

**NEW YORK INSTITUTE
OF TECHNOLOGY**

School of Management



SECOND ANNUAL GLOBAL DISPUTE RESOLUTION COMPETITION 2022

CASE STUDY

Sponsored by

Dispute Resolution Institute of
New York, Inc. &

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(Riyaz Akhtar Experiential Education Program)

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The Enbridge Inc. Line 5 Case Study

Our case study involves a complicated conflict between Canadian Pipeline Company Enbridge Inc., Environmental NGOs, Indigenous Nations (in Canada and U.S.), Canada, Michigan and the U.S. Governments. The dispute concerns Enbridge's Line 5 pipeline which runs along the bottom of the Straits of Mackinac, between Lake Michigan and Lake Huron.

Michigan, with the support of environmental NGOs and Indigenous Nations has said the pipeline poses an environmental risk and that any spill from it would threaten the Great Lakes. Enbridge has said that section of the 68-year-old pipeline has never leaked and that it is taking steps to protect the lakes after negotiating a plan with former Michigan Governor Rick Snyder (Republican) to encase the pipes in a tunnel below the lake bed.

In May 2021, Michigan Governor Gretchen Whitmer (Democrat) threatened to seize profits from Enbridge Inc. if the company continued to operate a pipeline through the Great Lakes after a May 12th deadline to shut the pipeline. In a letter sent to Enbridge, Governor Whitmer and Daniel Eichinger, Director of the State's Natural Resources Department, reminded the company the State had revoked a permit that allowed the Line 5 pipeline to run along the bottom of the Straits of Mackinac, between Lake Michigan and Lake Huron. Michigan has said the pipeline poses an environmental risk and that any spill from it would threaten the Great Lakes.

Enbridge has refused the order, arguing in their lawsuit against Michigan that the State doesn't have the authority to close the line, which transports oil and natural gas liquids from Superior, Wisconsin, to refineries in Michigan, Ohio, Pennsylvania, Ontario and Quebec.

In response, the Governor of Michigan asserted that "Enbridge's continued occupation and use of State-owned bottomlands in the absence of a valid and effective easement constitutes an intentional trespass,". Governor Whitmer also threatened that the state would, if it wins in court, require the company to disgorge "all profits derived from its wrongful use of the State's property" after the May 12 deadline.

Enbridge said it would continue to pursue its lawsuit and keep operating the pipeline. "Our responsibility is to the people of Michigan and the Great Lakes region," an Enbridge spokesman said. "Enbridge will continue to deliver via Line 5 safe, reliable and affordable energy to fuel to the region's economies."

In response, Governor Whitmer claimed that "Enbridge's continued occupation and use of State-owned bottomlands in the absence of a valid and effective easement constitutes an intentional trespass".

The potential closure of the 645-mile pipeline has become a major issue for Midwestern States and for Canada. The State of Ohio has already filed a brief siding with Enbridge in the case, and, on Tuesday, Canada weighed in with its own brief in support of the Company.

Officials in Ottawa say closing the pipeline would cut off almost half the supply used to make gasoline, jet fuel and home heating oil for residents in central Canada. The closure could lead to higher fuel costs and thousands of job losses in refineries, officials said.

In its filing, Canada said there should be no shutdown until the U.S. and Canadian officials work to resolve the matter, as allowed under the terms of a 1977 treaty between the North American Countries. The brief said Canada has initiated discussions with the U.S. to resolve this matter.

That Treaty prohibits authorities in either Country from blocking pipelines that ship oil and gas across the border unless there is an emergency. Canada's lawyers said the Treaty came about because of U.S. efforts to transport oil-and-gas products from Alaska through Canada to the Lower 48 U.S. States.

"Canada is seeking a mutually agreeable solution that also respects environmental and safety concerns. But neither this Court nor any state court should act in a way that bypasses and undermines the Treaty," said a legal brief filed by the Canadian government in the U.S. District Court of the Western District of Michigan.

Canada's Natural Resources Minister Seamus O'Regan said the Government supports the continued mediation between Enbridge and the State of Michigan, under the supervision of the U.S. District Court of the Western District of Michigan. "We remain confident this will lead to a solution," the Minister said in a statement.

Although Canadian officials, including its Ambassador to the U.S. Kirsten Hillman and Mr. O'Regan, have reached out to counterparts in Washington, the White House has so far been reluctant to intervene. Energy Secretary Jennifer Granholm said the Biden administration wouldn't weigh in on Line 5. "It's in court right now, so that's where it sits," she said. "It will be decided in court."

