then-Secretary of State John Kerry candidly admitted “[t]he reality is that this decision could not be made solely on the numbers – jobs that would be created, dirty fuel that would be transported here, or carbon pollution that would ultimately be unleashed.” In other words, the denial was not based on an objective, empirical assessment of the KXL Pipeline's impact on climate change, but was instead designed to create a perception that the United States was committed to addressing climate change.

8. By the time the United States denied Keystone’s second application in 2015, TC Energy had already invested billions of dollars into the KXL Pipeline in the legitimate expectation that the United States would run a fair administrative process consistent with U.S. law and decades of previous U.S. practice and precedent. On June 24, 2016, TransCanada Corporation and TransCanada Pipelines Limited (Keystone’s corporate parents) submitted a Request for Arbitration (“RFA”) on grounds that the November 2015 decision to deny the permit violated U.S. obligations under Chapter 11 of NAFTA 1994.

**ACT TWO: THE UNITED STATES REVERSES ITS POSITION, INVITES
KEYSTONE TO SUBMIT A NEW APPLICATION, AND GRANTS THE
PERMIT (TWICE) ON THE CONDITION THAT TC ENERGY WITHDRAW
ITS NAFTA CLAIMS**

9. On January 24, 2017, President Donald Trump issued a Presidential Memorandum Regarding the Construction of the Keystone XL Pipeline that explicitly “invit[ed] TransCanada Keystone Pipeline, L.P. (TransCanada), to promptly re-submit its application” for a Presidential permit for the KXL Pipeline. Recognizing the U.S. vulnerability in the pending NAFTA arbitration, President Trump instructed his chief economic adviser to “[g]o back to [TransCanada] and tell them, if they don’t drop the [NAFTA] suit immediately, we are going to terminate the deal.” He went on to explain that forcing TransCanada to drop the arbitration is “easier ... than settling for like \$4 billion in seven years from now.” TransCanada agreed to withdraw its NAFTA claims, believing and justifiably relying on the Administration’s promise that its third application would be fairly considered by the United States, and it promptly resubmitted its application.

10. In March 2017, the Trump Administration granted the permit (“2017 Permit”). The accompanying Record of Decision (“2017 ROD”) stated that the KXL Pipeline is “not likely to lead to a significant net increase in [GHG] emissions,” a finding that was entirely consistent with earlier determinations. The 2017 ROD then reversed the politically-driven position the United States had taken during the Obama Administration, and concluded that issuing the permit would not undermine U.S. leadership on climate change. On March 29, 2019, the Trump

Administration issued a new permit (“2019 Permit”) in order to address issues that arose in domestic litigation surrounding the 2017 Permit.

11. The 2017 and 2019 Permits both were conditioned upon TC Energy commencing construction of the cross-border segment of the KXL Pipeline within five years after the permits were issued. Accordingly, TC Energy continued to invest billions of dollars into the KXL Pipeline to advance project development and obtain ancillary regulatory authorizations, with the full knowledge and encouragement of the U.S. Government, and entered into contracts with multiple customers to ship oil on the pipeline. These contracts would have filled the entire capacity of the KXL Pipeline.

**ACT THREE (THE BREACHING ACT): THE UNITED STATES
REVERSES ITS POSITION A SECOND TIME, REVOKES THE 2019
PERMIT, AND ONCE AGAIN ASSERTS THAT BLOCKING THE KXL
PIPELINE IS NECESSARY TO PROMOTE THE PERCEPTION THAT THE
UNITED STATES IS A LEADER ON CLIMATE CHANGE**

12. During the U.S. Presidential campaign in 2019 and 2020, activists opposed to the KXL Pipeline reinvigorated their opposition and, among other actions, demanded that Democratic presidential candidates take a formal pledge to revoke the 2019 Permit “no matter what.” In 2020, the policy director of then-candidate Joseph Biden’s campaign declared that “Biden strongly opposed the Keystone pipeline in the last administration, stood alongside President Obama and Secretary Kerry to reject it in 2015, and will proudly stand in the Roosevelt Room again as President and stop it for good by rescinding the Keystone XL pipeline permit. ... Stopping Keystone was the right decision then and it’s still the right decision now.”

13. On January 20, 2021, within hours of being sworn in as President of the United States, President Biden issued Executive Order 13990 (“EO 13990”), which revoked the 2019 Permit in order to promote the perception that the United States was committed to taking action on climate change. The “Day One” revocation action was taken without any new analysis or assessment of the substantive merits of the project or any opportunity for TC Energy to respond to, or otherwise address, the new Administration’s concerns. For example, there is no evidence that

the Administration considered the significant engineering changes and commitments TC Energy had made to be able to operate the pipeline with net zero GHG emissions and to power the pipeline by renewable energy sources by 2030. Nor did the Administration update the previous environmental assessments to account for carbon tax policies Canada had recently put in place. Rather, EO 13990 expressly hearkened back to President Obama's decision to deny the permit application in 2015, i.e., the very decision that led TC Energy to initiate the 2016 NAFTA arbitration. And it was that same arbitration that the United States had demanded TC Energy withdraw as a condition for granting the 2017 Permit.

14. On January 20, 2021, immediately after President Biden revoked the 2019 Permit, TC Energy suspended work on the project, and on June 9, 2021, TC Energy announced that it was terminating the KXL Pipeline project.

CONCLUSION: THE UNITED STATES BREACHED ITS OBLIGATIONS UNDER NAFTA 1994

15. The United States revoked the 2019 Permit for the KXL Pipeline for purely political reasons. The U.S. revocation destroyed billions of dollars of direct and indirect investment by TC Energy in the project and upended the legitimate expectations held by TC Energy that the U.S. Government had itself created. When it signed NAFTA 1994, the U.S. Government committed to provide all Canadian investors with core investment protections, including national treatment (Article 1102 of NAFTA 1994), most-favored-nation treatment (Article 1103 of NAFTA 1994), treatment in accordance with international law, including fair and equitable treatment and full protection and security (Article 1105 of NAFTA 1994), and protection against uncompensated expropriations (Article 1110 of NAFTA 1994). The U.S. Government breached those commitments and, under NAFTA 1994 and Annex 14-C of USMCA, Claimants are entitled to full compensation.

I. INTRODUCTION

16. Pursuant to Articles 1116(1), 1117(1), and 1120(1)(a) of Section B of the North American Free Trade Agreement (“NAFTA 1994”),² Annex 14-C of the Agreement between the United States of America, the United Mexican States, and Canada (“USMCA”), and Article 36 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”), TC Energy Corporation and TransCanada PipeLines Limited (collectively “Claimants”) hereby submit their Request for Arbitration (“Request”) under the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (“ICSID Institution Rules”) and the Rules of Procedure for Arbitration Proceedings (“ICSID Arbitration Rules”) of the International Centre for Settlement of Investment Disputes (“ICSID” or “the Centre”).

17. USMCA entered into force, and NAFTA 1994 terminated, on July 1, 2020. Pursuant to paragraph 1 of Annex 14-C of USMCA, “[e]ach Party consents, with respect to a legacy investment, to the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex alleging breach of an obligation under... Section A of Chapter 11 (Investment) of NAFTA 1994.”³ Paragraph 6 of Annex 14-C of USMCA defines “legacy investment” to mean “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.”⁴ Under paragraph 3 of Annex 14-C of USMCA, a party’s consent to arbitration under paragraph 1 of Annex 14-C of USMCA expires three years after the termination of NAFTA.⁵ Therefore, the arbitration procedures under Section B of Chapter 11 of NAFTA 1994 remain available for “legacy investments” for three years from that date, i.e., until July 1, 2023. Claimants’ claims against the Government of the United States of America (“United States” or

² See Exhibit C-1, North American Free Trade Agreement Between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States, signed Dec. 17, 1992, entered into force Jan. 1, 1994, Chapter 11.

³ Exhibit C-2, Agreement between the United States of America, the United Mexican States, and Canada, signed Nov. 18, 2018, entered into force July 1, 2020, Annex 14-C (“USMCA, Annex 14-C”).

⁴ Exhibit C-2, USMCA, Annex 14-C at para. 6(a).

⁵ Exhibit C-2, USMCA, Annex 14-C at para. 3.

“Respondent”)⁶ relate to “legacy investment[s]” within the meaning of paragraph 6 of Annex 14C of USMCA. Accordingly, Claimants bring these claims pursuant to Annex 14-C of USMCA and Chapter 11 of NAFTA 1994.

18. Claimants’ claims against the United States arise out of the January 20, 2021, revocation of the Presidential permit to construct the KXL Pipeline, which was granted to TransCanada Keystone Pipeline, L.P. (“Keystone”) on March 29, 2019. Respondent’s actions breached U.S. obligations under Articles 1102 (National Treatment), 1103 (Most-Favored-Nation Treatment), 1105 (Minimum Standard of Treatment), and 1110 (Expropriation and Compensation) of NAFTA 1994.

19. On July 2, 2021, Claimants filed a Notice of Intent to submit a claim to arbitration under Chapter 11 of NAFTA 1994.⁷ On the same date, pursuant to Article 1118 of NAFTA 1994, Claimants indicated that they would “welcome any discussions the United States wishes to have regarding these matters.”⁸ On September 7, 2021, Claimants requested a meeting with Respondent to determine whether there was an opportunity to reach an amicable settlement of the dispute.⁹ The parties met by videoconference on September 17, 2021. The parties had further communications by email between October 1 and October 6, 2021. To date, the parties have not settled the dispute. Pursuant to Articles 1119 and 1120(1) of NAFTA 1994, respectively, Claimants submit this Request more than 90 days after delivery of their Notice of Intent and more than six months after the events giving rise to their claims.

⁶ Claimants and Respondent are hereinafter collectively referred to as “the parties.”

⁷ See Exhibit C-3, TC Energy Corporation and TransCanada PipeLines Limited, Notice of Intent to Submit a Claim to Arbitration, July 2, 2021.

⁸ See Exhibit C-4, TC Energy Corporation and TransCanada PipeLines Limited, Cover Letter to Notice of Intent to Submit a Claim to Arbitration, July 2, 2021. The U.S. State Department’s July 2, 2021 email confirmation of electronic delivery of the Notice of Intent is provided at Exhibit C-5. The Federal Express shipment receipt indicating delivery of the physical copy of the Notice of Intent to the U.S. State Department on July 6, 2021, is provided at Exhibit C-6.

⁹ Exhibit C-7, Email from James Mendenhall to Nicole Thornton, September 7, 2021.

II. PARTIES TO THE ARBITRATION

20. Claimants in this matter are two Canadian enterprises: (i) TC Energy Corporation; and (ii) TransCanada PipeLines Limited. The contact information for both Claimants is the same, and appears below:

450 1st Street, SW
Calgary, Alberta, Canada T2P5H1
Tel: 403-920-7680
Fax: 403-920-2467
E-mail: corporate_secretary@tcenergy.com

21. Proof of Claimants' Canadian nationality is included with this Request.¹⁰

22. Pursuant to Article 1116(1) of NAFTA 1994, Claimants are submitting claims on their own behalf, and, pursuant to Article 1117(1) of NAFTA 1994, on behalf of the following U.S. enterprises that they own and/or control: (i) TransCanada PipeLine USA Ltd.; (ii) TC Oil Pipeline Operations Inc.; (iii) TransCanada Oil Pipelines Inc.; (iv) Marketlink, LLC; (v) TC Terminals LLC; (vi) TransCanada Keystone Pipeline, LLC; (vii) TransCanada Keystone Pipeline GP, LLC; (viii) TransCanada Keystone Pipeline, LP; (ix) 6512924 LLC; (x) 181531115 Limited Partnership; (xi) 1991321 LLC; (xii) 181531115 LLC; and (xiii) Port Neches Link LLC. The contact information for each of Claimants' U.S. enterprises is the same, and appears below:

700 Louisiana Street, Suite 700
Houston, Texas, USA 77002-2700
Tel: 832-320-5864
Fax: 832-320-6864
E-mail: corporate_secretariat@tcenergy.com

¹⁰ See Annex 2, TC Energy Corporation – Canadian Certificate of Compliance, June 22, 2021; Annex 3, TransCanada PipeLines Limited – Canadian Certificate of Compliance, June 22, 2021; Annex 4, TransCanada Corporation – Articles of Incorporation and Amendments, various dates; Annex 5, TransCanada PipeLines Limited – Articles of Incorporation and Amendments, various dates.

23. Documentation proving the U.S. nationality of each of the above-listed enterprises,¹¹ as well as Claimants' ownership of each of these enterprises,¹² is included with this Request.

