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Alternative Dispute Resolution in International Trade and Business

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PART I: A COLLOQUY

ALTERNATIVE DISPUTE RESOLUTION IN INTERNATIONAL TRADE AND BUSINESS*

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I. INTRODUCTION

This workshop, which was held at the University of Maine School of Law on May 27, 1987, consisted of an informal discussion among an interdisciplinary group of experts. The purpose of the workshop was to generate ideas and recommendations regarding the utility of alternative dispute resolution (ADR) in international trade and business, with special reference to Canadian-United States trade relations. The discussion also explored the possible commonalties of domestic and international dispute resolution in the hope of developing a basis for a generic alternative dispute resolution

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* These proceedings laid the groundwork for a more formal analysis of alternative dispute resolution in international trade relations, focusing particularly on Canadian-United States trade relations and the Free Trade Agreement between these two countries. For a discussion of the current status of the Free Trade Agreement, see *Alternative Dispute Resolution in Canada-United States Trade Relations*, 40 MAINE L. REV. 261-373 (1988). This workshop was funded under a contract with the Maine State Executive Department for the development of an international trade regulation program.

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methodology.

The format of the workshop consisted of three panel discussions. The first of these was entitled *Dispute Resolution in International Commerce*, and its purview was threefold: 1) an introduction to international agreements and actors together with an assessment of the likely pitfalls of international contracting; 2) the use of arbitration in international commercial ventures; and 3) the Canadian attitude toward arbitration. By contrasting arbitration and litigation, the panelists evaluated the aptness of arbitration as a remedial process for international business disputes.

Building upon the first discussion, the second panel discussion was entitled *Canadian-United States Trade Relations*. Here, the panelists addressed the role of arbitration in a state-to-state context. They investigated the possibility of using alternative mechanisms of dispute resolution in trade relations among governments and in public international law conflicts. The discussion also centered upon the problem of transferring sovereign jurisdiction to ADR mechanisms.

The panelists considered whether ADR mechanisms could play a role in international trade relations that is similar to the role they play in private international transactions. Specifically, the panelists discussed whether arbitration could assist in the implementation of Canadian-United States trade policy, given the federal systems of both countries and the fact that each has ratified the New York Arbitration Convention.[1] In this regard, should a special arbitral or judicial tribunal be established—using the European Court of Justice as a model—to deal permanently with trade disputes between Canada and the United States? In a related but distinct vein, the question arose whether international law issues that affect trade, such as the acid rain problem, should be submitted to ADR mechanisms. There may be lessons to be learned from the *Gulf of Maine* case,[2] in which a panel of the World Court was selected to perform as an ad hoc means of dispute resolution akin to arbitration.

The third panel discussion was entitled *The Future Role of ADR*. Under this heading, a general discussion ensued concerning the role of adjudication. The panelists addressed the relative merits and deficiencies of litigation and ADR, as well as the application of ADR mechanisms to domestic disputes such as divorce, tort, contract, securities, and environmental conflicts. Finally, the panelists tied the

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1. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3.

2. Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), 1984 I.C.J. 246 (Judgment of Oct. 12). *See generally* Collins & Rogoff, *The Gulf of Maine Case and the Future of Ocean Boundary Delimitation*, 38 MAINE L. REV. 1 (1986).

day's discussions together with a consideration of the relationship between domestic and international dispute resolution processes.

II. Panel Sessions

Dean Wroth: This workshop, *Alternative Dispute Resolution in International Trade and Business*, is part of a University of Maine Law School effort to increase the State of Maine's presence and capacity to engage in international trade and commerce. The workshop is made possible by a special state appropriation. Our use of that appropriation has involved a number of different initiatives of which conferences, including this one, are a major component. The purpose of today's discussion is to focus upon two areas of concern—international trade and alternative dispute resolution—which are of interest both to the legal and business communities in Maine and in the country generally.

International trade is of increasing political and economic importance in our state not only as a regulatory phenomenon, but also as a means of discovering and participating in new markets. Moreover, Maine stands as a leader on an entirely different front: the use of alternative dispute resolution mechanisms in the resolution of civil disputes. This includes our court-annexed mediation service in domestic relations cases. Our hope this afternoon is to develop an agenda that includes a consideration of the basic groundwork and the development of a more elaborate set of issues dealing with alternative dispute resolution as a generic framework and its use in various areas of conflict resolution, including both international trade and domestic controversies.