(The above-stated quotes are from an article appearing in the Wall Street Journal on May 11, 2021)

The Challenge

Five students will be assigned to each team. The members of the team will assume the following roles: one student will be the representative of Enridge Inc., one student will be the representative of Environmental NGOs and Indigenous Natives, one student will be the representative of the Canada, one student will be the representative of U.S. and Michigan, and the fifth student will serve as the “mediator”.

Utilizing the interest-based conflict resolution methodology described below, the above-described parties to the dispute, with the assistance of the “mediator” student will negotiate an agreement which will address their respective interests and will preserve their relationship, while globally addressing the sources of conflict in the above-described Case Study. In order to complete the task, you must address the following:

1. Identify in a few paragraphs the nature and origins of the conflicts described in the above Case Study. Provide all necessary data to substantiate your presentation.
2. For each conflict described in Paragraph “1” identify the problems.
3. For each conflict described in Paragraph “1” identify the position(s) and interest(s) of each party to the dispute.
4. For each conflict described in Paragraph “1” identify all possible solutions.
5. For each conflict described in Paragraph “1” what will the consequences be for the Parties if the disputes are not resolved?
6. For each conflict described in Paragraph “1” identify the most viable resolution. Explain why you rejected the other possible solutions.
7. For each conflict described in Paragraph “1” identify the objective criteria that you rely upon to test the “fairness” and durability of the resolution.

(Apply the principles of “Getting to Yes” (Fisher & Uri¹) in addressing the seven aforementioned tasks. We recommend that you familiarize yourself with this book before our first virtual meeting).

Finalists will be required to present a power point presentation to the Judges summarizing, in detail, the sources of the conflict, the problems the conflict are generating, the positions and interests of each party to the conflict, the consequences if these conflicts are not resolved, identifying the most viable resolution of each conflict and the criteria that you rely upon to test the “fairness” and durability of the resolution.

¹Fisher, R., & Uri, W. (2011). *Getting to Yes: Negotiating Agreement Without Giving In*, New York: Penguin.

Alternative Dispute Resolution

Regardless of the origin and/or the substantive nature of the dispute, methodologies have been developed to resolve conflict without having to resort to court and litigation. The approach of agreeing to resolve the dispute outside the judicial forum is referred to as Alternative Dispute Resolution (“ADR”).

The ADR process is more flexible than litigation. Unlike in court, where a judge decides your fate, in ADR the outcome remains in the hands of the parties to the conflict. ADR promotes collaborative win/win resolutions, which are custom made by the parties to the dispute - as contrasted with the litigation win/lose model, where an outside party (judicial system) determines the outcome in a very rigid law driven outcome. Because the ADR process is voluntary, when the parties resolve disputes in this arena, the parties are more likely to comply with the resolution and settlements are more enduring.

Simply stated, the ADR process is cheaper, less time consuming, less stress inducing and is a forum that facilitates mutually beneficial resolutions which endure. The success of the ADR process as opposed to the litigation process can be best illustrated by the fact that even after parties commence litigation in United States courts, approximately 90% of court cases eventually are resolved by ADR methods. Regrettably, those litigants could have avoided months if not years enduring a costly, time consuming, stress inducing and relationship destroying process in court, if they had embraced ADR from the outset.

There are three methodologies employed under the umbrella of the ADR process:

- Negotiation
- Mediation
- Arbitration

Negotiation

The least formal process is known as negotiation where two parties seek to resolve their conflict without the intervention of any outside party.

Mediation

Mediation is a slightly more formal process than negotiation. The mediator is a neutral third party selected by the parties to the dispute. In mediation, the mediator seeks to gather all the facts, identify the parties' interests and attempts to find common ground by offering non-binding suggestions/recommendations. The mediator will also have expertise in the subject matter of the dispute which will make for a more effective facilitator.

Arbitration

Arbitration is the most formal ADR process. The arbitrator is a neutral decision maker selected by the parties. In contrast to a mediator, whose role is advisory, the arbitrator takes evidence from both parties to the dispute in a formal hearing and issues a final and binding decision. In one respect Arbitration shares some critical attributes of litigation - the parties lose control of their outcome and results tend to be fashioned in a win/lose model. However, unlike in litigation where the judge is assigned by the court, the parties select their arbitrator.

In our case study, we will be utilizing the mediation platform.

The Principles of Interest based Problem Solving to be utilized in this Competition

Contestants must incorporate the following concepts of alternative dispute resolution and interest-based problem solving into their reports. (There will be a PowerPoint presentation introducing the students to interest-based problem solving at the meeting scheduled on 1 February 2022).