24. Claimants are represented in these proceedings by Sidley Austin LLP. All correspondence and notices to Claimants should be addressed to counsel for Claimants at the following addresses:

James E. Mendenhall
Jennifer Haworth McCandless
Eric M. Solovy
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, D.C., USA 20005
Tel: 202-736-8000
Fax: 202-736-8711
Email: jmendenhall@sidley.com

¹¹ See Annex 6, TransCanada PipeLine USA Ltd. – Certificate of Incorporation, Oct. 24, 1979; Annex 7, TC Oil Pipeline Operations Inc. – Certificate of Incorporation, Dec. 12, 2007; Annex 8, TransCanada Oil Pipelines Inc. – Certificate of Incorporation, Nov. 18, 2005; Annex 9, Marketlink, LLC – Certificate of Formation and Certificate of Amendment, Sept. 2, 2010 and Apr. 5, 2013; Annex 10, TC Terminals LLC – Certificate of Formation, Feb. 28, 2012; Annex 11, TransCanada Keystone Pipeline, LLC – Certificate of Formation, Nov. 18, 2005; Annex 12, TransCanada Keystone Pipeline GP, LLC – Certificate of Formation, May 30, 2006; Annex 13, TransCanada Keystone Pipeline, LP – Certificate of Limited Partnership, June 2, 2006; Annex 14, 6512924 LLC – Certificate of Formation, Mar. 6, 2020; Annex 15, 181531115 Limited Partnership – Certificate of Limited Partnership, Mar. 3, 2020; Annex 16, 1991321 LLC – Certificate of Formation, Mar. 3, 2020; Annex 17, 181531115 LLC – Certificate of Formation, Mar. 3, 2020; and Annex 18, Port Neches Link LLC – Certificate of Formation, Mar. 8, 2021.

¹² See Annex 19, TransCanada PipeLine USA Ltd. – Share certificates issued to TransCanada PipeLines Limited, various dates (BCI); Annex 20, TC Oil Pipeline Operations Inc. – Share certificate issued to TC Oil Pipeline Holdings Inc. and Assignment and Assumption Agreement, Dec. 12, 2007 and Dec. 31, 2020 (BCI); Annex 21, TransCanada Oil Pipelines Inc. – Share certificates issued to TransCanada Pipeline USA Ltd., various dates (BCI); Annex 22, Marketlink, LLC – Excerpt of Limited Liability Company Agreement, Sept. 2, 2010 (BCI); Annex 23, TC Terminals LLC – Excerpt of Limited Liability Company Agreement, Feb. 29, 2012 (BCI); Annex 24, TransCanada Keystone Pipeline, LLC – Excerpt of Limited Liability Company Agreement, Nov. 21, 2005 (BCI); Annex 25, TransCanada Keystone Pipeline GP, LLC – Excerpt of Fourth Amended and Restated Limited Liability Company Agreement, Mar. 31, 2020 (BCI); Annex 26, TransCanada Keystone Pipeline, LP – Excerpt of Fourth Amended and Restated Limited Partnership Agreement, Mar. 31, 2020 (BCI); Annex 27, 6512924 LLC – Excerpt of Limited Liability Company Agreement, Mar. 6, 2020 (BCI); Annex 28, 181531115 Limited Partnership – Excerpt of Amended and Restated Limited Partnership Agreement, Mar. 31, 2020 (BCI); Annex 29, 1991321 LLC – Excerpt of Limited Liability Company Agreement, Mar. 3, 2020 (BCI); Annex 30, 181531115 LLC – Excerpt of Limited Liability Company Agreement, Mar. 31, 2020 (BCI); Annex 31, Port Neches Link LLC – Excerpt of Limited Liability Company Agreement, Mar. 8, 2021 (BCI).

j.haworth.mccandless@sidley.com

esolovy@sidley.com

25. Respondent is the Government of the United States of America. Claimants understand that Respondent's address, for the purposes of these proceedings, is as follows:

Executive Director (L/EX)
Office of the Legal Adviser
Department of State
Washington, D.C., USA 20520
United States of America

III. FACTUAL BACKGROUND

26. In the United States, a Presidential permit is needed for the construction and operation of an oil pipeline that crosses an international border. On January 24, 2017, President Donald Trump invited Keystone to apply for a Presidential permit for the KXL Pipeline.¹³ Keystone did so. President Trump proceeded to grant the 2017 Permit, and then granted a second superseding permit in 2019 to address certain concerns that had been raised in domestic litigation.¹⁴ On January 20, 2021, the same day he was sworn in as President of the United States, President Biden issued EO 13990, Section 6 of which revoked the 2019 Presidential Permit.¹⁵ The U.S. Government's decision to revoke the 2019 Permit breached U.S. obligations under Articles 1102

¹³ Exhibit C-8, White House, Office of the Press Secretary, "[Presidential Memorandum Regarding Construction of the Keystone XL Pipeline](#)," Jan. 24, 2017.

¹⁴ Exhibit C-9, Presidential Permit Authorizing TransCanada Keystone Pipeline, L.P. ("Keystone") To Construct, Connect, Operate and Maintain Pipeline Facilities at the International Boundary Between the United States and Canada, 82 Fed. Reg. 16467 (Apr. 4, 2017) ("2017 Permit"); Exhibit C-10, Presidential Permit of March 29, 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, 84 Fed. Reg. 13101 (Apr. 3, 2019) ("2019 Permit").

¹⁵ Exhibit C-11, "Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis," Executive Order 13990 of January 20, 2021, 86 Fed. Reg. 7037 (Jan. 25, 2021) ("EO 13990"), at Section 6.

(National Treatment), 1103 (Most-Favored-Nation Treatment), 1105 (Minimum Standard of Treatment), and 1110 (Expropriation and Compensation) of NAFTA 1994.

A. BACKGROUND OF THE KXL PIPELINE

27. On September 19, 2008 – more than 13 years ago – Keystone submitted an application to the State Department for a Presidential permit to construct, connect, operate, and maintain the cross-border segment of the KXL Pipeline.¹⁶ The proposed pipeline was designed to transport up to approximately 900,000 barrels per day (“bpd”) of Western Canadian Sedimentary Basin (“WCSB”) crude oil from a supply hub near Hardisty, Alberta to delivery points in Oklahoma and Texas, for ultimate delivery to U.S. refineries. As shown in the map below, the pipeline was to consist of three segments in the United States: (1) the “Steele City Segment,” which would extend from the Canadian border near Morgan, Montana to Steele City, Nebraska (illustrated by the red dotted line), where it would connect with an operating segment of pipeline that extends from Steele City to Cushing, Oklahoma; (2) the “Gulf Coast Segment”, which has been operating since 2014 and extends from Cushing to Port Arthur, Texas; and (3) the “Houston Lateral”, which splits off from the Gulf Coast Segment in Liberty County, Texas and extends to Moore Junction, Texas, near Houston. (The original Keystone pipeline, which is not part of the KXL Pipeline project, is indicated by the green line). Without the cross-border segment, the pipeline could not ship oil produced in Canada to the United States, which was the *raison d’être* of the entire KXL Pipeline project.

¹⁶ See Exhibit C-12, Application of TransCanada Keystone Pipeline, L.P. for a Presidential Permit Authorizing the Construction, Connection, Operation, and Maintenance of Pipeline Facilities for the Importation of Crude Oil to be Located at the United States-Canada Border, Sept. 19, 2008, at Art. 2.



B. THE POLITICAL SAGA LEADING TO REVOCATION OF THE 2019 PERMIT

28. TC Energy's claims arise out of the U.S. Government's unprecedented revocation of the 2019 Permit. However, that breaching act was the culmination of over a decade of erratic U.S. behavior, and the events that preceded the revocation provide important context for TC Energy's claims. As these events demonstrate, the United States took TC Energy on a regulatory roller coaster, repeatedly creating and then dashing expectations that TC Energy would be permitted to proceed with constructing the KXL Pipeline.

1. IN 2015, THE UNITED STATES DENIED KEYSTONE'S PERMIT APPLICATION IN ORDER TO PROMOTE THE PERCEPTION THAT THE UNITED STATES IS A LEADER ON CLIMATE CHANGE, PROMPTING TC ENERGY TO FILE A NAFTA ARBITRATION

29. Keystone had legitimately expected that the State Department would grant the Presidential permit within approximately two years of Keystone's September 2008 application. That expectation was reasonable given that the State Department had taken only 23 months to review and approve Keystone's application for a Presidential permit for the Keystone I pipeline

in 2008.¹⁷ The State Department took only 27 months to review and approve Enbridge Energy, Limited Partnership's application for a Presidential permit to construct the similar Alberta Clipper pipeline in 2009.¹⁸ Compared to the proposed KXL Pipeline, the Keystone I and Alberta Clipper pipelines originate in the same location (i.e., the oil sands in Alberta, Canada), carry the same product (i.e., WCSB crude oil), and are similar in size and throughput. A third pipeline, the Express Pipeline, also transports oil from the Alberta oil sands into the United States.¹⁹ The State Department granted a Presidential permit for that pipeline in 1996, approximately three and a half months after the application had been submitted.²⁰

30. Faced with a politically fraught decision, the United States wrung its hands over how to deal with the application for an unprecedented seven years. On the merits, the United States knew and acknowledged that the pipeline would not have a significant impact on climate change. No fewer than five State Department environmental reviews (in draft, final, or supplemental form) reached the same conclusion, i.e., that the pipeline would not impact the rate of extraction of oil in Canada or U.S. demand for oil, because, among other things, the oil would get to market

¹⁷ See Exhibit C-13, U.S. Department of State Media Note, "[Keystone Pipeline Presidential Permit](#)," Mar. 14, 2008.

¹⁸ See Exhibit C-14, U.S. Department of State Media Note, "[Permit for Alberta Clipper Pipeline Issued](#)," Aug. 20, 2009.

¹⁹ See Exhibit C-15, National Energy Board – Canadian Environmental Assessment Agency, Report of the Joint Review Panel on the Express Pipeline Project, May 1996, at p. 92.

²⁰ See Exhibit C-16, Spectra Energy, [Application for a New Presidential Permit to Express Pipeline LLC](#), May 16, 2013.

through alternative transportation options.²¹ In fact, in October 2010, six months after the State Department issued the very first of these analyses, then-Secretary of State Hillary Clinton publicly stated that the State Department was “inclined” to approve the permit.²² Any concern about granting the permit was not about the substantive merits of the project. It was about politics.

31. From the very start, activists opposed to the project sought to turn the KXL Pipeline into a political rallying point. As reported in the press, influential opposition groups decided in 2008 “to co-ordinate efforts and throw all of their energy at stopping one project...,”²³ the KXL Pipeline. As one activist leader explained, “The goal [of the anti-Keystone XL campaign] is as much about organizing young people around a thing. But you have to have a thing. You can’t organize people around a tipping point on climate change.”²⁴ According to John Podesta, a

²¹ Exhibit C-17, U.S. Department of State, Draft Environmental Impact Statement for the Keystone XL Project, Applicant for Presidential Permit: TransCanada Keystone Pipeline Project, Apr. 16, 2010 (excerpts), at pp. ES-21 and ES-22 (finding, *inter alia*, that “the proposed Keystone XL Project would result in limited adverse environmental impacts during both construction and operation” and that “since the crude oil delivered by the Project would be replacing similar crude oils from other sources, the incremental impact of these emissions would be minor”); Exhibit C-18, U.S. Department of State, Supplemental Draft Environmental Impact Statement for the Keystone XL Project, Applicant for Presidential Permit: TransCanada Keystone Pipeline Project, Apr. 22, 2011 (excerpts), p. 3-197 (finding that the proposed pipeline would not significantly affect GHG emissions as, “on a global scale, emissions are not likely to change [as a result of the pipeline]”); Exhibit C-19, U.S. Department of State, Final Environmental Impact Statement for the Keystone XL Project, Applicant for Presidential Permit: TransCanada Keystone Pipeline Project, Aug. 26, 2011 (excerpts), at p. 3.14-53 (finding that “on a global scale, the decision whether or not to build the Project will not affect the extraction and combustion of WCSB oil sands crude on the global market”); Exhibit C-20, U.S. Department of State, Draft Supplemental Environmental Impact Statement for the Keystone XL Project, Mar. 1, 2013 (excerpts), at p. 4.15-107 (finding that “there would be no substantive change in global GHG emissions” if the pipeline were constructed); Exhibit C-21, U.S. Department of State, Final Supplemental Environmental Impact Statement, Jan. 2014 (excerpts) (“SEIS”), at p. 4.14-5 (finding that “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 (based on expected oil prices, oil-sands supply costs, transport costs, and supply-demand scenarios)”). In December 2019, the State Department issued its Final Supplemental Environmental Impact Statement for the KXL Pipeline, which affirmed that “rail is becoming a growing alternative to pipelines for transport of WCSB crude oil. The[] other No Action Alternative scenarios [including rail transportation as an alternative to the Pipeline] considered in the 2014 Keystone XL Final SEIS, therefore, remain viable.” The FSEIS concluded that, “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.” Exhibit C-22, U.S. Department of State, Final Supplemental Environmental Impact Statement for the Keystone XL Project, Dec. 2019 (excerpts) (“FSEIS”), at pp. S-13 and 122.

²² Exhibit C-23, Elana Schor, [“Labor Uses Automated Calls to Tout Controversial Oil Pipeline,”](#) *N.Y. Times*, Oct. 21, 2010.

²³ Exhibit C-24, Alexander Panetta, [“How the American Environmental Movement Dealt a Blow to Alberta’s Oilpatch,”](#) *CBC*, Nov. 18, 2019.

