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REVIVING THE TRANSIT PIPELINE TREATY OF 1977: HOW A MICHIGAN PIPELINE COULD
BRING THE US AND CANADA TO ARBITRATION

By
Megan Geuss*

I. INTRODUCTION

Eighty-six transit pipelines cross the border between the United States and Canada with seventy carrying oil or natural gas.¹ For decades, this pipeline network grew without national concern, but the threat of climate change has brought urgency and fervor to opponents of new pipeline buildouts.² Now, a fresh controversy has surfaced with respect to the renovation of an existing U.S.-Canada pipeline, which Michigan wants to shut down and Canada wants to preserve.³ The dispute prompted Canada to dust off a 44-year-old, nearly-forgotten treaty between the two nations, prohibiting either country from interfering with the other's pipelines.⁴ The treaty's terms require binding arbitration between the two nations if negotiations fall through.⁵

The controversy centers around Line 5, an oil and gas line owned by Enbridge, a Canadian pipeline company, which traverses the ecologically sensitive Straits of Mackinac in Michigan.⁶ The company has proposed a \$500 million tunnel under the Straits to house Line 5 and keep it from outside interference by boats and their anchors.⁷ The buildout

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1. See GOV'T OF CAN., FREQUENTLY ASKED QUESTIONS (FAQS) CONCERNING FEDERALLY-REGULATED PETROLEUM PIPELINES IN CANADA (2020), <https://www.nrcan.gc.ca/our-natural-resources/energy-sources-distribution/clean-fossil-fuels/pipelines/faqs-federally-regulated-petroleum-pipelines-canada/5893> (“There are 70 operating oil and gas pipelines regulated by the CER that cross the Canada-US border: 31 oil and 39 natural gas. There are 16 operating pipelines which transport other commodities. There are also about 10-15 additional pipelines at other stages (e.g., deactivated, decommissioned, built, but not operating).”).

2. See Nia Williams, *Canada's Alberta province files trade challenge over scrapped Keystone XL pipeline*, REUTERS (Feb. 9, 2022, 5:16 PM), <https://www.reuters.com/business/energy/canadas-alberta-province-files-trade-challenge-over-scrapped-keystone-xl-2022-02-09/>.

3. See James McCarten, *Ottawa files court brief supporting Enbridge in Line 5 dispute with Michigan*, THE CAN. PRESS (Feb. 4, 2022), <https://www.theglobeandmail.com/business/industry-news/energy-and-resources/article-ottawa-files-court-brief-supporting-enbridge-inc-in-line-5-dispute/>.

4. See generally, Brief of Amicus Curiae, The Gov't of Can., In Support of Defendants, Michigan v. Enbridge, No. 1:20-CV-1142, 2021 WL 5355511 (W.D. Mich. May 12, 2021) [hereinafter *Amicus Brief*].

5. See generally, Agreement Concerning Transit Pipelines, Can.-U.S., Jan. 28, 1977, 28 U.S.T. 7449 [hereinafter *Transit Pipeline Treaty*].

6. See McCarten, *supra* note 3.

7. See Sheri McWhirter, *Line 5 tunnel could be a 'stranded asset' in 20 years, report suggests*, M LIVE (Jan. 20, 2022, 3:50 PM), <https://www.mlive.com/public-interest/2022/01/line-5-tunnel-could-be-a-stranded-asset-in-20-years-report-says.html>.

would extend the life of the pipeline by renovating its underwater infrastructure.⁸ However, opponents of the project say that the pipeline should be phased out, not retrofitted, as climate change accelerates.⁹ Among the opponents of the Line 5 underwater renovation project is Michigan Governor Gretchen Whitmer.¹⁰ On November 13, 2020, the Governor and the Michigan Department of Natural Resources filed a complaint in the state's Circuit Court to enforce an injunction against Enbridge, prohibiting Line 5 from operating.¹¹ On November 24, Enbridge removed the case to federal court.¹²

Unusually, the Government of Canada stepped in, filing an amicus brief in favor of Enbridge and citing the Transit Pipeline Treaty of 1977.¹³ The Treaty prescribes a policy of regulatory non-interference with pipelines that run between the United States and Canada, signed by the two nations as oil prices skyrocketed in the 1970s.¹⁴ If a nation does impede the operation of a pipeline, Article IX of the Treaty calls for negotiations between the disputing nations and, failing a resolution in those talks, submittal to arbitration.¹⁵

This paper offers analysis of the Transit Pipeline Treaty of 1977 based on a comparison to two other investment treaties: the Energy Charter Treaty (ECT) and the United States-Mexico-Canada Agreement (USMCA, formerly NAFTA). This paper first gives some more background on Enbridge's Line 5 and the controversy surrounding it, then it interrogates the wording of the treaty itself, and then it provides background on tribal involvement in the Line 5 controversy. Finally, the paper suggests that the terms of the Transit Pipeline Treaty of 1977 are brief and vague, and thus the United States and Canada should resolve the dispute in negotiation, rather than leave settlement up to an arbitrator, whose decisions and internal reasoning may be difficult to anticipate.

II. WHAT IS THE TRANSIT PIPELINE TREATY OF 1977, AND HOW IS DISPUTE RESOLUTION HANDLED ACCORDING TO ITS TERMS?

A. Enbridge's Line 5

Enbridge, a Canada-based pipeline company, operates an extensive pipeline network that distributes hydrocarbons like oil and gas across North America.¹⁶ Among its

8. *See id.*

9. *See id.*

10. *See* Hannah Northey, *Biden asks tribes to weigh in on high-stakes pipeline talks*, E&E NEWS (Dec. 14, 2021, 7:03 AM), <https://www.eenews.net/articles/biden-asks-tribes-to-weigh-in-on-high-stakes-pipeline-talks/>.

11. *See* Michigan v. Enbridge, No. 1:20-CV-1142, 2021 WL 5355511, app. at 1 (W.D. Mich. Nov. 16, 2021).

12. *See id.* at 1.