Professor Carbonneau: Today's workshop consists of three panels. The first panel deals with private international law matters, that is, how arbitration and other alternative dispute resolution mechanisms have been useful in resolving problems that attend international contracting. The second panel concerns alternative dispute resolution in regard to public international law issues, namely, those conflicts arising in state-to-state relations that pertain to national and international policies and interests. The subject matter of the second panel also focuses specifically upon Canadian-United States trade relations. Finally, to complete the examination of various possibilities of ADR, the third panel explores ADR by comparing domestic and international dispute resolution processes and needs. Does the international experience in ADR indicate how alternative mechanisms such as arbitration, mediation, conciliation, or negotiation might be used successfully in a domestic setting? From the opposite vantage point, does the domestic experience in ADR teach us anything about how international commercial and public law disputes might be resolved?

A. Panel on Dispute Resolution in International Commerce.

Professor Carbonneau: In order to set the stage properly, let me first discuss international contracts. International contracts come in a variety of genres, including, for example, joint venture agreements, exclusive distributorship agreements, and licensing and franchising agreements. These kinds of agreements codify a commercial relationship between two or more parties. In terms of anatomy and content, international contracts are similar to domestic contracts but for a number of distinguishing characteristics. International contracts, unlike domestic contracts, involve parties from a variety of national jurisdictions and regulate transactions that span national borders.

These features give rise to special problems and the need for special contractual provisions. For example, if the contemplated transaction involves a state or state entity, one must include or negotiate for a sovereign immunity clause that prevents the state or state entity from invoking its immunity to suit (in the event of a breach on its part) or to execution (for purposes of enforcing a judgment). The current fluctuation in the value of the dollar relative to foreign currencies illustrates that international contracts should also contain a currency stabilization clause. The value of the currency referred to in the contract could vary during the period of performance and, in effect, grossly distort the purchase price originally stipulated in the contract. The parties to long-term international construction contracts should also provide gap-filling measures in case an unforeseen contingency materializes. What happens to the contract if the price of basic materials dramatically and unexpectedly increases? Is the agreement, in effect, rescinded or should the relationship continue in a modified form? Gap-filling mechanisms might allow the contracting parties or a third party to restructure and salvage the contractual relationship.

In addition, because international contracts involve commercial parties of different nationalities, cultures, and languages, international contracts should contain a controlling language clause. A controlling language clause can be useful in the event of litigation or disagreement as to contract terms. Given the precarious nature of international dealings, international contracts also usually include hardship clauses, or *force majeure* clauses, to deal with irresistible, unavoidable, and unforeseeable events such as a tornado, an earthquake, a civil insurrection, or a military takeover. The parties need to determine before the event occurs what effect the circumstance will have on their commercial relationship.

Like domestic commercial parties, international merchants also need stability, predictability, and neutrality in dispute resolution. Transactions involving hundreds of millions of dollars need to be backed by a guarantee that viable adjudicatory mechanisms are

available when conflicts arise. Although national processes might be used to resolve disputes arising from international contracts, problems attend the resolution of such disputes before domestic courts applying national law. For example, there is the question of extraterritorial extension of national jurisdiction and legal provisions. Can or should a domestic court assert jurisdiction over litigants who are international parties? Are domestic laws able to provide a suitable basis for resolving private international commercial disputes? Domestic law might be inappropriate to govern the merits of the litigation. A domestic court usually elects to apply a purely national set of legal provisions on the basis of choice-of-law principles. By its nature, national substantive law is inadequate to regulate specifically transnational disputes. Although that governing law may be suitable under the logic of choice-of-law reasoning, it may be entirely inappropriate for the resolution of a transnational commercial dispute because of its rigidity, fundamentally domestic character, or partiality to the interests of one party.

Moreover, there are difficulties with litigation practices such as discovery. Despite the existence of the Hague Evidence Convention,[3] there is really no internationally uniform evidence gathering process; standards and procedures differ from one jurisdiction to another. No central court or administrative agency exists to deal with such matters on a transnational level. The procedural differences between common law and civil law systems may make the application of a given procedure unfair in the context of transnational litigation. Civil law parties understand neither the American discovery practices nor the importance placed in American proceedings upon the adversarial ethic. Similarly, common law parties find judge-centered adjudicatory processes alien. The court may also lack essential substantive expertise to deal with international commercial matters. Even if successfully pursued to culmination, national court adjudication might result in enforcement of judgment problems. The option of national court adjudication thus is not very promising. Unfamiliarity with the jurisdiction and the jurisdiction's lack of familiarity with international contracts create distrust, the fear of bias, and a sense of potential ineptitude and of general unfairness.

In addition to all of these private law adjudicatory problems, there are, as Dr. Colgan and Professor Wilner will discuss, difficulties that might arise as a result of national government policies on international trade. Import-export restrictions, custom procedures, taxation devices, and even nationalization programs might significantly disrupt the venture and imperil the viability of the contract and the transaction.

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3. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231.