²⁴ Exhibit C-25, Ryan Lizza, [“The President and the Pipeline,”](#) *The New Yorker*, Sept. 16, 2013.

former top advisor to President Obama, “People were beginning to doubt the President’s commitment [to deal with climate change in 2010]. [The KXL Pipeline] became the test of the question: Are we going to do anything long term about climate change? as he had promised in the 2008 election.”²⁵

32. Activists opposed to the project conducted a years-long public campaign to pressure the Obama Administration to deny the KXL permit application. For example, in August 2011, they staged a two-week campaign of civil disobedience at the White House to protest the KXL Pipeline.²⁶ Then, in February 2013, tens of thousands of activists opposed to the project staged another protest in Washington, D.C.²⁷ The Administration’s response was years of administrative paralysis.

33. After two years and eight months without a decision from the State Department, in May 2011, Congressman Lee Terry (R-Neb.) introduced legislation in the U.S. House of Representatives that would have set a November 1, 2011 deadline for the State Department to decide whether to grant Keystone’s application.²⁸ On July 25, 2011, the Administration issued a Statement of Administration Policy that opposed the legislation but explained that “the Department of State has been working diligently to complete the permit decision process for the Keystone XL Pipeline and has publicly committed to reaching a decision before December 31, 2011.”²⁹ The legislation was not adopted.

34. While TransCanada was working to make some final changes to the proposed route of the pipeline, politics overtook the review process. On November 10, 2011, four days after a demonstration at the White House urging the President to deny the application,³⁰ and ostensibly in response to the Nebraska Governor’s objection to the proposed KXL Pipeline route, the State

²⁵ Exhibit C-25, Ryan Lizza, “[The President and the Pipeline](#),” *The New Yorker*, Sept. 16, 2013, available at (quoting John Podesta, former Counselor to President Obama).

²⁶ Exhibit C-26, “[A chronological history of controversial Keystone XL pipeline project](#),” *CBC*, Jan. 24, 2017.

²⁷ Exhibit C-27, Suzanne Goldenberg, “[Keystone XL protesters pressure Obama on climate change promise](#),” *The Guardian*, Feb. 17, 2013.

²⁸ See Exhibit C-28, North American-Made Energy Security Act, H.R. 1938 (May 23, 2011).

²⁹ Exhibit C-29, Statement of Administration Policy, H.R. 1938 – North American-Made Energy Security Act (July 25, 2011).

³⁰ See, e.g., Exhibit C-30, “[Thousands in D.C. Protest Pipeline](#),” *CBS/AP*, Nov. 6, 2011.

Department announced that it would not make a decision on the KXL Pipeline until it had evaluated alternative routes in Nebraska.³¹ It also announced that “it is reasonable to expect that this process including a public comment period on a supplement to the final EIS consistent with NEPA [i.e., the National Environmental Policy Act] could be completed as early as the first quarter of 2013.”³²

35. In December 2011—over three years after Keystone submitted its first application—Congress passed, and President Obama signed, legislation that required the President to decide within 60 days whether to approve the application.³³ Then, in January 2012 the State Department denied Keystone’s application (without prejudice), before the 60-day statutory deadline had even expired. Despite the Administration’s earlier assurances in July 2011 that it would complete its review by December 2011, President Obama based the denial on the premise that the State Department needed more time to consider the application.³⁴ The White House made it clear that “[t]his announcement is not a judgment on the merits of the pipeline, but the arbitrary nature of a deadline that prevented the State Department from gathering the information necessary to approve the project and protect the American people.”³⁵

36. The State Department further clarified that “the determination does not preclude any subsequent permit application or applications for similar projects,” thereby implying that the next logical step was for Keystone to resubmit its application so that the State Department could complete its evaluation.³⁶ Nevertheless, the State Department stated that, “if TransCanada comes in with a new application, it will trigger a new review process, a completely new review

³¹ See Exhibit C-31, U.S. Department of State Media Note, “[Keystone XL Pipeline Project Review Process: Decision to Seek Additional Information](#),” Nov. 10, 2011.

³² See Exhibit C-31, U.S. Department of State Media Note, “[Keystone XL Pipeline Project Review Process: Decision to Seek Additional Information](#),” Nov. 10, 2011.

³³ See Exhibit C-32, Temporary Payroll Tax Cut Continuation Act of 2011, Pub. L. 112-78 (Dec. 23, 2011), at Section 501.

³⁴ Exhibit C-33, White House, Office of the Press Secretary, “[Presidential Memorandum – Implementing Provisions of the Temporary Payroll Tax Cut Continuation Act of 2011 Relating to the Keystone XL Pipeline](#) Permit,” Jan. 18, 2012.

³⁵ Exhibit C-34, White House, Office of the Press Secretary, “[Statement by the President on the Keystone XL Pipeline](#),” Jan. 18, 2012.

³⁶ Exhibit C-35, U.S. Department of State, “[Report to Congress Concerning the Presidential Permit Application of the Proposed Keystone XL Pipeline](#),” Jan. 18, 2012.

process. We cannot state that anything would be expedited [W]e would also have to look at this as a completely new application, and that's how it would be treated.”³⁷

37. By letter dated February 27, 2012, Keystone notified the State Department of its intention to file a second application for a Presidential permit for the KXL Pipeline. Keystone thereafter proceeded to construct two domestic segments of the KXL Pipeline—the Gulf Coast Segment and the Houston Lateral, which are illustrated above in Section III.A. At a press conference held at a pipe storage yard owned by TransCanada in Cushing, Oklahoma, President Obama praised Keystone's plan to build the Gulf Coast Segment, stating as follows:

I've come to Cushing, an oil town ... because producing more oil and gas here at home has been, and will continue to be, a critical part of an all-of-the-above energy strategy. ...

Now, under my administration, America is producing more oil today than at any time in the last eight years. ... That's important to know. Over the last three years, I've directed my administration to open up millions of acres for gas and oil exploration across 23 different states. We're opening up more than 75 percent of our potential oil resources offshore. We've quadrupled the number of operating rigs to a record high. We've added enough new oil and gas pipeline to encircle the Earth and then some.

So we are drilling all over the place – right now. That's not the challenge. That's not the problem. In fact, the problem in a place like Cushing is that we're actually producing so much oil and gas in places like North Dakota and Colorado that we don't have enough pipeline capacity to transport all of it to where it needs to go -- both to refineries, and then, eventually, all across the country and around the world. There's a bottleneck right here because we can't get

³⁷ Exhibit C-36, [U.S. Department of State, Transcript of Briefing on the Keystone Pipeline by Kerri-Ann Jones, Assistant Secretary of the Bureau of Oceans and International Environmental and Scientific Affairs](#), Jan. 18, 2012.

enough of the oil to our refineries fast enough. And if we could, then we would be able to increase our oil supplies at a time when they're needed as much as possible.

Now, right now, a company called TransCanada has applied to build a new pipeline to speed more oil from Cushing to state-of-the-art refineries down on the Gulf Coast. And today, I'm directing my administration to cut through the red tape, break through the bureaucratic hurdles, and make this project a priority, to go ahead and get it done

... So, yes, we're going to keep on drilling. Yes, we're going to keep on emphasizing production. Yes, we're going to make sure that we can get oil to where it's needed.³⁸

38. Thus, in 2012, the Administration fully supported the production and transportation of oil through the KXL Pipeline, or at least the transportation of oil from Cushing to the Gulf Coast to support U.S. domestic needs. In fact, the same day that President Obama held his press conference in Cushing, he also issued a memorandum regarding the review of domestic (rather than international) pipeline infrastructure projects. Under the subject heading "Expedited Review of Pipeline Projects from Cushing to Port Arthur and Other Domestic Pipeline Infrastructure Projects," the memorandum stated that, "[i]n expediting reviews ..., agencies shall, to the maximum extent practicable and consistent with applicable law, utilize and incorporate information from prior environmental reviews and studies conducted in connection with previous applications for similar or overlapping infrastructure projects so as to avoid duplicating effort."³⁹ The approach outlined in the memorandum for the review of domestic pipeline applications contrasted sharply with the State Department's decision in January 2012 that it could **not expedite** a review of the portion of the KXL Pipeline that crossed the Canadian

³⁸ Exhibit C-37, White House, Office of the Press Secretary, "[Remarks by the President on American-Made Energy](#)," Mar. 22, 2012.

³⁹ Exhibit C-38, White House, Office of the Press Secretary, "[Presidential Memorandum – Expediting Review of Pipeline Projects from Cushing, Oklahoma, to Port Arthur, Texas, and Other Domestic Pipeline Infrastructure Projects](#)," March 22, 2012(emphasis added).

and U.S. international border, based on information that the State Department had previously received. This fundamentally inconsistent treatment of the purely domestic and international segments of the same project was part of a years-long pattern of arbitrary, unfair, and discriminatory treatment of the KXL Pipeline.

39. Keystone submitted its second application for a Presidential permit for the KXL Pipeline in May 2012.⁴⁰ More years passed without any decision from the Obama Administration. On September 22, 2015, Tony Clark, then a sitting Commissioner on the U.S. Federal Energy Regulatory Commission (“FERC”), provided the following explanation of how the Administration had mishandled the process for reviewing Keystone’s application for the KXL Pipeline:

[The KXL Pipeline] has clearly been held up over political reasons, not because it is any different than any of those other pipelines. ... In an administrative practices act, that’s not how you want a functional government to operate. You want a much more clear process by which any pipeline developer or intervenors who are opposed to it know the process by which that takes place—to have one sort of plucked out and held up for fairly arbitrary and capricious reasons primarily related to politics is not a good system of regulation.⁴¹

40. On November 3, 2015, White House Press Secretary Josh Earnest stated:

We’ve talked about how aggressively advocates on both sides of this issue have politicized this particular infrastructure project. I would venture to say that there’s probably **no infrastructure project in the history of the United States that’s been as politicized as this one. ...**

⁴⁰ See Exhibit C-39, Application of TransCanada Keystone Pipeline, L.P. for a Presidential Permit Authorizing the Construction, Connection, Operation, and Maintenance of Pipeline Facilities for the Importation of Crude Oil to Be Located at the United States-Canada Border, May 4, 2012.

⁴¹ Exhibit C-40, Interview with Federal Energy Regulatory Commissioner Tony Clark, “[Should Politics be Kept Out of Pipeline Decisions](#),” *Wall Street Journal*, Sept. 22, 2015(video at 0:38).

And [in] my experience when things that are worthy of technical consideration get politicized, that rarely speeds up the technical consideration. That typically has the effect of slowing it down.⁴²

41. Finally, on November 6, 2015, President Obama announced the U.S. decision to deny Keystone's application.⁴³ To TC Energy's knowledge, this was the first and only time in history that the United States had denied an application to construct a pipeline across an international border. This decision was based on politics, not substance. In fact, in the very press statement where the Administration announced the denial of the permit, it also stated that "[t]he proposed project by itself is unlikely to significantly impact the level of crude extraction or the continued demand for heavy crude oil at refineries in the United States."⁴⁴

42. During the press conference announcing the decision, President Obama admitted that politics had disrupted the review process, stating that, "for years, the Keystone Pipeline has occupied what I, frankly, consider an overinflated role in our political discourse. It became a symbol too often used as a campaign cudgel by both parties rather than a serious policy matter."⁴⁵ The State Department explained that President Obama was referring to the "overinflated perception" regarding "the extent of material impact on emissions, among other things that this pipeline would entail."⁴⁶ In its November 6, 2015 Background Briefing, a State Department official explained:

We actually – in our analysis, we do not conclude that this project denial will impact, on its own, production in Alberta or in Canada. The production increases that are already scheduled to occur are

⁴² Exhibit C-41, White House, Office of the Press Secretary, "[Press Briefing by Press Secretary Josh Earnest, 11/3/2015](#)," Nov. 3, 2015 (emphasis added).

⁴³ Exhibit C-42, White House, Office of the Press Secretary, "[Statement by the President on the Keystone XL Pipeline](#)," Nov. 6, 2015.

⁴⁴ Exhibit C-43, Press Statement of Secretary of State John Kerry, "[Keystone XL Pipeline Determination](#)," Nov. 6, 2015.

⁴⁵ Exhibit C-44, White House, Office of the Press Secretary, "[Statement by the President on the Keystone XL Pipeline](#)," Nov. 6, 2015.