13. *See generally*, Amicus Brief, *supra* note 4.

14. *See id.* at 1.

15. *See id.* at 8-9.

many pipelines is Line 5, a 645-mile, 30-inch pipeline built in 1953 that carries light crude oil and natural gas liquids (NGLs) from Enbridge’s Superior Terminal in Superior, Wisconsin to Sarnia, Ontario in Canada.¹⁷ On its way from the Superior Terminal in Wisconsin to Canada, Line 5 crosses the Straits of Mackinac, an ecologically sensitive and economically important waterway that joins two Great Lakes—Lake Huron and Lake Michigan.¹⁸ The portion of Line 5 that crosses the four-mile-wide Straits of Mackinac consists of two pipelines, with the underlying land granted to Enbridge as part of an easement of land that is held in public trust by the State of Michigan.¹⁹

In 2018, Enbridge proposed building a utility tunnel under the Straits of Mackinac to house Line 5 after an anchor hit the two underwater pipelines, causing a gouge and three dents.²⁰ Following the accident, Enbridge signed an agreement with Michigan’s then-governor Rick Snyder to move ahead with the preliminary phases of the construction project.²¹ However, conservation groups opposed the project on the grounds that the Tunnel Project would extend the life of the nearly-seventy-year-old pipeline for several decades, at a time when climate change requires pipelines to be decommissioned, rather than preserved.²² One month after Governor Snyder signed the Tunnel Project agreement

16. See ENBRIDGE, ANNUAL REPORT, FORM 10-K 12 (2021), https://www.enbridge.com/investment-center/reports-and-sec-filings/~media/Enb/Documents/Investor%20Relations/2021/ENB_2020_Annual_Report.pdf.

17. See ENBRIDGE, ENBRIDGE’S ENERGY INFRASTRUCTURE ASSETS 19 (2022), https://www.enbridge.com/~media/Enb/Documents/Factsheets/FS_EnergyInfrastructureAssets.pdf?la=en; see also *Second Agreement Between the State of Michigan and Enbridge Energy on Line 5 in Michigan*, MICH. PETROLEUM PIPELINES (Oct. 3, 2018, 9:59 AM), <https://mipetroleumpipelines.org/document/second-agreement-between-state-michigan-and-enbridge-energy-line-5-michigan> [hereinafter *Second Agreement*].

18. See NAT’L OCEANIC & ATMOSPHERIC ADMIN. - GREAT LAKES ENVTL. RESEARCH LAB., PREDICTING CURRENTS IN THE STRAITS OF MACKINAC, <https://www.glerl.noaa.gov/res/straits/> (last visited Feb. 5, 2022). (“The Straits of Mackinac is . . . the largest freshwater system on Earth . . . Not only do the waters in this area support an important fishery and recreational economy, the Straits are also a crucial waterway for commercial shipping of iron ore, coal, cement, limestone, grain and oil.”)

19. See *Second Agreement*, *supra* note 17; see also Keith A. Braswell, 18A MICH. CIV. JURIS. NAVIGABLE WATERS *Title and ownership of lands under Great Lakes* § 24 at 1, Westlaw (database updated Jan. 2022) (discusses the nature of public trust easement in Michigan: “The state has an obligation to protect and preserve the waters of the Great Lakes and the lands beneath them for the public, and cannot relinquish the duty to preserve public rights in the Great Lakes and their natural resources.”).

20. See Michael Kransz, *Enbridge will pay for Line 5 tunnel in Straits of Mackinac, state says*, MLIVE (Oct. 3, 2018, 3:48 PM), https://www.mlive.com/news/grand-rapids/2018/10/enbridge_will_pay_for_line_5_t.html.

21. *Second Agreement*, *supra* note 17.

22. See Keith Matheny, *Gov. Rick Snyder, Enbridge reach deal for oil pipeline tunnel under Straits*, DETROIT FREE PRESS (Oct. 3, 2018, 11:51 AM), <https://www.freep.com/story/news/local/michigan/2018/10/03/gov-rick-snyder-enbridge-reach-oil-pipeline-deal/1509866002/>.

with Enbridge, Michigan’s current Governor, Gretchen Whitmer, won Snyder’s position.²³ Whitmer’s office pursued revocation of the easement in the Straits of Mackinac with a state court complaint and simultaneously ordered Enbridge to cease operation of the portion of Line 5 that crossed the Straits of Mackinac by May 2021.²⁴ Enbridge removed the complaint to federal court.²⁵ Despite Michigan’s May 2021 deadline, Line 5 has remained in operation as court battles between the company and Michigan play out.²⁶

Amid the flurry of judicial parries between Enbridge and the state, the Canadian government took the unusual step of filing an amicus brief on behalf of Enbridge in US District Court for the Western District of Michigan in mid-2021.²⁷ The central thesis of the brief was that Michigan could not shut down a large portion of an international pipeline, because the US federal government had signed a treaty with Canada in 1977 prohibiting unilateral pipeline disruptions, “absent specific justifications.”²⁸ This treaty has—until now—never been invoked, but it includes language that specifies negotiation as a first step, and arbitration as a secondary step if bilateral negotiations fail to settle disputes.²⁹ In its amicus, the Government of Canada said that it had “initiated discussions with the United States to resolve this matter without a pipeline shutdown.”³⁰ However, exactly one year later, Canadian politicians addressed the US Senate asking it to prevent the Governor of Michigan from shutting down Line 5, suggesting negotiations are ongoing, at best, or at worst, stagnating.³¹

B. Transit Pipeline Treaty of 1977

The US and Canada entered the Transit Pipeline Treaty of 1977 due to the OPEC oil embargo, when several oil-producing countries refused to sell oil to the United States and other countries that supported Israel during the Yom Kippur War.³² In the context of

23. See *Michigan: Michigan Governor*, CNN (Dec. 21, 2018, 10:48 AM), <https://www.cnn.com/election/2018/results/michigan/governor>.

24. ENBRIDGE, *supra* note 16, at 91; see also *Shively v. Bowlby*, 152 U.S. 1, 16 (1894) (for an explanation of the public trust doctrine).