What is Conflict?

- It is a struggle between two parties who perceive their goals as incompatible
- It is perceived as a clash between different, hostile, or opposing elements, values, or ideas
- The outcome model is perceived as being win/lose (You can't get what you want if the other side gets what they want)

However, Conflict managed properly will:

- Result in very favorable outcomes...
 - Solve problems (achieve goals)
 - Improve relationships

There are two contrasting ways to manage conflict:

- Positionally/Rigidly (win/lose model)
- Interest Based/Flexibly (win/win model)

Factors that drive Conflict include:

- Competition for limited resources
- Miscommunication
- Personality
- Actual or perceived unfair, unequal or abusive treatment
- Failure to observe and comply with boundaries/rules
- Unequal power relationships
- Fears/insecurities
- Policies which are unclear
- Cultural differences

The Methodology

This case study will challenge the contestants to utilize the interest-based conflict resolution methodology, a problem-solving approach, where the parties treat each other with respect, avoid making the other feel uncomfortable, refrain from criticizing or blaming each other in a personal way such that they lose face! Each party yields to reason not pressure and the GOAL is to reach a solution that addresses the needs of each party.

The Interest Based Conflict Resolution Methodology

Contestants will utilize a structured problem-solving process that generates creative solutions meeting the interests of both the USA and China by focuses on the problem not on the personalities (emotion), seeks to generate creative ideas which have to this point eluded the parties. In this model of searching for common solutions the parties refrain from the blame game and arguing over who is right and who is wrong.

Step 1: Define the Problem

- Identify the problem
- Gather data
- What are the underlying reasons for the conflict?

Step 2: Identify Each Parties interest

- USA?
- China?
- Distinguish between wants and needs
- Identify common interests (common ground)

Step 3: Distinguish between Positions and Interests:

- Positions (what I want) are:
 - Fixed
 - Inflexible
 - Are devoid of explanation or justification
 - Offer limited and often dead-end solutions to the problem
- Interests (why I want something) are:
 - Flexible
 - Needs based
 - Motivate
 - Generate multiple solutions
 - Focus on preserving the relationship

Step 4: The Process of Interest Based Problem Solving

- Separate the people from the problem
- Focus on interests not positions
- Develop multiple options for mutual gains
- Evaluate the Agreement (making sure we have a deal)

Step 5: Crafting Solutions that meet the needs of both the USA and China

- Identify the interests (needs) of each party
- Identify common interests
- Determine whether compromise (win/lose-Win/lose model) is necessary?
- Test options against objective criteria

Step 6: Developing Multiple Options:

- Brainstorm all possible solutions
- Eliminate the unacceptable solutions.
- Prioritize the remaining solutions in order of acceptability to the parties.

Step 7: Implementing and Evaluating the Agreement:

In order to be assured that there is a viable resolution which has promise of enduring over time the following questions must be answered in a satisfactory fashion:

- Is it clear as to what each party will do and by when?
- Are all issues resolved?
- Has the relationship between parties been preserved?
- Can it be implemented?
- What happens if one party or the other fails to live up to their commitments?
- What happens if circumstances change in the future?

Dispute Resolution Institute of New York, Inc.

Introduction

Dispute Resolution Institute of New York, Inc. is a not-for-profit educational organization whose mission is:

- i. to promote and disseminate information regarding the process and benefits of alternative dispute resolution,
- ii. with educational organizations described in section 501(c)(3) of the internal revenue code of 1986, as amended (the "code"), to assist in educating the students, businesses and labor organizations of the New York area on the process and benefits of alternative dispute resolution methods,
- iii. to provide training to those qualified individuals, who are interested in becoming mediators and arbitrators,
- iv. to research current trends and issues in the field of alternative dispute resolution, and
- v. to conduct forums and workshops on, and to create educational and training manuals, videos and other media relating to, conflict resolution, mediation and arbitration.

Our Goal

As a widely recognized conflict management and resolution think tank our ultimate goal is to eschew litigation and conflict in favor of the utilization of alternative dispute resolution (negotiation, mediation and arbitration) utilizing interest-based conflict resolution methodology to promote global harmony.

Our Programs

The organization provides information and provides programs to governmental organizations, NGOs, businesses and unions regarding alternative dispute resolution methods to students, businesses and labor organizations.

The Principles

Professors Joshua Bienstock, Stacey Baez, Vincent Petraro are the Directors of Dispute Resolution Institute of New York, Inc., and are also faculty members of the School of Management, New York Institute of Technology, New York.

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