⁴⁶ Exhibit C-45, U.S. Department of State Special Briefing, "[Background Briefing on the Keystone XL Pipeline](#)," Nov. 6, 2015.

likely to continue, and future decisions on investment in that area for production are like – are more – are going to be more reliant on global oil markets, global oil prices, and the condition of the individual companies and their ability to make those investments. Because – what we’ve said before: Because there are alternative methods of transportation and an ability to get to the U.S. market and U.S. refineries, we don’t believe that this project denial will affect production.⁴⁷

43. Similarly, the 2015 ROD, which provided the formal reasons for the State Department’s conclusion that the KXL Pipeline was not in the U.S. national interest, recognized that the State Department had found that the KXL Pipeline “would be 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.”⁴⁸ The 2015 ROD went on to conclude that, “[u]nder most market conditions, alternative transportation infrastructure would allow growing oil sands production to reach markets irrespective of the proposed Project.”⁴⁹ The 2015 ROD even concluded that the KXL Pipeline would be less GHG intensive than alternative means of transporting oil from Alberta to the Gulf Coast, and would reduce the risk of oil spills compared to rail transportation.⁵⁰

44. The decision to deny Keystone’s application was not based on the actual or anticipated impact of the KXL Pipeline on the environment, but on the political desire to prove U.S. leadership credentials to activist opponents of the project and foreign governments. As the 2015 ROD explained, “While the proposed Project by itself is unlikely to significantly impact the level

⁴⁷ Exhibit C-45, U.S. Department of State Special Briefing, “[Background Briefing on the Keystone XL Pipeline](#),” Nov. 6, 2015.

⁴⁸ Exhibit C-46, U.S. Department of State, Record of Decision and National Interest Determination, TransCanada Keystone Pipeline, L.P. Application for Presidential Permit, Nov. 3, 2015 (“2015 ROD”).

⁴⁹ Exhibit C-46, 2015 ROD at p. 11.

⁵⁰ See Exhibit C-46, 2015 ROD at p. 23 (“Annual GHG emissions (direct and indirect) attributed to the No Action transportation scenarios would be greater than for the proposed [KXL Pipeline] Project, but those emissions relate solely to the movement of equivalent amounts of oil from Alberta to the Gulf Coast. Construction of the rail terminals would also involve large numbers of trucks to transport construction materials and equipment. This increased traffic could cause congestion on roads. Increased shipment of crude by rail could reduce rail capacity available for other goods. ... Transportation by rail would likely lead to a greater number of injuries and fatalities per ton-mile than transportation by pipeline, as well as a greater number of accidental releases of crude oil and a greater overall volume of crude oil released.”).

of GHG-intensive extraction of oil sands crude or the continued demand for heavy crude oil at refineries in the United States, it is critical for the United States to prioritize actions that are not **perceived** as enabling further GHG emissions globally.”⁵¹

45. Secretary Kerry reiterated that this politically-driven decision was untethered to objective facts in his November 6, 2015 press statement, where he stated: “[t]he reality is that this decision could not be made solely on the numbers—jobs that would be created, dirty fuel that would be transported here, or carbon pollution that would ultimately be unleashed.”⁵² In other words, the decision would not be made based on objective considerations of the anticipated benefits and costs of the proposed KXL Pipeline. Instead, as Secretary Kerry explained, “The critical factor in my determination was this: moving forward with this project would significantly undermine our ability to continue leading the world in combating climate change.”⁵³ President Obama similarly concluded that, “[f]rankly, approving this project would have undercut that global leadership ... and that’s the biggest risk that we face.”⁵⁴

46. Then-FERC Commissioner Tony Clark summed up the process as follows: “[T]he idea of having linear infrastructure sit around as a matter of politics and not be decided for seven years ... is not how the industries we deal with can move forward. ... Exactly how you do not

⁵¹ Exhibit C-46, 2015 ROD at p. 29 (emphasis added).

⁵² Exhibit C-43, Press Statement of Secretary of State John Kerry, “[Keystone XL Pipeline Determination](#),” Nov. 6, 2015.

⁵³ Exhibit C-43, Press Statement of Secretary of State John Kerry, “[Keystone XL Pipeline Determination](#),” Nov. 6, 2015. *See also* Exhibit C-45, U.S. Department of State Special Briefing, “[Background Briefing on the Keystone XL Pipeline](#),” Nov. 6, 2015. (“The decision to approve or deny a presidential permit for the proposed project will be understood by many foreign governments and their citizens as a test of U.S. resolve to undertake significant and difficult decisions as part of a broader effort to address climate change. The decision to approve the proposed project would have been *viewed* internationally as inconsistent with the broader U.S. effort to transition to less polluting forms of energy; it would have undercut the credibility and influence of United States in urging other countries to put forward ambitious actions and implement efforts to combat climate change”; “it’s absolutely true that the *perception* of U.S. leadership on climate change, the *perception* of what this President and this Administration have been doing, and the resolve that they have been *showing* over the course of the last number of years has been enormously important to the U.S. posture internationally.” (emphasis added)).

⁵⁴ Exhibit C-42, White House, Office of the Press Secretary, “[Statement by the President on the Keystone XL Pipeline](#),” Nov. 6, 2015.

want infrastructure development to happen is how the Keystone XL permitting process went through at the State Department.”⁵⁵

47. By the time the White House denied the permit in November 2015, TransCanada had already invested billions of dollars into the KXL Pipeline in the legitimate expectation that the United States would conduct a fair administrative process consistent with decades of previous U.S. practice and precedent. Having been wrongly denied that fair process, TransCanada Corporation and TransCanada Pipelines Limited submitted a Request for Arbitration (“RFA”) under Chapter 11 of NAFTA 1994 in June 2016. As the claimants explained in the RFA, the Obama Administration’s decision to deny the permit was “driven by perceptions and symbolism that conflicted with reality. The State Department abandoned its traditional review criteria to appease activists opposed to the pipeline and their false beliefs—the hallmark of a decision driven by politics.”⁵⁶ The claimants asserted that the denial of the permit breached U.S. obligations under Articles 1102 (National Treatment), 1103 (Most-Favored-Nation Treatment), 1105 (Minimum Standard of Treatment), and 1110 (Expropriation and Compensation) of NAFTA 1994.

2. IN 2017, THE UNITED STATES REVERSED ITS POSITION, INVITED KEYSTONE TO SUBMIT A NEW APPLICATION, AND GRANTED THE PERMIT ON THE CONDITION THAT TC ENERGY WITHDRAW ITS NAFTA CLAIMS

48. On January 20, 2017, Donald Trump was sworn in as the President of the United States. On January 24, 2017, the Trump Administration reversed the Obama Administration’s position on the KXL Pipeline and issued a Presidential Memorandum Regarding the Construction of the Keystone XL Pipeline, explicitly “invit[ing] TransCanada Keystone Pipeline, L.P. (TransCanada), to promptly re-submit its application” for a Presidential permit.⁵⁷ In response to

⁵⁵ Exhibit C-47, Maya Weber, “Clark: Independent Regulatory Model Attacked,” *Gas Daily*, Nov. 11, 2015, at p. 6.

⁵⁶ Exhibit C-48, *TransCanada Corporation & TransCanada PipeLines Limited v. the Government of the United States of America, Request for Arbitration*, June 24, 2016, at para. 62.

⁵⁷ Exhibit C-8, White House, Office of the Press Secretary, “[Presidential Memorandum Regarding Construction of the Keystone XL Pipeline](#),” Jan. 24, 2017.

the President’s invitation, Keystone submitted a new application on January 26, 2017.⁵⁸ Just over a month later (but prior to issuing the permit), in his first address to a joint session of the U.S. Congress, President Trump specifically identified “clear[ing] the way for the construction of the Keystone and Dakota Access Pipelines—thereby creating tens of thousands of jobs,” as one of the first accomplishments in his presidency.⁵⁹

49. The United States conditioned granting the permit on TransCanada agreeing to withdraw its then-pending NAFTA claims that arose out of President Obama’s refusal to grant a permit in 2015. In doing so, President Trump recognized the U.S. vulnerability in the pending NAFTA arbitration. As reported in the press in March 2017:

Trump told the National Republican Congressional Committee’s March fundraising dinner that TransCanada dropped its lawsuit in late February only because he threatened to rescind his approval if the company did not do so.

“I said, ‘Wait a minute. I’m approving the pipeline and they’re suing us for \$14 billion and I’ve already approved it right?’” Trump said, according to a pool report of what was an otherwise closed-to-the-media event. The president said he deployed Gary Cohn, a former Goldman Sachs executive who now is now [sic] Trump’s chief economic adviser, to relay a message to the Canadian firm.

“Go back to them and tell them, if they don’t drop the suit immediately, we are going to terminate the deal,” Trump said he instructed Cohn. “Being president gives you great power.”

...

⁵⁸ See Exhibit C-49, Application of TransCanada Keystone Pipeline, L.P. for a Presidential Permit Authorizing the Construction, Connection, Operation, and Maintenance of Pipeline Facilities for the Importation of Crude Oil to be Located at the United States-Canada Border, Jan. 26, 2017.

⁵⁹ Exhibit C-50, Transcript, “[Donald Trump’s Congress Speech \(full text\)](#),” *CNN*, Mar. 1, 2017.

Trump contended that essentially forcing TransCanada to drop the suit in the long run is “easier ... than settling for like \$4 billion in [sic] seven years from now.”⁶⁰

President Trump had not formally granted the permit at that stage, but the message to TransCanada was clear: terminate the NAFTA arbitration or the permit would not be issued.

50. On March 23, 2017, the TransCanada claimants and the United States entered into a Termination Agreement and Release of NAFTA Claims (“Termination Agreement”).⁶¹ Pursuant to Section C of the Termination Agreement, the claimants “release[d], with prejudice, all claims raised in the NAFTA Arbitration” and “fully and finally release[d] all future claims arising out of events prior to the Effective Date” of the Termination Agreement. Section A of the agreement defined the “effective date” as “the date of issuance to the Applicant of a Presidential permit (‘the Effective Date’), pursuant to Executive Order 13337, for the construction, connection, operation, and maintenance of the Pipeline.”

51. That same day, the State Department issued the 2017 Permit.⁶² The Record of Decision supporting the decision to grant the 2017 Permit (“2017 ROD”) explained as follows:

- The State Department took into account “all input received over the course of the [State] Department’s review” of the permit applications, spanning the period from May 2012 through March 2017.⁶³

⁶⁰ Exhibit C-51, John T. Bennett, “[Trump Boasts of Forcing Canadian Firm to Drop Keystone Lawsuit](#),” *Roll Call*, Mar. 22, 2017. *See also* Exhibit C-52, Damien Paletta and Steven Mufson, “[Trump Says He Told Aide to Threaten Keystone XL Pipeline Company over Arbitration Case](#),” *Washington Post*, Mar. 22, 2017.

⁶¹ Exhibit C-53, *TransCanada Corporation & TransCanada PipeLines Limited v. the Government of the United States of America*, Termination Agreement and Release of NAFTA Claims, Mar. 23, 2017.

⁶² Exhibit C-9, 2017 Permit.

⁶³ Exhibit C-54, U.S. Department of State, Record of Decision and National Interest Determination: TransCanada Keystone Pipeline, L.P. Application for Presidential Permit, Keystone XL Pipeline, Mar. 23, 2017 (“2017 ROD”), at p. 27.

- The KXL Pipeline would create 42,000 jobs; increase tax revenues for local communities; raise U.S. GDP by \$3.4 billion; and enhance global energy security, given that Canada is a “relatively stable and secure source of energy.”⁶⁴
- TransCanada had agreed “to incorporate additional mitigation measures [to address, e.g., the likelihood of an accidental release of oil and to reduce the consequences and impact of a spill] in the design, construction, and operation of the proposed Project, in some instances exceeding what is normally required.”⁶⁵
- Consistent with the 2015 ROD (prepared under the Obama Administration), the 2017 ROD concluded that “the proposed Project would be unlikely to significantly impact the rate of extraction in the oil sands and is therefore not likely to lead to a significant net increase in [GHG] emissions By itself the proposed Project is unlikely to significantly impact the level of GHG intensive extraction of oil sands crude or the continued demand for heavy crude oil at refineries in the United States.”⁶⁶
- Also consistent with the 2015 ROD, the 2017 ROD found that “[u]nder most market conditions, alternative transportation infrastructure would allow growing oil sands production to reach markets irrespective of the proposed Project. Most recently, this has been demonstrated by the growth in rail loading capacity in Western Canada”⁶⁷
- “[P]er unit rail transport of WCSB oil would be more GHG-intensive than transport by pipelines when accounting for the total aggregate lifecycle GHG emissions (including direct and indirect emissions),” and rail “likely results in a greater number of injuries and fatalities per ton-mile than transportation by

⁶⁴ Exhibit C-54, 2017 ROD at p. 28.

⁶⁵ Exhibit C-54, 2017 ROD at p. 17.

⁶⁶ Exhibit C-54, 2017 ROD at p. 31.

⁶⁷ Exhibit C-54, 2017 ROD at p. 13.

pipeline, as well as a greater number of accidental releases of crude oil and a greater overall volume of crude oil released.”⁶⁸

The 2017 ROD then reversed the Obama Administration’s position, concluding that issuing the permit “would not undermine U.S. objectives in” addressing climate change, that “a decision to approve this proposed Project would support U.S. priorities relating to energy security, economic development, and infrastructure,”⁶⁹ and that the KXL Pipeline “would serve the national interest.”⁷⁰

52. The day after the State Department issued the 2017 Permit, President Trump stated:

TransCanada will **finally be allowed to complete this long overdue project** with efficiency and with speed. **It’s going to be an incredible pipeline**, greatest technology known to man or woman. And frankly, we’re very proud of it. ... It is a great day for American jobs and a historical day for North American and energy independence. This announcement is a part of a new era in American energy policy that will lower costs for American families. We ... create **thousands of jobs** here in America. ... it’s **a lot safer** to have pipelines than to use other forms of transportation for your product. ... As the Keystone XL pipeline **now moves forward**, this is just the first of many energy and infrastructure projects that my administration will approve.⁷¹

⁶⁸ Exhibit C-54, 2017 ROD at pp. 15, 18.