25. See *id.*

26. McCarten, *supra* note 3.

27. See generally, Amicus Brief, *supra* note 4.

28. *Id.* at 2 (“The shutdown order that Michigan seeks to enforce poses grave concerns for Canada at two distinct levels: first, for Canada’s ability to rely on bilateral treaties that are at the heart of the U.S.-Canada relationship, and second, for Canada’s energy security and economic prosperity.”).

29. Transit Pipeline Treaty, *supra* note 5, art. 9; see also Northey, *supra* note 10.

30. See Amicus Brief, *supra* note 4, at 2.

31. See Patrick Shea, *Canadian officials urge US Congress to prevent Line 5 shutdown*, INTERLOCHEN PUBLIC RADIO (May 18, 2022, 1:41 PM), <https://www.interlochenpublicradio.org/2022-05-18/canadian-officials-urge-us-congress-to-prevent-line-5-shutdown>.

the United States' eagerness to secure oil from a friendly ally as well as from Alaska (which requires international pipelines to bring American oil to Americans), the Transit Pipeline Treaty was signed.³³

In Article II, the treaty specifically states that “No public authority in the territory of either Party shall institute any measures,” to hinder the transmission of hydrocarbons across the border.³⁴ However, the treaty’s Article IV also states that, “[n]otwithstanding the provisions of Article II,” the “appropriate governmental authorities” may regulate international pipelines based on safety and environmental protection.³⁵

On the one hand, Article II is unambiguous that the US and Canada must allow transit pipelines to transport hydrocarbons without interference by public authorities.³⁶ On the other hand, the exceptions listed in Article IV, combined with the ambiguity of “appropriate governmental authorities” offers fodder for both sides of the dispute.³⁷ Michigan stakeholders have alleged both safety as well as environmental protection issues with Line 5, so it is far from clear from the text of the treaty how the dispute should be resolved.³⁸

What is clear, however, is the method of dispute resolution that the Treaty prescribes in Article IX.³⁹ When a dispute arises under the Treaty, negotiations continue until either party decides to request arbitration.⁴⁰ At that point, each party appoints an arbitrator, and the two arbitrators select a third “neutral” party, who will be neither a US nor a Canadian national, and who will decide where the arbitration will take place.⁴¹

32. See Amicus Brief, *supra* note 4, at 3; Taylor Noakes, *Oil and Gas Policy in Canada, 1947–80*, THE CAN. ENCYCLOPEDIA (May 22, 2020), www.thecanadianencyclopedia.ca/en/article/oil-and-gas-policy-in-canada-1947-80.

33. See *id.*; Sasha Yusufali & Larry R. Pratt, *Petro-Canada*, THE CAN. ENCYCLOPEDIA (Dec. 16, 2013), www.thecanadianencyclopedia.ca/en/article/petro-canada; Amicus Brief, *supra* note 4.

34. Transit Pipeline Treaty, *supra* note 5, at 5; Amicus Brief, *supra* note 4.

35. Transit Pipeline Treaty, *supra* note 5, at 6.

36. Transit Pipeline Treaty, *supra* note 5, at 5.

37. Transit Pipeline Treaty, *supra* note 5, at 6.

38. See Sheri McWhirter, *Line 5 fight goes international; experts suggest independent, binational study*, M LIVE (Dec. 23, 2021, 8:30 AM), <https://www.mlive.com/public-interest/2021/12/line-5-fight-goes-international-experts-suggest-independent-binational-study.html>; see also Amicus Brief, *supra* note 4, at 4 (Canada seems to acknowledge that environmental issues will have to be addressed in any negotiations or arbitration. It wrote in its brief that, “The agreed international processes for reconciling Canadian interests with U.S. interests and reconciling environmental interests with energy security and economic interests should be followed, and should not be set aside based on unilateral state action under state law.”).

39. See Transit Pipeline Treaty, *supra* note 5, at 10.

40. See *id.*

41. See *id.*

Although negotiations are informal and often private matters, the two nations have been meeting to discuss Line 5 and its continued operation.⁴² In a brief filed in February 2022 in US District Court for the Western District of Michigan, Ottawa’s counsel reported that Canada and the United States sat down to negotiate on the issue of Line 5 in mid-December and planned to meet again in early 2022.⁴³

C. Tribal involvement

One unique component of the dispute over Line 5 is the involvement of indigenous people. The protests over the Dakota Access Pipeline, initiated by the Standing Rock Sioux tribe, set the stage for serious, sustained protest over pipelines.⁴⁴ The result is that in recent years the US Federal Government has intermittently signaled that it is willing to at least make a cursory attempt at including tribes in the negotiation process.⁴⁵

In July 2019, the Bad River Band of the Lake Superior Tribe of Chippewa Indians, on whose land a 12-mile stretch of Line 5 runs, filed a public nuisance and trespass complaint against Enbridge in the US District Court for the Western District of Wisconsin regarding easements that had been granted to Line 5 decades before.⁴⁶ The tribe alleges that the easement permitting Line 5 to cross the Bad River Reservation expired in 2013, and the Band declined to renew the easement, but Enbridge has continued operating the pipeline anyway.⁴⁷ Enbridge has offered the tribe a multi-million dollar settlement to continue operating until Line 5 can be rerouted, but conservationists challenged the permitting for the reroute that circumvents the reservation.⁴⁸ In May 2022, the Band

42. See Amicus Brief, *supra* note 4, at 2 (“Canada has initiated discussions with the United States to resolve this matter without a pipeline shutdown.”); see also Northey, *supra* note 10.

43. See McCarten, *supra* note 3.

44. See Guillermo J. Garcia Sanchez, *When Drills and Pipelines Cross Indigenous Lands in the Americas*, 51 SETON HALL L. REV. 1121, 1125-26 (2021).