Given the particularities of international contracts and of the transnational commercial setting, what sort of dispute resolution process and remedies should be available to parties who want to do business across national boundaries? What sort of remedial predictability or stability can one reasonably contemplate in the event of a breach?

If the contract dispute is significant and bears upon political interests, governments might establish a special claims commission, similar to the war claims commissions, through diplomatic channels. Alternatively, governments might agree to create a special arbitral tribunal such as the Iran-United States tribunal in the Hague. In the absence of such remedies when the transaction involves a state or state entity in the developing world, overseas private investment corporations could purchase insurance against expropriation,[4] thereby lessening one potential risk of international business. There is always the remedy of self-help, but it is usually quite precarious. Finally, parties could also simply learn to live with the loss.

Clearly, none of these remedies is very realistic in terms of either private law adjudication or private commercial parties. International contracting, therefore, requires recourse to nontraditional dispute resolution remedies. These remedies are in the nature of self-designated mechanisms. Negotiations conducted through legal representatives might resolve the breach. Conciliation or mediation might provide other fora for third-party-assisted private dispute resolution. Arbitration has emerged over the last ten or fifteen years as the primary mechanism for resolving private international commercial disputes, because the parties to transnational contracts fear local prejudice and inexpert determinations before national courts.

Arbitration is suitable in the international setting primarily because it is a neutral dispute resolution mechanism. It is a private form of justice in which each party usually designates one arbitrator, and the two designated arbitrators select a neutral third arbitrator. Arbitration eliminates the localization factor. In addition, arbitral proceedings, unlike court proceedings, are nonpublic in character. By participating in arbitration, a commercial party does not reveal to its competitors that it is having difficulty; the contract dispute is resolved within the enclave of a private adjudicatory process. Moreover, the appointed arbitrators usually have substantial expertise that is directly relevant to the dispute. The parties need not rely on a court of law that may know nothing about international transfer of technology or joint venture agreements. Arbitrating disputes, however, is not necessarily quicker than litigating them before a judicial tribunal. Most international commercial arbitrations take a fairly

4. For a discussion of OPIC insurance, see D. WILSON, INTERNATIONAL BUSINESS TRANSACTIONS IN A NUTSHELL 312-34 (2d ed. 1984).

long time to complete. For example, International Chamber of Commerce[5] (ICC) arbitrations in general run from eighteen to twenty-four months. The factors of time and expense, therefore, do not recommend the process.

The increasing reliance on arbitral adjudication signifies that international merchants recognize the need to establish their own dispute resolution process and use the principle of party autonomy (freedom of contract) to satisfy that need. An emerging transnational consensus upholds the use of party discretion to establish a dispute resolution process. The 1958 New York Arbitration Convention, which has been ratified by more than 70 states (by the United States in 1970 and by Canada in 1986), reflects and promotes an international consensus concerning the viability and utility of international commercial arbitration.[6] The Convention renders arbitral awards presumptively enforceable in all the signatory states. The most important factor in arbitration law is the autonomy of the process in relation to judicial supervision. Arbitral adjudication will not work if states do not legitimate the process and prevent courts from interfering with the arbitral proceedings and the enforcement of awards. Most modern arbitration statutes, therefore, have established a cooperative relationship between courts and arbitral tribunals, providing for limited judicial supervision of awards and the process. The New York Convention has been instrumental in advancing these tenets of arbitration law.

We now turn to Professor Trakman for his views on the recent

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5. The International Chamber of Commerce (ICC), founded in 1919 and headquartered in Paris, is an association of internationally oriented enterprises and their national organizations. The general purpose of the ICC is to promote international commerce by encouraging favorable action by enterprises and governments, and to inform the public, with a special emphasis on informing the international business community. Approximately 6750 enterprises and organizations in 106 countries are members of the ICC. *See* L. CRAIG, W. PARK & J. PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION § 2.02, at 17 (1984).

6. For a comprehensive discussion of the Convention, see A. VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958 (1981). *See also* Aksen, *Application of the New York Convention by United States Courts*, 4 Y.B. COM. ARB. 341 (1979) (Int'l Council for Com. Arb.); Contini, *International Commercial Arbitration: The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 8 AM. J. COMP. L. 283 (1959); Mirabito, *The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards: The First Four Years*, 5 GA. J. INT'L & COMP. L. 471 (1975); Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE L.J. 1049 (1961); Sanders, *Consolidated Commentary Volumes III and IV*, 4 Y.B. COM. ARB. 231 (1979) (Int'l Council for Com. Arb.) (consolidated commentary on court decisions on the New York Convention of 1958); Sanders, *Consolidated Commentary Volumes V and VI*, 6 Y.B. COM. ARB. 202 (1981) (Int'l Council on Com. Arb.) (consolidated commentary on court decisions on the New York Convention of 1958); Springer, *The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 3 INT'L LAW. 320 (1969).