⁶⁹ Exhibit C-54, 2017 ROD at p. 29.

⁷⁰ Exhibit C-54, 2017 ROD at p. 31.

⁷¹ Exhibit C-55, [Transcript, President Donald J. Trump, “Remarks on the Keystone XL Pipeline Project,”](#) Mar. 24, 2017 (emphasis added).

53. Article 13 of the 2017 Permit stated that “[t]his permit shall expire five years from the date of issuance in the event that the permittee has not commenced construction of the United States facilities by that deadline.”⁷²

54. On March 29, 2019, in response to domestic litigation surrounding the 2017 Permit, President Trump revoked the 2017 Permit and issued the 2019 Permit. Like Article 13 of the 2017 Permit, Article 10 of the 2019 Permit states, “This permit shall expire 5 years from the date of its issuance if the permittee has not commenced construction of the Border facilities by that date.”⁷³

55. By inviting Keystone to submit an application, granting the 2017 Permit and the 2019 Permit, steadfastly defending the permits publicly and in U.S. courts, and conditioning the permits on Keystone beginning construction of the KXL Pipeline within five years, the United States again established legitimate expectations that TransCanada would be permitted to construct and operate the crucial cross-border segment of the KXL Pipeline. In reliance on the U.S. actions and its long history of never having revoked a Presidential permit in order to terminate a pipeline project, and with the U.S. Government’s knowledge, TransCanada continued to invest billions of dollars into the KXL Pipeline with a view to bringing the pipeline into service in 2022. TC Energy completed construction of the cross-border section in May 2020.

3. IN 2021, THE UNITED STATES SUDDENLY REVERSED ITS POSITION A SECOND TIME, REVOKED THE 2019 PERMIT, AND ONCE AGAIN ASSERTED THAT BLOCKING THE KXL PIPELINE WOULD PROMOTE THE PERCEPTION THAT THE UNITED STATES IS A LEADER ON CLIMATE CHANGE

56. After President Trump granted the 2017 Permit, activists renewed their opposition to the KXL Pipeline, including by challenging the permit in court. Then, in August 2019, in the midst

⁷² Exhibit C-9, 2017 Permit at Art. 13.

⁷³ Exhibit C-10, 2019 Permit at Art. 10.

of the U.S. Presidential campaign, activists opposed to the project encouraged Democratic presidential candidates to agree to a “NoKXL Pledge,” the text of which is as follows:

If elected, I pledge to take executive action on Day One to stop any construction on the Keystone XL pipeline – no matter what – and revoke the existing presidential permits issued unilaterally by President Trump for the Keystone XL and Dakota Access pipelines, sending both projects back to relevant federal agencies to undergo legitimate environmental review and Tribal consultations.

I pledge to direct all federal agencies (State Dept., FERC, Army Corps) to submit these two projects as well as all new pipeline and energy infrastructure projects to a true climate test and reject permits for any project that would exacerbate our climate crisis.

I pledge to protect the property rights of farmers and ranchers from eminent domain abuse, and to honor the treaties the U.S. Government has signed with sovereign Tribal Nations.¹

Ten Democratic presidential candidates reportedly took the NoKXL Pledge, including then Senator Kamala Harris, who would later become President Biden’s Vice President.

57. Then-candidate Joseph Biden did not initially take the pledge, but later made it clear that he would—in the words of the NoKXL Pledge—stop the KXL Pipeline “no matter what.”² In May 2020, the Biden campaign’s policy director released a statement that “Biden strongly opposed the Keystone pipeline in the last administration, stood alongside President Obama and Secretary Kerry to reject it in 2015, and will proudly stand in the Roosevelt Room against President Trump and stop it for good by rescinding the Keystone XL pipeline permit. ... Stopping

¹ Exhibit C-56, Mark Hefflinger, “[Take the ‘NoKXL Pledge’: Democratic Candidates Urged to Pledge to Stop Keystone XL Pipeline if Elected](#),” *Bold Nebraska*, Aug. 13, 2019 (emphasis added).

² Cf. Exhibit C-57, Kelsey Tamborino, “[Morning Energy: Marathon markup ahead for climate-friendly transportation bill](#),” *Politico*, June 17, 2020. (“As president I’m going to restore our position, rescinding the permit issued by Trump for any significant infrastructure projects, including pipelines, support the establishment of a process requiring that there must be a full review and accounting of the impacts on climate, local and environmental health and climate justice before any project can proceed,” he said.”).

Keystone was the right decision then and it's still the right decision now.”⁷⁶ The campaign expressed no interest in assessing the merits of the pipeline based on science and actual empirical evidence.

58. Joseph Biden was elected President of the United States in November 2020. In the days leading up to his inauguration, it was widely understood that revoking the 2019 Permit was, indeed, a “Day One” priority.⁷⁷ In the meantime, TC Energy made it clear that it was willing to work with the U.S. Government to address any outstanding concerns with the project, including GHG emissions. TC Energy undertook extensive engineering and development efforts to reduce and eventually eliminate carbon emissions that would be associated with the operation of the pipeline. After many months of effort, on January 17, 2021, TC Energy publicly announced that it would achieve net zero GHG emissions across the operations of the KXL Pipeline and committed to fully operate the pipeline by renewable energy sources no later than 2030.⁷⁸ Even before the initiative, the U.S. Government had concluded that the KXL Pipeline would have been a less GHG-intensive option than alternatives such as rail. The new initiative would have made the KXL Pipeline an even better alternative in that regard. The Administration ignored it.

59. Within hours of being sworn in, President Biden issued EO 13990, Section 6 of which revoked the 2019 Permit. To TC Energy's knowledge, this was the first and only time in history that the United States has ever unilaterally revoked a permit for a pipeline across an international border in order to terminate a project, and certainly the only time after construction of a pipeline border crossing had concluded. TC Energy immediately suspended work on the project on January 20, 2021.

60. In explaining his decision to revoke the 2019 Permit, President Biden cited the same analysis President Obama had used over five years earlier in 2015 to deny Keystone's permit

⁷⁶ Exhibit C-58, Savannah Behrmann, “[Biden campaign said he would rescind Keystone Pipeline permit if elected](#),” *USA Today*, May 18, 2020. *See also* Exhibit C-59, James Oliphant, “[Democrat Biden says he would kill Keystone XL pipeline](#),” *Reuters*, May 18, 2020.

⁷⁷ *See* Exhibit C-60, Lauren Gardner and Ben Lefebvre, “[Biden to yank Keystone XL permit on first day of presidency](#),” *Politico*, Jan. 17, 2021. (“Biden to yank Keystone XL permit on first day of presidency: The move is billed as one of Biden's Day One climate change actions, according to a presentation circulating among Washington trade groups and lobbyists”).

⁷⁸ Exhibit C-61, TC Energy Media Advisory, “[Keystone XL commits to become first pipeline to be fully powered by renewable energy](#),” Jan. 17, 2021.

application. EO 13990 states that, “[i]n 2015, following an exhaustive review, the Department of State and the President determined that approving the Keystone XL pipeline would not serve the national interest” because, inter alia, “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.”⁷⁹

61. Neither President Biden nor any other U.S. Government representative cited any new or current evidentiary basis for revocation of the permit. The Administration did not take into account any of the efforts TC Energy had made to eliminate emissions from the future operation of the pipeline, nor did it take into account Canada’s stronger carbon tax policies. EO 13990 concludes simply that “[t]he United States must be in a position to exercise vigorous climate leadership in order to achieve a significant increase in global climate action and put the world on a sustainable climate pathway. Leaving the Keystone XL pipeline permit in place would not be consistent with my Administration’s economic and climate imperatives.”⁸⁰ In other words, President Biden revoked the 2019 Permit on the same grounds that gave rise to TC Energy’s NAFTA claims in 2016, i.e., the very claims that the United States demanded that TC Energy withdraw as a condition for granting the 2017 Permit. In short, the United States had engaged in a bait and switch. The United States promised to allow TC Energy to move forward with the project if TC Energy dropped its NAFTA claims, imposed conditions on TC Energy designed to force it to invest billions of dollars to construct the pipeline under strict deadlines, and then, after TC Energy had done exactly what the United States asked it to do, the United States revoked the permit, thereby causing TC Energy to lose the billions of dollars it had invested and the economic value of its long-term contracts.

62. EO 13990 revoked the 2019 Permit with immediate effect, without providing any opportunity for TC Energy to present, or for the new Administration to review, information necessary to make a reasoned, objective decision based on analysis and study. The Administration failed to provide TC Energy with an opportunity to address any environmental concerns the Administration may have had with the pipeline. In doing so, President Biden

⁷⁹ Exhibit C-11, EO 13990, Section 6.

⁸⁰ Exhibit C-11, EO 13990, Section 6.

surpassed even the highest hopes expressed by the political activists behind the NoKXL Pledge. As the NoKXL Pledge demanded, he revoked the 2019 Permit on “Day One,” but he neither sent the KXL Pipeline “back to relevant federal agencies to undergo legitimate environmental review and Tribal consultations” nor submitted the KXL Pipeline “to a true climate test.”⁸¹ Instead, he summarily revoked the 2019 Permit, without any further analysis.

63. President Biden did not ask the State Department or any agency to prepare a Record of Decision objectively explaining the decision, nor did he request any further environmental reviews. Furthermore, EO 13990 does not itself provide any evidence that would call into question the State Department’s earlier conclusions that the KXL Pipeline would not have a significant impact on the rate of extraction of oil sands or the consumption of oil produced from oil sands.

64. While Section 6 of EO 13990 makes certain general assertions about climate change, its impact on the U.S. economy, and the need for the United States to play a leadership role in combating it, the EO does not link the 2019 Permit to any actual GHG or climate change impact from the project. It does not refute or even address the conclusions in the 2015 ROD or 2017 ROD that the KXL Pipeline likely would not significantly impact the rate of extraction of oil sands crude, nor does it address the statement in the 2015 ROD that “[u]nder most market conditions, alternative transportation infrastructure would allow growing oil sands production to reach markets irrespective of the proposed Project.”⁸² The approach President Biden took with respect to the revocation of the 2019 Permit contrasts starkly with other aspects of EO 13990, in which President Biden instructed relevant Executive Branch agencies to review and study other measures—including all orders and policies adopted between January 20, 2017, and January 20, 2021 focused on “protecting public health and the environment” —for a number of months (in some cases imposing a temporary moratorium) before considering whether to suspend, revise, or rescind those actions.⁸³

⁸¹ Exhibit C-56, Mark Hefflinger, “[Take the ‘NoKXL Pledge’: Democratic Candidates Urged to Pledge to Stop Keystone XL Pipeline if Elected](#),” *Bold Nebraska*, Aug. 13, 2019.

⁸² Exhibit C-46, 2015 ROD at p. 11.

⁸³ See, e.g., Exhibit C-11, EO 13990 at Sections 2, 3, and 4.

65. The Attorneys General of 14 U.S. states protested President Biden’s decision to revoke the 2019 Permit, accurately describing it as “rushed” and as having been made without “consider[ing] the[] impacts” on states and other entities. In a letter to President Biden, they stated that:

[n]owhere ... do you explain how killing the Keystone XL pipeline project directly advances the goals of “protect[ing] Americans and the domestic economy from harmful climate impacts.” Nor does your decision actually cure any of the climate ills you reference. Observers are thus left with only one reasonable supposition: it is a symbolic act of virtue signaling to special interests and the international community.⁸⁴

Indeed, there is no other way to understand the U.S. actions.

66. On March 17, 2021, the Attorneys General from 21 states filed suit in federal court on grounds that, inter alia, President Biden’s decision to revoke the Keystone XL permit violated the U.S. Constitution.⁸⁵

67. Because of President Biden’s decision to revoke the 2019 Permit, TC Energy terminated the KXL Pipeline project on June 9, 2021.⁸⁶

C. RESPONDENT BREACHED ITS NAFTA OBLIGATIONS BY REVOKING THE 2019 PERMIT

68. Claimants’ claims are based on the arbitrary, discriminatory, expropriatory, and damaging U.S. decision to revoke the 2019 Permit after: explicitly inviting TransCanada to apply for the permit; demanding that TransCanada drop its preceding NAFTA claims as a

⁸⁴ Exhibit C-62, Letter to President Biden regarding the Keystone XL Pipeline, signed by Attorneys General of Montana, Alabama, Arkansas, Georgia, Indiana, Kansas, Louisiana, Mississippi, Missouri, North Dakota, South Carolina, South Dakota, Texas, and West Virginia, Feb. 9, 2021 (footnote omitted).