45. See Press Release, Dep’t of Justice, the Department of the Army, and the Department of the Interior, Regarding Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers (Sept. 9, 2016) (on file with the Department of Justice), <https://www.justice.gov/opa/pr/joint-statement-department-justice-department-army-and-department-interior-regarding-standing> (“Furthermore, this case has highlighted the need for a serious discussion on whether there should be nationwide reform with respect to considering tribes’ views on these types of infrastructure projects.”); cf. Garcia Sanchez, *supra* note 44, at 1136 (“For example, the same international conventions that recognize indigenous communities’ rights and important cultural value to humanity affirm that, when it comes to natural resources and the State’s right to extract them, the only protection left to indigenous communities is the right to be consulted.”).

46. See ENBRIDGE, ANNUAL REPORT (FORM 10-K) 83 (2020); see also *Environmental: Awards and Recognition*, BAD RIVER TRIBE, <http://www.badriver-nsn.gov/environmental/> (last visited Feb. 5, 2022); Amended Complaint at 6, *Bad River Band v. Enbridge*, No. 3:19-cv-602 (W.D. Wis. Jul. 23, 2019).

47. See Amended Complaint, *supra* note 46, at 3.

48. See Danielle Kaeding, *Enbridge Offers Bad River Tribe \$24M To Settle Pipeline Lawsuit*, WIS. PUB. RADIO (Oct. 19, 2019, 1:25 PM), <https://www.wpr.org/enbridge-offers-bad-river-tribe-24m-settle-pipeline-lawsuit>; see also *Line 5 through the Bad River Reservation*, ENBRIDGE, <https://www.enbridge.com/projects-and-infrastructure/public-awareness/line-5-wisconsin-segment-relocation-project/line-5-through-the-bad>

appeared to reject the settlement, asking the Federal court to allow it to evict Enbridge.⁴⁹ An Enbridge spokesperson stated that the company's position is that Band's request violates the Transit Pipeline Treaty of 1977.⁵⁰

While other tribes have not contested the underlying property right that Enbridge has under Line 5 in court, they have also opposed continued operation of the pipeline outside of court.⁵¹ Additionally, some Michigan tribes have asserted that Line 5 must be decommissioned, whether or not Canada has a valid claim under the Transit Pipeline Treaty, because the 1977 treaty is preempted by various earlier treaties that the tribes have with the US government.⁵² These treaties guarantee the tribes access to their way of life, which includes hunting and fishing in the Straits of Mackinac.⁵³ In November 2021, twelve tribes including the Sault Ste. Marie Tribe of Chippewa Indians, whose territory covers seven counties in Michigan's Upper Peninsula, called on President Biden to support their efforts to decommission Line 5.⁵⁴ In advance of its talks with Canada regarding the Transit Pipeline Treaty, the Biden Administration sent an invitation to several Great Lakes tribes in December to discuss Line 5 and the tribes' views and concerns about it.⁵⁵ The results of any meetings that occurred do not appear to have been made public, and it's unclear how the US will proceed in negotiations given the Great Lakes Tribes' input.

III. COMPARING THE TRANSIT PIPELINE TREATY TO THE ENERGY CHARTER TREATY AND THE UNITED STATES-MEXICO-CANADA AGREEMENT

As the State of Michigan and the local tribes stand firmly opposed to the continued use of Line 5, and Canada and Enbridge stand firmly for it, the United States federal

river-reservation (last visited Feb. 9, 2022); *Enbridge pipeline reroute draws opposition*, THE ASSOCIATED PRESS (Feb. 4, 2022), <https://journalrecord.com/2022/02/04/enbridge-pipeline-reroute-draws-opposition/>.

49. See Steven Chase, *Enbridge's Line 5 pipeline faces second shutdown risk in the Great Lakes after Indigenous band asks U.S. court for injunction*, GLOBE AND MAIL (May 4, 2022), <https://www.theglobeandmail.com/politics/article-line-5-faces-second-shutdown-risk-in-the-great-lakes/>.

50. See *id.*

51. See *Michigan Tribal Nations Letter to President Biden Regarding Line 5*, E&E NEWS (Nov. 4, 2021), <https://subscriber.politicopro.com/eenews/f/eenews/?id=0000017d-493a-d8e1-a57d-c9ff027a0000>.

52. See Zak Triplett, *Michigan Tribes Condemn Canadian Government Over 1977 Treaty*, 9 & 10 NEWS (Oct. 12, 2021), <https://www.9and10news.com/2021/10/12/michigan-tribes-condemn-canadian-government-over-1977-treaty/>.

53. See *id.*

54. See *id.*; see also *About Us: Service Area*, SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS (Sept. 7, 2011), <https://www.saulttribe.com/about-us/service-area>.

55. See Northey, *supra* note 10 ("A spokesperson for the State Department in an email confirmed the agency had invited the tribes to voice their views and concerns surrounding the Line 5 project before [the administration began] engaging with Canada under the 1977 treaty." This policy appears in accord with The White House's "Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships," published Jan. 26, 2021.).

government has been careful not to appear too strident on either side of the argument.⁵⁶ Given the lack of direction from the US Federal Government, and the lack of any previous action between the two countries based on the Transit Pipeline Treaty, it is worth analyzing similar international energy treaties to draw comparisons that could help clarify how the US might proceed under the Transit Pipeline treaty.⁵⁷ Specifically, the Energy Charter Treaty (ECT) and the United States-Mexico-Canada Agreement Treaty (USMCA, the successor to NAFTA), have weathered disputes that have been resolved with negotiation or arbitration.⁵⁸

A. The Energy Charter Treaty: A Flexible Investment Treaty

Like the Transit Pipeline Treaty, the ECT specifically addresses transferring oil and gas via pipeline, although the ECT is a broader treaty that addresses other forms of energy investment as well.⁵⁹ Unlike the Transit Pipeline Treaty of 1977, the ECT is a multilateral treaty that nations can ratify or not, but if a nation does ratify the treaty, then investors from other ECT-ratifying countries are generally able to take advantage of arbitration when a dispute arises between the foreign investor and the host country.⁶⁰ ECT Article 7 deals explicitly with transit pipeline issues and requires that parties to a contract for pipeline investment refrain from interrupting, or requiring an entity to interrupt, existing flows from a pipeline.⁶¹ Notably, Article 7 also specifies a conciliation process that can use to come to binding interim agreements (which last for up to twelve months) before the parties take their dispute all the way to arbitration.⁶²

56. See Sarah Cwiek, *White House: No plans to shut down Line 5*, MICH. RADIO: GREAT LAKES NOW (Nov. 11, 2021), <https://www.greatlakesnow.org/2021/11/white-house-line-5/> (White House spokeswoman Karine Jean-Pierre said in a press conference, about talks between the US and Canada regarding Line 5: ““These negotiations and discussions between the two countries shouldn’t be viewed as anything more than that, and not an indicator the U.S. government is considering shutdown””).

57. See Garcia Sanchez, *supra* note 44, at 1144 (“To grant investors full protection and security, in essence, means that the State is obligated to take active measures to protect international investment from adverse effects.”).

58. See Dillon Fowler, *Keystonewalled: TransCanada's Discrimination Claim Under NAFTA and the Future of Investor-State Dispute Settlement*, 31 AM. U. INT’L L. REV. 103, 116-18 (2016); see also Danae Azaria, *Transit of Energy Via Pipelines in International Law*, 110 AM. SOC’Y INT’L L. PROC. 131, 134 (2016).

59. See Azaria, *supra* note 58, at 131.

60. See *id.*; Energy Charter Treaty art. 7, Dec. 17, 1994, 2080 U.N.T.S. 95 (it is important to note the term “generally able” hedges this sentence because a recent CJEU holding in a case called *Moldova v. Komstroy* resulted in uncertainty about whether inter-EU states and investors can proceed to arbitration.).

61. See Azaria, *supra* note 58, at 134.

62. See *id.*; Energy Charter Treaty, *supra* note 60, at 48-51 (“The Contracting Parties undertake to observe and ensure that the entities under their control or jurisdiction observe any interim decision under subparagraph (c) on tariffs, terms and conditions for 12 months following the conciliator’s decision or until resolution of the dispute, whichever is earlier.”).

However, no contracting parties to transit pipelines have ever made use of the conciliation process.⁶³ Article 7 itself suggests that conciliation may only be permitted after all other methods of dispute resolution have been exhausted.⁶⁴ Commentators have also suggested that conciliation has never been used because, per the terms of Article 7, the conciliator has extremely narrow jurisdiction over transit pipeline issues.⁶⁵

Rather, when disputes do arise under the ECT, matters are taken to “diplomatic channels” and can then be submitted to arbitration if the matter has not been settled within a “reasonable period of time.”⁶⁶ Once a dispute governed by the ECT is submitted to arbitration, arbitrators often apply the “fair and equitable treatment” standard to disputes.⁶⁷ This standard has been interpreted differently by different arbitral tribunals, and the ad hoc nature of tribunals means that no particular definition is binding.⁶⁸ However, a cited interpretation is that the state in which an investor works may not change the rules that induced the investor to invest, after the investment occurs.⁶⁹ Although the words “fair and equitable treatment” do not appear in the Transit Pipeline Treaty like they do in the ECT, lawyers strategizing ahead of a potential arbitration between the US and Canada over Line 5 may want to analyze how likely it is that an arbitrator could “read in” a standard like “fair and equitable treatment.”

B. United States-Mexico-Canada

In the summer of 2020, the United States-Mexico-Canada Agreement (USMCA) went into force, replacing the twenty-six-year-old North America Free Trade Agreement (NAFTA) that had previously governed trade between the USMCA’s three eponymous nations.⁷⁰ The USMCA, like NAFTA before it, is a wide-ranging trade agreement that

63. See Azaria, *supra* note 58, at 134.

64. See Energy Charter Treaty, *supra* note 60, at 50 (“The following provisions shall apply to a dispute described in paragraph (6), but only following the exhaustion of all relevant contractual or other dispute resolution remedies previously agreed between the Contracting Parties party to the dispute.”).

65. See Azaria, *supra* note 58, at 134 (“[T]he conciliator only has ‘jurisdiction’ to deal exclusively with the transit dispute under Article 7, and cannot adopt binding measures vis-à-vis terms and conditions or prices for exports or imports, which may be (and often is) an important aspect of the overall dispute surrounding transit.”).

66. Energy Charter Treaty, *supra* note 60, at 72-73.

67. Anatole Boute, *Combating Climate Change Through Investment Arbitration*, 35 FORDHAM INT’L L.J. 613, 658 (2012); see also Energy Charter Treaty, *supra* note 60, at 53-58.

68. See Fowler, *supra* note 58, at 118.

69. See Boute, *supra* note 67 (“[T]he fair and equitable treatment standard should guarantee to investors that host states will apply the mechanisms that they developed to induce investments in conformity with the ordinary use of these mechanisms.”).

70. See INT’L TRADE ADMIN., NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA): THE U.S.-MEXICO-CANADA AGREEMENT (USMCA) ENTERED INTO FORCE ON JULY 1, 2020, REPLACING THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA), <https://www.trade.gov/north-american-free-trade-agreement-nafta> (last visited Feb. 18, 2022).

covers everything from agriculture to textiles to services.⁷¹ Disputes over infrastructure like transit pipelines are likely to run afoul of Chapter 14, which includes an article forbidding expropriation and nationalization of investments.⁷²

Reports contemporaneous with the negotiation of the USMCA suggested that the United States wanted to scrap NAFTA's provision making extrajudicial panel decisions binding (and thus opening up appeal of unfavorable decisions to US Courts), but Canada threatened to walk away from treaty talks if the US insisted on non-binding panel decisions.⁷³ Scholars and economists have noted that Canada's desire to help its investors keep certain kinds of trade disputes out of American courts was its primary motive for signing both NAFTA and the USMCA.⁷⁴ With respect to private party disputes between investors, the treaty specifies that the party countries should promote, "the use of arbitration, mediation, online dispute resolution and other procedures," to prevent and resolve international trade disputes.⁷⁵

The above-mentioned dispute resolution mechanisms cover a broad range of economic sectors, but language specifically tailored to transit pipelines is secondary to language discussing the goods transported in those pipelines in the USMCA.⁷⁶ Oil and gas trade between Canada and the US are discussed in a Canada-United States Side Letter that is annexed to the agreement itself.⁷⁷ The text of that side letter, much like the text of the Transit Pipeline Treaty of 1977, suggests a policy of non-intervention "to the maximum extent practicable" with respect to regulating the other country's energy infrastructure.⁷⁸ A

71. See United States-Mexico-Canada Agreement, Can.-Mex.-U.S., 134 Stat. 11 (2020), <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> [hereinafter *USMCA*].