⁸⁵ See Exhibit C-63, Complaint, *State of Texas, et al. v. Joseph R. Biden, Jr., et al.*, 2021 WL 1050111 (S.D. Tex. Mar. 17, 2021).

⁸⁶ Exhibit C-64, TC Energy News Release, “[TC Energy confirms termination of Keystone XL Pipeline Project](#),” June 9, 2021.

condition for granting the permit; granting the permit (twice); staunchly defending the permit in court; and conditioning the permit on TransCanada beginning construction of the cross-border segment of the KXL Pipeline within five years. In revoking the 2019 Permit, the United States: (1) violated Article 1105 of NAFTA 1994 by failing to accord to investments of Claimants and their subsidiaries treatment in accordance with international law, including fair and equitable treatment and full protection and security; (2) expropriated such investments without payment of compensation in violation of Article 1110 of NAFTA 1994; and (3) denied Claimants and their subsidiaries, and their respective investments, national treatment in violation of Article 1102 of NAFTA 1994 and most-favored-nation treatment under Article 1103 of NAFTA 1994.

69. This dispute is not about climate change. It is about the erratic, discriminatory, arbitrary, politicized, and utterly unfair treatment the United States accorded to Claimants, their subsidiaries, and their investments—treatment that violated the substantive provisions of NAFTA 1994. As the events described above make clear, the decision to revoke the 2019 Permit was not based on an objective assessment of the KXL Pipeline’s potential effect on climate change. The decision was political and symbolic. As we have explained, the United States has found repeatedly that the KXL Pipeline would not have a significant effect on the extraction of Canadian oil or on the consumption of oil in the United States. The fact that the U.S. actions were not driven by concerns about the pipeline’s impact on climate change is further evidenced by the following:

- By revoking the 2019 Permit for the KXL Pipeline, the United States blocked a single pipeline that would have carried oil from Canada to the United States, but the United States has not imposed any limits on the volume of oil that may be produced in, imported into, refined in, or otherwise consumed in, the United States. Indeed, there has been no slowing of imports of oil from Canada or any other foreign jurisdiction this year.⁸⁷ Imports of Canadian oil into the United States in June 2021

⁸⁷ See Exhibit C-65, U.S. Energy Information Administration, “[U.S. Imports from Canada of Crude Oil](#),” (last accessed Oct. 18, 2021); Exhibit C-66, U.S. Energy Information Administration, “[U.S. Imports of Crude Oil](#),” (last accessed October 18, 2021).

were near record levels.⁸⁸ At the same time, the United States is producing so much petroleum that, in 2020, it became a net petroleum exporter.⁸⁹

- The Biden Administration was singularly focused on blocking the KXL Pipeline but did not impose any restrictions on transporting oil through other pipelines, or by rail, truck, or ship. In fact, the United States has continued to allow the Dakota Access pipeline (stretching from North Dakota to Illinois) to operate, pending completion of an environmental review. The Army Corps of Engineers actually opposed a request for a preliminary injunction that would have discontinued the operation of that pipeline.⁹⁰ An Associated Press report from August 2021 reported that Energy Transfer (one of the U.S. owners of the pipeline) announced that the pipeline “can now transport 750,000 barrels of oil daily, which is 180,000 more than before ... [Once] the full expansion is up and running, as much as 1.1 million barrels of oil will flow through the pipeline each day.”⁹¹ The Dakota Access pipeline is, of course, a domestic pipeline, carrying domestic oil.
- President Biden asserted that “[l]eaving the Keystone XL pipeline permit in place would not be consistent with my Administration’s economic and climate imperatives.”⁹² Thus, the United States implies (but never actually finds) that stopping the KXL Pipeline would substantially limit oil imports and oil consumption in the United States. The disingenuous nature of the U.S. position—i.e., that blocking the KXL Pipeline was a critical measure to address climate change—is

⁸⁸ See Exhibit C-65, U.S. Energy Information Administration, “[U.S. Imports from Canada of Crude Oil](#),” (last accessed Oct. 18, 2021).

⁸⁹ According to the U.S. Energy Information Administration, “In 2020, the United States exported about 8.51 MMb/d and imported about 7.86 MMb/d of petroleum, making the United States a net annual petroleum exporter for the first time since at least 1949 ... The United States remained a net crude oil importer in 2020, importing nearly 5.88 MMb/d and exporting about 3.18 MMb/d. However, some of the crude oil that the U.S. imports is refined by U.S. refineries into petroleum products—such as gasoline, heating oil, diesel fuel, and jet fuel—that the U.S. exports. Also, some of imported petroleum may be stored and subsequently exported.” See Exhibit C-67, U.S. Energy Information Administration, “[Oil and petroleum products explained](#),” (last accessed Oct. 15, 2021).

⁹⁰ See Exhibit C-68, Brief of Defendant/Appellant, *Standing Rock Sioux Tribe, et al. v. United States Army Corps of Engineers*, 2020 WL 5057671 (D.C. Cir. Aug. 26, 2020).

⁹¹ Exhibit C-69, “[More oil shipped as Dakota Access Pipeline expansion starts](#),” *ABC News*, Aug. 6, 2021.

⁹² See Exhibit C-11, EO 13990 at Section 6(d).

evident from the fact that, between 2014 and 2020, the United States allowed construction to be completed on 65 new oil and gas pipelines, and, as of May 2020, the United States was allowing construction of 17,716 miles of oil and gas pipelines.⁹³ Indeed, in a recent court filing, the Biden Administration has continued to defend an Army Corps of Engineers permit for Enbridge’s Line 3 oil pipeline project.⁹⁴ Like the KXL Pipeline, Line 3 would move Canadian crude oil into the United States. On September 29, 2021, Enbridge announced the substantial completion of Line 3 and its imminent entry into service transporting oil from Edmonton, Alberta to Superior, Wisconsin, on October 1, 2021.⁹⁵

- According to the Liquids Pipeline Project Database maintained by the U.S. Government’s Energy Information Administration, between 2010 (i.e., two years after TC Energy’s first permit application) and June 7, 2021, crude oil pipeline capacity in the United States grew (through, e.g., new construction, or conversion or expansion of pipelines) by close to 29 million barrels per day.⁹⁶ When also factoring in announcements of new crude oil pipeline capacity, this figure rises to close to 40 million barrels per day.⁹⁷ Many of these pipelines are owned and operated in whole or in part by U.S. or non-Canadian investors, and, to our knowledge, the U.S. federal government has not taken action to prevent construction or halt operations of these pipelines due to concerns over climate change. These figures do not include pipeline capacity that was constructed before 2010, but which remains operational.

⁹³ Exhibit C-70, Canadian Energy Centre, “[CEC Fact Sheet #5 - 50,000 new miles: A comparison on new oil and gas pipelines worldwide](#),” May 2020.

⁹⁴ Exhibit C-71, Memorandum in Support of Federal Defendants’ Cross-Motion for Summary Judgment and Response in Opposition to Plaintiffs’ Motions for Summary Judgment, *Red Lake Band of Chippewa Indians et. al. vs. U.S. Army Corps of Engineers*, Civil Action No. 1:20-cv-03817-CKK (D.D.C. June 23, 2021).

⁹⁵ Exhibit C-72, Enbridge News Release, “[Line 3 Replacement Project Substantially Completed and Set to be Fully Operational](#),” Sept. 29, 2021.

⁹⁶ See Exhibit C-73, U.S. Energy Information Administration, Liquids Pipeline Project Database (version dated June 7, 2021) (calculated by summing the “Added Capacity” in column Q for projects whose status in column E is “completed” or “construction” and where the product type in column O is “CRD”).

⁹⁷ See Exhibit C-73, U.S. Energy Information Administration, Liquids Pipeline Project Database (version dated June 7, 2021) (calculated by summing the “Added Capacity” in column Q for projects whose status in column E is “announced”, “completed”, or “construction”, and where the product type in column O is “CRD”).

- Ironically, on August 11, 2021, the Biden Administration urged OPEC+ producers to increase oil production.⁹⁸ Those producers, of course, supply oil into world markets, including the United States. According to U.S. National Security Advisor Jake Sullivan, “[h]igher gasoline costs, if left unchecked, risk harming the ongoing global recovery. ... President Biden has made clear that he wants Americans to have access to affordable and reliable energy, including at the pump.”⁹⁹
- Blocking the KXL Pipeline will not meaningfully reduce oil consumption. This is made clear by the network of pipelines that currently carry crude oil into and across the United States, as depicted on the map below:

North American Crude Oil Pipeline Network¹⁰⁰



⁹⁸ OPEC+ refers to members of the Organization of the Petroleum Exporting Countries (“OPEC”) and 10 non-OPEC partner countries.

⁹⁹ Exhibit C-74, White House Briefing Room, “[Statement by National Security Advisor Jake Sullivan on the Need for Reliable and Stable Global Energy Markets](#),” Aug. 11, 2021.

¹⁰⁰ Exhibit C-75, U.S. Energy Information Administration, “[U.S. Energy Mapping System](#)” (displaying North American Crude Oil Pipeline Networks) - (last accessed Oct. 18, 2021).

- As the map above makes obvious, there are multiple other pipelines carrying oil into, and throughout, the United States. The map does not even take into account other transportation options, such as rail, ships, or trucks, which, together with the pipelines, can import and transport oil in virtually unlimited quantities.
- For example, Gibson Energy and US Development Group, LLC have constructed a diluent recovery unit (“DRU”) near Hardisty, Alberta, Canada, that facilitates transport of oil by rail.¹⁰¹ In particular, a DRU significantly lowers the costs of transporting crude oil by rail to levels that are closer to pipeline costs. Canadian bitumen from this facility will be delivered by rail to some of the same refineries that the KXL Pipeline would have served. A plan to double the capacity of the Hardisty DRU/rail terminal is already in development.¹⁰² Given that the United States does not limit the import of oil by rail, this DRU will have the potential to greatly increase Canadian oil imports into the United States. The facility currently has the capacity to move 50,000 barrels per day of bitumen, and can expand that capacity in 50,000 barrels per day increments depending on space and rail capacity.¹⁰³
- To provide a sense of the magnitude of oil shipments through such alternative modes of transportation, and how quickly they can be scaled up, shipments by rail in the United States increased from 1.2 million barrels in January 2010 to 35.3 million barrels of oil in October 2014, before dropping to 25.7 million barrels of oil in January 2020.¹⁰⁴
- The following map shows the proposed KXL Pipeline overlaid on a map showing crude oil pipelines, the largest (Class 1) freight railroads, and U.S. crude oil rail

¹⁰¹ See Exhibit C-76, USD Group Press Release, “[Gibson Energy and USD Announce Government of Alberta Approval of Hardisty DRU and Finalization of Agreements to Sanction the Construction of the Initial 50,000 bbl/d of Capacity](#),” Feb. 25, 2020; Exhibit C-77, “[Alberta’s First Stand-Alone DRU Completes Construction in Hardisty](#),” *Oil Sands Magazine*, Aug. 6, 2021.

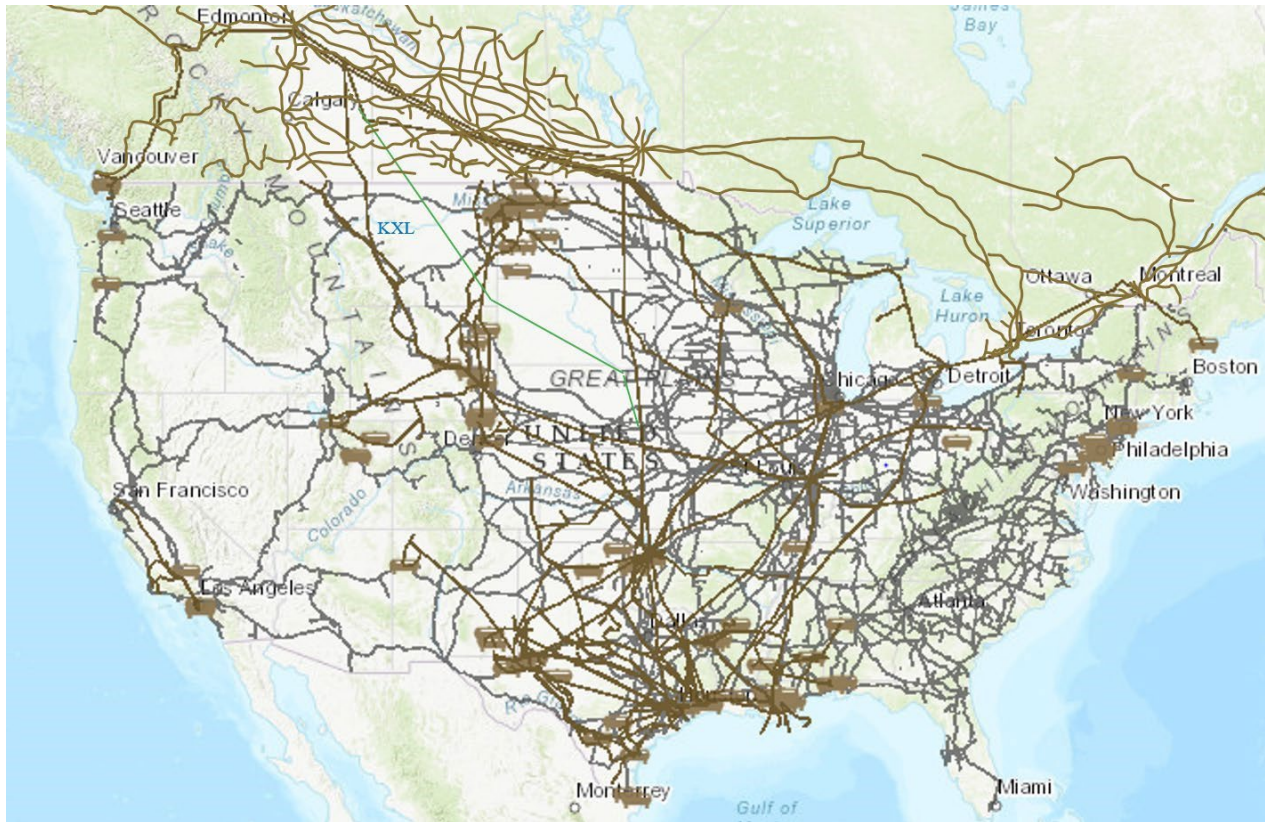
¹⁰² Exhibit C-78, “[Conocophillips Bets on Crude-By-Rail, Despite Progress on Pipeline Expansions](#),” *Oil Sands Magazine*, Nov. 5, 2020; Exhibit C-79, [USD Partners LP Investor Presentation](#), Aug. 2020.