72. See *id.* at art. 14.8; *cf.* North American Free Trade Agreement art. 1110, Dec. 17, 1992, 32 I.L.M. 670 [hereinafter *NAFTA*].

73. See David Ljunggren & Andrea Hopkins, *Canada suggests it could quit NAFTA talks over dispute mechanism*, REUTERS (Aug. 14, 2017), <https://www.reuters.com/article/us-usa-trade-nafta-canada/canada-suggests-it-could-quit-nafta-talks-over-dispute-mechanism-idUSKCN1AU1CK>.

74. See John S. Baker & Lindsey Keiser, *NAFTA/USMCA Dispute Settlement Mechanisms and the Constitution*, 50 U. MIAMI INTER-AM. L. REV. 1, 8 (2019) ("Canada desperately wants to avoid American courts.").

75. See USMCA, *supra* note 71, at Art. 31.22, 31-14 (Article 31.22 paragraphs 2-3 further state that, "each Party shall provide appropriate procedures to ensure observance of agreements to arbitrate and for the recognition and enforcement of arbitral awards and settlement agreements in those disputes," and "[a] Party shall be deemed to be in compliance with paragraph 2 if it is a party to and is in compliance with the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, done at New York on June 10 1958, or the *Inter-American Convention on International Commercial Arbitration*, done at Panama on January 30, 1975.").

76. See generally, USMCA, *supra* note 71.

77. See *id.* at *Canada-US Side Letter on Energy*.

78. *Id.*

footnote within this side letter states that the policy “does not apply to a measure related exclusively to the protection of human health or the environment.”⁷⁹ The word “exclusively” appears to place a high standard on any country seeking to enforce a climate-related energy regulatory measure on the basis of human health or environmental concerns.

Notably, as the three nations were negotiating the USMCA, Canada proposed an entire chapter on the rights of indigenous people in international trade.⁸⁰ However, by the time negotiations were complete, indigenous representation in international trade had been whittled down to Article 32.5, which states that the USMCA may not prevent a country from taking an action that it believes necessary to meet its legal obligations to indigenous people.⁸¹ This points to two conclusions that could be made with respect to the Line 5 dispute. First, Canada also has lip service to pay to indigenous leaders who are opposed to the continued operation of Line 5—after all, indigenous territory does not fit US state or Canadian provincial borders, and the Anishinaabe Nation, which exists in both Michigan and Ontario, has condemned the Canadian government’s support of Line 5.⁸² Second, if Michigan or the Bad River Band were to succeed in shutting down Line 5, and if Canada requested an arbitral resolution under the Transit Pipeline Treaty, the US might argue that Article 32.5 of the USMCA compelled it to uphold its legal obligations to tribal leaders.

IV. THE MANY CONSIDERATIONS FOR THE US AND CANADA APPROACHING ARBITRATION

An instructive example of an arbitration claim involving a Canada-US transit pipeline is *TransCanada v. United States*.⁸³ Canadian investment firm TransCanada (now TC Energy) brought this claim against the United States, under NAFTA, after Keystone XL Pipeline protests stymied the pipeline construction and the US federal government denied Keystone XL the permits it needed.⁸⁴ In its *Notice of Intent to Submit a Claim to Arbitration* under NAFTA, TransCanada accused the United States Government of allowing environmentalists to “[turn] opposition to the Keystone XL Pipeline into a litmus test for politicians ... to prove their environmental credentials.”⁸⁵ The company accused the US federal government of sitting on its hands when considering the pipeline due to

79. *Id.* at 2, n. 3.

80. *See* Garcia Sanchez, *supra* note 44, at 1156-57.

81. *See id.* at 1157.

82. *See Anishinabek Nation leadership supports shut down of Line 5 pipeline*, CISION (May 6, 2021), <https://www.newswire.ca/news-releases/anishinabek-nation-leadership-supports-shut-down-of-line-5-pipeline-841152299.html>.

83. *See* TransCanada Corp. & TransCanada PipeLines Ltd. v. U.S., ICSID Case No. ARB/16/21, Notice of Intent to Submit a Claim to Arbitration under Chapter 11 of the North American Free Trade Agreement, 1 (Jan. 6, 2016).

84. *See id.*

85. *See id.*

political pressure—all while approving other domestic pipelines.⁸⁶ TransCanada’s claim rested on making the argument before an arbitral tribunal that the US federal government did not give TransCanada “fair and equitable treatment.”⁸⁷ As under the ECT, the “fair and equitable treatment” standard governed arbitral dispute resolution under NAFTA (and under USMCA).⁸⁸

In any future arbitration under the Transit Pipeline Treaty, the US might prepare a defense to the closure of Line 5 by suggesting its actions were fair and equitable to Canadian interests. On the other hand, the “fair and equitable” standard as described above in Section III has been applied in investor-state disputes, whereas this is a dispute between two nations. While the notion of economic fairness to investment expectations is likely important to the US and Canada, it might not be the *only* concern for the two countries. Other concerns might include the collateral damage to the integrity of other treaties, or political importance of certain transit pipelines.

As for TransCanada’s success with the “fair and equitable treatment” argument, political back-and-forth has caused the company to simply drop the pipeline project and rescind the claim.⁸⁹ In early 2022, Canada’s Alberta province initiated a \$1 billion legacy NAFTA claim against the US for cancellation of the Keystone XL pipeline, to which it had contributed funds.⁹⁰

A. An Echo in Pipeline Disputes

Like Keystone XL, Line 5’s future has been altered by change in political sentiment. The State of Michigan first approved of Enbridge’s Tunnel Project in 2018, and then a couple months later in 2019 Michigan sought to shut down Line 5 altogether under a new Governor.⁹¹

Unlike the Keystone XL pipeline, however, conditions are not yet ripe for Enbridge to file an arbitration claim under the USMCA or NAFTA, because it likely would not (yet) be able to prove damages, since the company has continued operating Line 5 despite the

86. *See id.* at 2.

87. *See Boute, supra* note 67.

88. *See id.*

89. U.N. CONFERENCE ON TRADE & DEV.: INV. POLICY HUB, INVESTMENT DISPUTE SETTLEMENT NAVIGATOR: TRANSCANADA V. USA (Dec. 31, 2020), <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/720/transcanada-v-usa>; *see also* Douglas Thompson, *TransCanada drops US\$15 billion NAFTA case*, GLOB. ARBITRATION REVIEW (Mar. 27, 2017), <https://globalarbitrationreview.com/transcanada-drops-us15-billion-nafta-case>; *TC Energy confirms termination of Keystone XL Pipeline Project*, TC ENERGY (June 9, 2021), <https://www.tcenergy.com/announcements/2021/2021-06-09-tc-energy-confirms-termination-of-keystone-xl-pipeline-project/>.

90. Sebastian Perry, *Alberta seeks US\$1 billion from US in NAFTA claim*, GLOBAL ARBITRATION REVIEW (Feb. 15, 2022), <https://globalarbitrationreview.com/article/alberta-seeks-us1-billion-us-over-thwarted-pipeline>.

91. *See* Second Agreement, *supra* note 17; *see also* McCarten, *supra* note 3.

flurry of lawsuits.⁹² Despite Governor Whitmer’s revocation of Enbridge’s Straits of Mackinac easement and her order that Line 5 cease operating in May 2021, no court has enforced the Governor’s policy and Line 5 continues to operate.⁹³ In fact, the Mackinac Bridge Corridor Authority, an entity created by former Governor Snyder in the final days of his term to facilitate the permitting of the Tunnel Project, has yet to be dissolved, and it even issued an approval in mid-February 2022 for Enbridge to begin soliciting bids for construction services.⁹⁴

Instead, the threat of arbitration is inter-national in nature under the Transit Pipeline Treaty, if negotiations with the US do not resolve Michigan’s dispute with Enbridge. Thus far it seems that the Biden Administration is treading carefully and distancing itself from the idea of a federal shutdown of Line 5, especially as fuel prices rise in the US.⁹⁵

Further complicating matters is that fact that it is unclear what possible remedies are available to the arbitral tribunal under the Transit Pipeline Treaty.⁹⁶ The treaty itself is silent on whether monetary compensation could be ordered, or whether remedies would be equitable in nature.⁹⁷ This is in contrast to the USMCA and NAFTA before it, both of which expressly authorize compensation if a panel or arbitral tribunal finds evidence of “expropriation.”⁹⁸ The ECT, too, directs a signatory state to pay any ordered arbitral awards.⁹⁹ A 1979 review of US-Canada treaties by the countries’ two Bar Associations

92. See ENBRIDGE, ANNUAL REPORT, FORM 10-K 83-84 (2022), https://www.enbridge.com/investment-center/reports-and-sec-filings/~/_media/Enb/Documents/Reports/AR2021/ENB_2021_Annual_Report.pdf

93. See Sheri McWhirter, *Enbridge can seek Line 5 tunnel construction bids, Michigan panel says*, MLIVE (Feb. 16, 2022, 7:30 PM), <https://www.mlive.com/public-interest/2022/02/enbridge-can-seek-line-5-tunnel-construction-bids-michigan-panel-says.html>.

94. See Beth LeBlanc, *Enbridge to move forward with Line 5 tunnel construction bid process after getting panel OK*, THE DETROIT NEWS (Feb. 16, 2022, 4:00 PM), <https://www.detroitnews.com/story/news/local/michigan/2022/02/16/enbridge-line-5-tunnel-construction-bid-process-straits-of-mackinac/6813577001/>; see also 2018 Mich. Pub. Acts 359 § 254.324b; Letter from Gretchen Whitmer, Governor, Mich., to State Dep’t Dir. & Autonomous Agency Heads (Mar. 28, 2019) (on file with the state of Michigan), https://www.michigan.gov/documents/whitmer/ED_2019-13_Public_Act_359_of_2018_650679_7.pdf (Immediately after taking office Governor Whitmer challenged the constitutionality of the Act creating the Mackinac Straits Corridor Authority).

95. See Rachel Frazin, *Biden administration clarifies it’s not weighing Line 5 shutdown*, THE HILL (Nov. 9, 2021, 5:02 PM), <https://thehill.com/policy/energy-environment/580809-biden-administration-clarifies-its-not-weighing-line-5-shutdown> (quoting a Biden spokesperson saying “These negotiations and discussions between the two countries shouldn’t be viewed as anything more than that—and certainly not an indicator that the U.S. government is considering shutdown. That is something that we’re not going to do.” The spokesperson added that the US Army Corps of Engineers was studying ways that the pipeline under the Straits of Mackinac could be replaced).

96. See generally, Transit Pipeline Treaty, *supra* note 5.

97. See *id*; see also Hao Zhu, *Dynamically Interpreting Property in International Regulatory Takings Regimes*, 51 COLUM. J.L. & SOC. PROBS. 129, 130 (2017).