¹⁰³ Exhibit C-77, “[Alberta’s First Stand-Alone DRU Completes Construction in Hardisty](#),” *Oil Sands Magazine*, Aug. 6, 2021.

¹⁰⁴ Exhibit C-80, U.S. Energy Information Administration, “[Total Crude Oil by Rail](#),” (last accessed Oct. 15, 2021).

terminals. Of course, the map below does not even cover maritime ports that import oil from around the world.

North American Crude Oil Pipeline and Rail Networks¹⁰⁵



70. The idea that blocking the KXL Pipeline would significantly slow the production, refining, importation, transportation, or consumption of oil in the United States is manifestly wrong. The decision to revoke the 2019 Permit was—as the letter from the Attorneys General to President Biden stated—a “symbolic act of virtue signaling” and the fulfillment of a political campaign promise rather than a reasoned, fact-based, and objective determination.¹⁰⁶

¹⁰⁵ Exhibit C-81, U.S. Energy Information Administration, “[U.S. Energy Mapping System](#)” (displaying North American Crude Oil Pipeline Networks and Freight Railroads (Class 1)), (last accessed Oct. 18, 2021); Exhibit C-82, ACW Railway Company, “[Freight Rail Map of Class I Carriers in North America](#),” (last accessed Oct. 15, 2021).

¹⁰⁶ Exhibit C-62, Letter to President Biden regarding the Keystone XL Pipeline, signed by Attorneys General of Montana, Alabama, Arkansas, Georgia, Indiana, Kansas, Louisiana, Mississippi, Missouri, North Dakota, South Carolina, South Dakota, Texas, and West Virginia, Feb. 9, 2021.

IV. JURISDICTION

71. ICSID has jurisdiction over this dispute pursuant to Chapter 11, Section B of NAFTA 1994, Annex 14-C of USMCA, and Article 25 of the ICSID Convention.

A. THE JURISDICTIONAL REQUIREMENTS UNDER NAFTA 1994 AND USMCA ARE MET

72. All jurisdictional requirements of NAFTA 1994 and USMCA are met. Claimants have also complied with all procedural requirements of NAFTA 1994 for submission of a claim to arbitration.

73. As explained above, under paragraph 1 of Annex 14-C of USMCA, “[e]ach Party consents, with respect to a legacy investment, to the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex alleging breach of an obligation under: ... Section A of Chapter 11 (Investment) of NAFTA 1994.”¹⁰⁷ Paragraph 6 of Annex 14-C of USMCA defines “legacy investment” to mean “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.”¹⁰⁸ The terms “investment” and “investor” in Annex 14-C of USMCA “have the meanings accorded in Chapter 11 (Investment) of NAFTA 1994.”¹⁰⁹ Under paragraph 3 of Annex 14-C of USMCA, a party’s consent to arbitration under paragraph 1 of Annex 14-C of USMCA expires three years after the termination of NAFTA.¹¹⁰

74. USMCA entered into force, and NAFTA 1994 terminated, on July 1, 2020. Therefore, the opportunity to initiate arbitration procedures under Section B of Chapter 11 (Investment) of

¹⁰⁷ Exhibit C-2, USMCA, Annex 14-C.

¹⁰⁸ Exhibit C-2, USMCA, Annex 14-C at para. 6(a).

¹⁰⁹ Exhibit C-2, USMCA, Annex 14-C at para. 6(b).

¹¹⁰ Exhibit C-2, USMCA, Annex 14-C at para. 3.

NAFTA 1994 remains available for “legacy investments” for three years from that date, i.e., until July 1, 2023.

75. Claimants are “investor[s] of a Party” authorized to submit a claim to arbitration under NAFTA Articles 1116(1) and 1117(1). As defined in NAFTA Article 1139, an “investor of a Party” means “a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment.” NAFTA Article 1139 further defines “enterprise of a Party” as including “an enterprise constituted or organized under the law of a Party” Claimants are enterprises of Canada, because Claimants TC Energy Corporation and TransCanada PipeLines Limited are both constituted in and organized under the laws of Canada.¹¹¹

76. Claimants have made investments in the United States. Claimants directly and indirectly own and control legacy investments (as defined at paragraph 6 of Annex 14-C of USMCA) in connection with the KXL Pipeline project that qualify as U.S. investments under subsections (a)(h) of the definition of “investment” under NAFTA Article 1139, including, inter alia, enterprises; equity and other interests in enterprises, including interests in the income and profits of such enterprises; tangible and intangible property; loans; pipelines; contractual rights, including rights under contracts with shippers; equipment; an array of land easements in the United States; and other interests arising from the commitment of capital and other resources in the United States.

77. Articles 1116(1) and 1117(1) of NAFTA 1994 permit an investor of a Party to submit to arbitration a claim that another Party has breached an obligation under, inter alia, Chapter 11, Section A of NAFTA 1994, and that the investor, or the enterprise on whose behalf the investor is submitting a claim under Article 1117(1), as applicable, “has incurred loss or damage by reason of, or arising out of, that breach.” Claimants’ claims concern breaches of Respondent’s obligations under Chapter 11, Section A of NAFTA 1994. Furthermore, Claimants, and Claimants’ U.S. enterprises, have incurred loss or damage by reason of, or arising out of, those

¹¹¹ See *supra* at para. 21.

breaches. President's Biden's revocation of the 2019 Permit substantially diminished or eliminated the value of Claimants' investments in the KXL Pipeline project.

78. Claimants' submission of their claims to arbitration is also timely under Articles 1116(2), 1117(2), 1119, and 1120(1) of NAFTA 1994. Article 1116(2) of NAFTA 1994 provides "[a]n 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." Article 1117(2) of NAFTA 1994 further provides that "[a]n investor may not make a claim on behalf of an enterprise described in [Article 1117(1) of NAFTA 1994] if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage." Claimants' claims are timely under Articles 1116(2) and 1117(2) of NAFTA 1994 as three years have not elapsed since Claimants, or Claimants' U.S. enterprises, first acquired knowledge of the breaches (i.e., the breaches arising out of President Biden's revocation of the 2019 Permit), and knowledge that Claimants, or Claimants' U.S. enterprises, respectively, had incurred loss or damage.

79. Under Article 1119 of NAFTA 1994, an investor must deliver to the disputing Party a written Notice of Intent to Submit a Claim to Arbitration more than 90 days before submitting the claim to arbitration. Claimants delivered their Notice of Intent to the United States on July 2, 2021, which is more than 90 days prior to the date of this Request for Arbitration. Additionally, under Article 1120(1) of NAFTA 1994, an investor may submit a claim to arbitration only after six months have elapsed since the events giving rise to the claim. Claimants' claims arise out of the January 20, 2021 revocation of the March 29, 2019 Presidential Permit to construct the KXL Pipeline. That revocation took place more than six months before the date of this Request for Arbitration.

80. Claimants have also satisfied the conditions precedent to the submission of a claim to arbitration under NAFTA 1994. Pursuant to Article 1121(1) and (2) of NAFTA 1994, Claimants and Claimants' U.S. enterprises consent to arbitration with the United States in accordance with the procedures set out in NAFTA 1994 and Annex 14-C of USMCA. Also pursuant to Article 1121(1) and (2) of NAFTA 1994, Claimants and Claimants' U.S. enterprises waive their right to

initiate or continue before any administrative tribunal or court under the law of any party to NAFTA 1994, or other dispute settlement procedures, any proceedings with respect to the measures of the United States that Claimants allege are a breach referred to in Articles 1116 or 1117 of NAFTA 1994 (i.e., a breach of the United States' obligations under Chapter 11, Section A of NAFTA 1994), except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the laws of the United States. The written consent and waivers required by NAFTA Article 1121 are included with this Request as Annexes 32 through 46¹¹² and shall be delivered to the United States.

81. Furthermore, the exercise of the Centre's jurisdiction is proper under Article 1120(1) of NAFTA 1994, which allows a disputing investor to submit a claim to arbitration under the ICSID Convention, provided that both the disputing Party and the Party of the investor are parties to the ICSID Convention. The United States became a Contracting State to the ICSID Convention on October 14, 1966. Canada became a Contracting State to the ICSID Convention on December 1, 2013.¹¹³ Accordingly, under Article 1120(1)(a) of NAFTA 1994, Claimants may properly submit their claims to arbitration under the ICSID Convention.

82. Finally, Claimants have sought to settle their claims by consultation or negotiation, as directed by NAFTA Article 1118. At Claimants' initiative,¹¹⁴ representatives of Claimants and Respondent held a video conference on September 17, 2021 for the purposes of settlement

¹¹² Annex 32, TC Energy Corporation – Consent and Waiver, Nov. 10, 2021; Annex 33, TransCanada PipeLines Limited – Consent and Waiver, Nov. 10, 2021; Annex 34, TransCanada PipeLine USA Ltd. – Consent and Waiver, Nov. 10, 2021; Annex 35, TC Oil Pipeline Operations Inc. – Consent and Waiver, Nov. 10, 2021; Annex 36, TransCanada Oil Pipelines Inc. – Consent and Waiver, Nov. 10, 2021; Annex 37, Marketlink, LLC – Consent and Waiver, Nov. 10, 2021; Annex 38, TC Terminals LLC – Consent and Waiver, Nov. 10, 2021; Annex 39, TransCanada Keystone Pipeline, LLC – Consent and Waiver, Nov. 10, 2021; Annex 40, TransCanada Keystone Pipeline GP, LLC – Consent and Waiver, Nov. 10, 2021; Annex 41, TransCanada Keystone Pipeline, LP – Consent and Waiver, Nov. 10, 2021; Annex 42, 6512924 LLC – Consent and Waiver, Nov. 10, 2021; Annex 43, 181531115 Limited Partnership – Consent and Waiver, Nov. 10, 2021; Annex 44, 1991321 LLC – Consent and Waiver, Nov. 10, 2021; Annex 45, 181531115 LLC – Consent and Waiver, Nov. 10, 2021; Annex 46, Port Neches Link LLC – Consent and Waiver, Nov. 10, 2021.

¹¹³ See Exhibit C-83, ICSID [List of Contracting States and Other Signatories of the Convention](#) (as of June 21, 2021), Doc. No. ICSID/3.

¹¹⁴ See *supra* para. 19.

negotiations. Notwithstanding Claimants' good faith efforts to settle their dispute with Respondent, no resolution has been achieved.

B. THE JURISDICTIONAL REQUIREMENTS UNDER THE ICSID CONVENTION ARE MET

83. All jurisdictional requirements under the ICSID Convention are also met. Article 25(1) of the ICSID Convention states:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State ... and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.

84. This dispute involves “a Contracting State” and “national[s] of another Contracting State.” The United States and Canada are both Contracting States to the ICSID Convention.¹¹⁵ Article 25(2)(b) states that “National of another Contracting State” means “any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration.” Claimants are, and at all times have been, nationals of Canada because they are juridical persons incorporated in Canada in accordance with Canadian law and have their primary place of business in Canada.¹¹⁶

85. Claimants also have “investments” within the meaning of Article 25(1) of the ICSID Convention. Although Article 25 does not itself provide a definition of “investment,” Claimants’ interests in the KXL Pipeline project, as well as direct and indirect ownership of assets—including enterprises; equity and other interests in enterprises, including interests in the income and profits of such enterprises; tangible and intangible property; loans; pipelines; contractual rights, including rights under contracts with shippers; equipment; an array of land easements in

¹¹⁵ See *supra* n.113.

¹¹⁶ See *supra* para. 21 and n.10.

the United States; and other interests arising from the commitment of capital and other resources in the United States—constitute investments under any reasonable definition.