98. See USMCA, *supra* note 71, at art.14.8; see also NAFTA, *supra* note 72.

99. See Energy Charter Treaty, *supra* note 60, at 81.

notes that “[The Transit Pipeline Treaty] contains a provision for arbitration of disputes concerning its interpretation, application, or operation. The actual implementation of these principles in pipeline construction and operation has yet to be worked out.”¹⁰⁰ In the forty-two intervening years, the treaty has not been revisited.¹⁰¹

B. Comparisons

From the ECT, we may analyze the Line 5 dispute with a “fair and equitable treatment” lens, as discussed above, to see if the US’ actions might incur liability. If this dispute goes all the way to arbitration, and the arbitral tribunal attempts to adopt some of the “fair and equitable” language used in ECT decisions, then Canada would likely need to show that the US changed some rule that induced Canada to invest. Perhaps it could point to the revocation of the easement at the bottom of the Straits of Mackinac, which had not expired, when they were revoked. In such a situation, a Canadian award seems likely.

From NAFTA, later USMCA, we learn that Canada’s priority is keeping trade disputes out of US courts, and that it shares concerns with the US about indigenous input on pipeline operation.¹⁰² Unlike NAFTA, the Transit Pipeline Treaty is silent on remedies that an arbitral tribunal can adopt, so an arbitral tribunal would have more leeway there.¹⁰³

However, both countries benefit more from resolving this matter in negotiation than from letting it go to arbitration. Despite its intervention on behalf of a private company, Canada also has a strong conservationist movement, and in mid-February a leading Canadian group called Environmental Defence released a widely-circulated report that laid out how Enbridge could shut down Line 5 with minimal impact on the US-Canadian economy.¹⁰⁴ The report recommends upgrading a relatively-new pipeline owned by Enbridge—Line 78—to handle some of the oil and gas that would have otherwise gone through Line 5.¹⁰⁵ Line 78 goes through the southern part of Michigan and avoids the Straits of Mackinac.¹⁰⁶

100. Am. Bar Ass’n & Can. Bar Ass’n, *Settlement of International Disputes Between Canada and the USA*, 35 CAN.-U.S. L.J. 9, 50 (1979).

101. *See* Northey, *supra* note 10.

102. *See* Ljunggren, *supra* note 73; Garcia Sanchez, *supra* note 44, at 1156-57.

103. *See* Jacob H. Cappel, *The Volcker Rule: A Reminder of the Need for Additional Remedies for Party-to-Party Nafta Disputes*, 47 CASE W. RES. J. INT’L L. 377, 383 (2015).

104. *See* James McCarten, *Canada has replacements for Line 5 if pipeline shuts down, report says*, THE CAN. PRESS (Feb. 16, 2022, 8:59 AM), <https://globalnews.ca/news/8623719/canada-replacements-line-5-pipeline-shuts-down/>; *see also* STATE OF MICH., MI PROPANE SECURITY PLAN: ENSURING RESILIENCE WITHOUT LINE 5 (Mar. 11, 2021), https://www.michigan.gov/-/media/Project/Websites/mpsc/consumer/propane/MI_Propane_Security_Plan_Overview.pdf?rev=90d4da17bbfb482a96fec64e2201b6c9 (Governor Whitmer has also issued her own plan to mitigate the effects of a Line 5 shutdown).

105. *See* McCarten, *supra* note 104.

106. *See id.*

By contrast, despite Michigan’s efforts to protect sensitive ecological systems, the Biden Administration has a lot to lose by supporting efforts to put Line 5 out of commission.¹⁰⁷ Whether or not the shutdown of Line 5 would lead to higher fuel prices, fuel prices are *already* high, so a pipeline shutdown could look like the Administration is not trying to solve the more immediate problem that most Americans face—the problem of high gas prices.¹⁰⁸

Conversely, the United States and Enbridge must by law at least consider the views of the indigenous people who consider the Straits of Mackinac culturally and spiritually significant, and consult them about projects that impinge on their way of life.¹⁰⁹ As mentioned above, the Anishinaabe people of Bay Mills consider the Straits of Mackinac sacred.¹¹⁰ However, scholars have called this requirement perfunctory: “The right to be consulted and the duty of the State to evaluate the impact do not translate to a right to veto or oppose the project.”¹¹¹ Despite local tribes’ stalwart opposition to Line 5 and the Tunnel Project, US-Canada economic interests may outweigh.

V. CONCLUSION

When a United States State Governor threatened to shut down a Canadian pipeline, Canada invoked the Transit Pipeline Treaty, a bilateral treaty between the US and Canada that has never been invoked in a dispute before.¹¹² Looking at other energy treaties like the Energy Charter Treaty and the US-Mexico-Canada Agreement help to illuminate the ambiguity and brevity of the Transit Pipeline Treaty in terms of when the treaty permits exceptions to its no interference rule, and in terms of what remedy could be applied by an arbitral tribunal. Given the major uncertainties that surround claims under the Transit Pipeline Treaty, and given the fact that Canada and the US share objectives with respect to oil price, climate change, and, to a limited extent, the rights of indigenous people, avoiding arbitration by coming to a negotiated solution would be a prudent outcome.

107. See Jake Neher, *Biden Stays Silent on Line 5 as Efforts to Shut It Down Become More Complicated*, WDET (Oct. 11, 2021), <https://wdet.org/2021/10/11/biden-stays-silent-on-line-5-as-efforts-to-shut-it-down-become-more-complicated/>.

108. See Beth LeBlanc, *What a Line 5 shutdown would mean for Michigan's energy*, THE DETROIT NEWS (Dec. 19, 2019, 11:11 PM), <https://www.detroitnews.com/story/news/politics/2019/12/19/what-line-5-shutdown-means-michigan-energy-enbridge/4334264002/>.

109. See Garcia Sanchez, *supra* note 44, at 1130.

110. See David L. Gover & Wesley James Furlong, *Enbridge’s Line 5 Pipeline*, NATIVE AM. RIGHTS FUND, <https://www.narf.org/cases/enbridges-line-5-pipeline/> (last visited Feb. 20, 2022).

111. Garcia Sanchez, *supra* note 44, at 1137-38.

112. See Northey, *supra* note 10.