86. Furthermore, as required under Article 25(1) of the ICSID Convention, there exists a legal dispute that arises directly out of Claimants' investments in the United States, as described more fully in Sections III and V of this Request for Arbitration. The legal dispute described in this Request for Arbitration directly concerns Claimants' U.S. investments.

87. Finally, the parties to the dispute have consented in writing to submit this dispute to arbitration before the Centre. Respondent's consent in writing to submit investment disputes to ICSID Convention arbitration is contained in Article 1122(1) of NAFTA 1994 and Annex 14-C of USMCA. Claimants hereby provide their written consent to submit this dispute to arbitration under the ICSID Convention, as contained in the written expressions of consent included with this Request as Annexes 32 and 33.¹¹⁷ As provided in Article 1122(2) of NAFTA 1994 and Annex 14-C of USMCA, Respondent's written expression of consent in Article 1122(1) of NAFTA 1994 and Annex 14-C of USMCA, and Claimants' submission of their claims to arbitration in accordance with the procedures set out in NAFTA 1994 and Annex 14-C of USMCA, satisfy the requirement under Article 25(1) of the ICSID Convention for written consent of the parties. Accordingly, the date of consent, as defined in ICSID Institution Rule 2(3), is the date of this Request, in which Claimants submit their claims to arbitration before the Centre.

88. Therefore, all procedural requirements of the Centre have been met. Claimants have provided in this Request for Arbitration the information and materials specified in ICSID Institution Rules 2 and 3. Pursuant to ICSID Institution Rule 2(1)(f), Claimants affirm that they have taken all internal actions necessary to authorize this Request for Arbitration. Attached as Annexes 47 and 48 are signed letters of authority from Claimants TC Energy Corporation and TransCanada PipeLines Limited, respectively.¹¹⁸ Claimants have also paid the US \$25,000

¹¹⁷ See Annex 32, TC Energy Corporation – Consent and Waiver, Nov. 10, 2021; Annex 33, TransCanada PipeLines Limited – Consent and Waiver, Nov. 10, 2021.

¹¹⁸ See Annex 47, Letter of Authority from TC Energy Corporation, Oct. 15, 2021; Annex 48, Letter of Authority from TransCanada PipeLines Limited, Oct. 15, 2021.

filing fee required under regulation 16 of the ICSID Administrative and Financial Regulations.¹¹⁹ A copy of the wire transfer order is attached as Annex 49.¹²⁰ Accordingly, all procedural requirements under the ICSID Convention and ICSID Institution Rules are met.

V. RESPONDENT'S BREACHES OF NAFTA 1994

89. Respondent's actions with respect to Claimants and their investments in the United States (described in Section III, above) breached Respondent's obligations under Chapter 11, Section A of NAFTA 1994. In particular, as explained in Section III.C above, and as further elaborated below, Respondent breached its obligations under Articles 1102 (National Treatment), 1103 (Most-Favored-Nation Treatment), 1105 (Minimum Standard of Treatment), and 1110 (Expropriation and Compensation) of NAFTA 1994. Claimants reserve the right to raise claims of additional breaches by Respondent.

A. RESPONDENT HAS BREACHED ITS OBLIGATIONS UNDER ARTICLES 1102 AND 1103 OF NAFTA 1994

90. Article 1102 of NAFTA 1994 provides in relevant part:

Article 1102: National Treatment

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

2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect

¹¹⁹ See ICSID Schedule of Fees (Effective July 1, 2020), Fee for Lodging Request, <https://icsid.worldbank.org/services/content/schedule-fees>.

¹²⁰ See Annex 49, Transaction Details of Claimants' Wire Transfer to ICSID, November 22, 2021.

to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. ...

91. Respondent has breached Article 1102 by affording more favorable treatment to U.S. investors and their investments, as compared to the treatment Respondent afforded to Claimants and Claimants' investments. For example, Respondent has continued to allow the Dakota Access pipeline to continue to operate, along with other oil and gas pipelines owned and operated, in whole or in part, by U.S. investors.

92. Article 1103 of NAFTA 1994 provides in relevant part:

Article 1103: Most-Favored-Nation Treatment

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

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

93. Respondent has breached Article 1103 of NAFTA 1994 by affording more favorable treatment to non-Canadian investors, and their investments, as compared to the treatment Respondent afforded to Canadian investors (i.e., Claimants), and their investments (i.e., the KXL Pipeline project). Respondent has continued to allow the oil and gas pipelines owned and operated, in whole or in part, by foreign, non-Canadian investors to continue to operate.

94. In addition, to the extent U.S. bilateral investment treaties signed and entered into force

after the date of entry into force of NAFTA 1994 provide stronger protection to investors and their investments than is otherwise provided in NAFTA 1994, the most-favored nation obligation in Article 1103 of NAFTA 1994 requires Respondent to extend similar treatment to Claimants and their investments. These other treaties, inter alia, require that Respondent at all times accord to investments “fair and equitable treatment and full protection and security, and ... in no case accord treatment less favorable than that required by international law,” prohibit Respondent from “in any way impair[ing] by unreasonable and discriminatory measures the management, conduct, operation, and sale or other disposition of covered investments,” and prohibit Respondent from “in any way impair[ing] by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of

investments.”¹²¹ Respondent failed to treat Claimants and their investments in accordance with these standards. Respondent denied Claimants and their investments fair and equitable treatment as specified by these treaties, and impaired the management, conduct, operation, and sale or other disposition of Claimants’ investments by unreasonable, discriminatory, and arbitrary

¹²¹ See, e.g., Exhibit CL-1, Treaty Between the Government of the United States of America and the Government of the Republic of Azerbaijan Concerning the Encouragement and Reciprocal Protection of Investment, signed Aug. 1, 1997, entered into force Aug. 2, 2001, at Art. II (requiring that “[e]ach Party shall at all times accord to covered investments fair and equitable treatment and full protection and security, and shall in no case accord treatment less favorable than that required by international law” and that “[n]either Party shall in any way impair by unreasonable and discriminatory measures the management, conduct, operation, and sale or other disposition of covered investments.”); Exhibit CL-2, Treaty Between the Government of the United States of America and the Government of the State of Bahrain Concerning the Encouragement and Reciprocal Protection of Investment, signed Sept. 29, 1999, entered into force May 30, 2001, at Art. 2 (requiring that “[e]ach Party shall at all times accord to covered investments fair and equitable treatment and full protection and security, and shall in no case accord treatment less favorable than that required by international law” and that “[n]either Party shall in any way impair by unreasonable and discriminatory measures the management, conduct, operation, and sale or other disposition of covered investments.”); Exhibit CL-3, Treaty Between the Government of the United States of America and the Government of the Republic of Estonia Concerning the Encouragement and Reciprocal Protection of Investment, signed Apr. 19, 1994, entered into force Feb. 16, 1997, at Art. II (requiring that “[i]nvestment[s] shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law” and that “[n]either Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments.”); Exhibit CL-4, Treaty Between the Government of the United States of America and the Government of the Republic of Georgia Concerning the Encouragement and Reciprocal Protection of Investment, signed Mar. 7, 1994, entered into force Aug. 17, 1997, at Art. II (requiring that “[e]ach Party shall at all times accord to covered investments fair and equitable treatment and full protection and security, and shall in no case accord treatment less favorable than that required by international law” and that “[n]either Party shall in any way impair by unreasonable and discriminatory measures the management, conduct, operation, and sale or other disposition of covered investments.”); Exhibit CL-5, Treaty Between the Government of the United States of America and the Government of the Republic of Honduras Concerning the Encouragement and Reciprocal Protection of Investment, signed July 1, 1995, entered into force July 11, 2001, at Art. II (requiring that “[e]ach Party shall at all times accord to covered investments fair and equitable treatment and full protection and security, and shall in no case accord treatment less favorable than that required by international law” and that “[n]either Party shall in any way impair by unreasonable and discriminatory measures the management, conduct, operation, and sale or other disposition of covered investments.”). Similar provisions that appear in: Exhibit CL-6, Treaty Between the Government of the United States of America and the Government of the Republic of Croatia Concerning the Encouragement and Reciprocal Protection of Investment, signed July 13, 1996, entered into force June 20, 2001, at Art. II; Exhibit CL-7, Treaty Between the Government of the United States of America and Jamaica Concerning the Reciprocal Encouragement and Protection of Investment, signed Feb. 4, 1994, entered into force Mar. 7, 1997, at Art. II; Exhibit CL-8, Treaty Between the Government of the United States of America and the Government of the Hashemite Kingdom of Jordan Concerning the Encouragement and Reciprocal Protection of Investment, signed July 2, 1997, entered into force June 13, 2003, at Art. II; Exhibit CL-9, Treaty Between the Government of the United States of America and the Government of the Republic of Latvia Concerning the Encouragement and Reciprocal Protection of Investment, signed Jan. 13, 1995, entered into force Nov. 26, 1996, amended May 1, 2004, at Art. II; Exhibit CL-10, Treaty Between the United States of America and Mongolia Concerning the Encouragement and Reciprocal Protection of Investment, signed Oct. 6, 1994, entered into force Jan. 1, 1997, at Art. II; Exhibit CL-11, Treaty Between the Government of the United States of America and the Government of the Republic of Trinidad and Tobago Concerning the Encouragement and Reciprocal Protection of Investment, signed Sept. 26, 1994, entered into force Dec. 26, 1996, at Art. II; Exhibit CL-12, Treaty Between the United States of America and Ukraine Concerning the Encouragement and Reciprocal Protection of Investment, signed Mar. 4, 1994, entered into force Nov. 16, 1996, at Art. II.

measures. As a result, Respondent breached Article 1103 of NAFTA 1994.

B. RESPONDENT HAS BREACHED ITS OBLIGATIONS UNDER ARTICLE 1105 OF NAFTA 1994

95. Article 1105 of NAFTA 1994 provides in relevant part:

Article 1105: Minimum Standard of Treatment

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

96. Respondent has denied Claimants' investments treatment in accordance with international law. Claimants' made their investments with the legitimate expectation that the United States would behave objectively and in accordance with longstanding regulatory practice. Respondent invited Claimants to apply for a Presidential permit, induced Claimants into surrendering the claims for damages that they had raised in 2016 by promising to grant the Presidential permit, issued the permit (twice) on the condition that Claimants commence construction of the cross-border segment of the KXL Pipeline within five years after the permit was issued, then revoked the permit for political reasons. Respondent's revocation of the 2019 Permit was arbitrary, undermined Claimants' legitimate expectations, and undermined legal stability and predictability with respect to Claimants' investments.

C. RESPONDENT HAS BREACHED ITS OBLIGATIONS UNDER ARTICLE 1110 OF NAFTA 1994

97. Article 1110 of NAFTA 1994 provides in relevant part:

Article 1110: Expropriation and Compensation

1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or

- expropriation of such an investment (“expropriation”), except: (a) for a public purpose;
- (b) on a non-discriminatory basis;
- (c) in accordance with due process of law and Article 1105(1); and
- (d) on payment of compensation in accordance with paragraphs 2 through 6.

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

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

98. Respondent’s revocation of the 2019 Permit is tantamount to an expropriation in that it has deprived Claimants’ investments in the KXL Pipeline project of substantially all value. Claimants are left with land easements, equipment, and other investments that they cannot use and either cannot sell or can sell only at substantially discounted prices, and were forced to terminate their carrier/shipper contracts with customers. Respondent has breached Article 1110 of NAFTA 1994, including by failing to compensate Claimants for the damage caused by its actions.

VI. RELIEF REQUESTED

99. Claimants respectfully request an award of damages arising from Respondent’s breaches of its obligations under NAFTA 1994 in an amount of more than U.S. \$15 billion, plus interest

calculated from the date of breach until the date of payment, and the costs of this arbitration including, without limitation, attorneys' fees and other expenses.

100. Claimants reserve the right to adjust the relief requested during the course of the arbitration.

VII. CONSTITUTION OF THE TRIBUNAL

101. Having regard to the agreement of the parties expressed in NAFTA Articles 1123 and 1124 and to Rule 3 of the ICSID Institution Rules, Claimants request the constitution of a Tribunal in accordance with Article 37(2)(a) of the ICSID Convention. The Tribunal shall be comprised of three arbitrators, with one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the parties. If the Tribunal has not been constituted within 90 days from the date of the receipt of this Request by the Secretary-General, the procedures set out in Article 1124(2) and (3) of NAFTA 1994 shall apply.

102. Pursuant to Article 1125 of NAFTA 1994, for the purposes of Article 39 of the ICSID Convention, and without prejudice to an objection to an arbitrator based on Article 1124(3) of NAFTA 1994 or on a ground other than nationality, Claimants and Claimants' U.S. enterprises hereby agree to the appointment of each individual member of the arbitration Tribunal to be established under Article 1120 of NAFTA 1994.

Respectfully submitted,

James E. Mendenhall

Jennifer Haworth McCandless

Eric M. Solovy

SIDLEY AUSTIN LLP

Counsel for Claimants