Canadian ratification of the 1958 New York Arbitration Convention and the practical workings of the arbitration process in Canada.

Professor Trakman: I am going to start by trying to provide a description of the arbitration situation in Canada and the reasons for its present state. Canadian arbitration, I think, is relevant to the American context. I then would like to talk about some specific problems, the pluses and minuses, of dealing with arbitration that I have encountered as an arbitrator with the American Arbitration Association.

The Canadian perspective on international commercial arbitration traditionally has been rather restrictive. Canada only recently adopted the New York Arbitration Convention[7] and was the last industrialized nation to do so. International commercial arbitration centers are rather novel in Canada.[8] In addition, experts on international trade traditionally have been somewhat uneasy about the prospects of widespread arbitration as a preferred medium for resolving international trade disputes.[9] The question arises: why was international commercial arbitration so poorly received in Canada? Why have there been so few instances of international commercial arbitration in Canada? With the recent ratification of the New York Arbitration Convention, is there a change and what is the cause of this change? If the change is purely nominal, why is that so? If there has been a change of substance, what is the nature of that substance?

Traditionally, despite the lack of arbitration in Canada, Canadians have been quite popular as arbitrators in the United States. Canadians are supposedly neutral in conflicts between the English and American or European and American corporations. The history of Canada reveals that the traditional conservatism in regard to arbitration is linked to a conservative political process and judicial system. A general lack of familiarity with arbitration, the perception that commercial arbitration is an unknown to be avoided, and the belief that arbitration is a costly and time-consuming process contributed to the unpopularity of arbitration in Canada. There also were practical legal concerns. Since Canadian jurisdictions were reluctant to accept arbitration as an alternative dispute resolution process, they were hesitant to enforce awards. Why should parties go to arbitration if the process ultimately became just another stage of judicial adjudication?

Interestingly, there was a paradox in the Canadian experience.

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7. *See* United Nations Foreign Arbitral Awards Convention Act, 1986 Can. Gaz. ch. 21, § 6. *See also* Mendes & Binavince, *Canada and the New York Convention on Foreign Arbitral Awards*, 9 CAN. ARB. J. 2 (1984).

8. *See, e.g.*, Commercial Arbitration Act, B.C. Stat. ch. 3 (1986).

9. *See generally*, CAN. DEP'T OF JUSTICE, FIRST INTERNATIONAL TRADE SEMINAR (1983).

The lack of receptivity to international commercial arbitration was only one side of the coin. The other side of the coin suggests that there was a lot of experience in Canada with arbitration. For instance, arbitration is a very large part of labor dispute resolution in Canada. Arbitration is also used extensively in construction, maritime contracting, and long-term commercial transactions. In sum, the Canadian experience reveals, on the one hand, extensive recourse to arbitration in certain dispute areas, and, on the other hand, a comparative dearth of recourse to international commercial arbitration in all other areas.

A realization of practical circumstances led to Canada's change in attitude in regard to international commercial arbitration. Thirty percent of the Canadian gross national product is dependent upon foreign trade. Seventy-five percent of Canadian foreign trade is with the United States. The United States is by far Canada's biggest trading partner, and United States law is very amenable to arbitration, especially in matters of international trade. Canadians realized that their failure to accede to a consensus view on arbitration, shared by the United States, might impair its ability to engage in foreign trade. General transnational acceptance of arbitration also argued for a Canadian reevaluation of the process. In addition, Canada was eager to enter into the business of providing arbitration services to international merchants. There was an increasing Canadian awareness that international arbitration provided benefits and could mitigate the effects of the oil crisis and of the recession.

The reasons why Canada decided to go along with the New York Arbitration Convention, however, need to be qualified. Canada's accession to the New York Convention was half-hearted. There was no extensive lobbying by provincial governments with this acclamation. There was no great force of business pressing for the Canadian government ratification. Canada's accession was due primarily to the influence of one or two individuals. What Canada has now is federal legislation and corresponding provincial legislation with some variations. British Columbia and Quebec have established arbitration centers in addition to adopting the model arbitration law of the United Nations Commission on International Trade Law.[10] By and large, there is a fairly large cross-section of acceptance of arbitration in Canada.

What does all this mean? Quite candidly, I do not know if it means a great deal. The legislation has not generated an increase in

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10. *Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session*, 40 U.N. GAOR Supp. (No. 17), U.N. Doc. A/140117 (1985). The UNCITRAL model law is not a treaty, but an attempt to encourage harmonization of national laws governing arbitration. *See* Lucio, *The UNCITRAL Model Law on International Commercial Arbitration*, 17 U. MIAMI INTER-AM. L. REV. 313 (1986).

international commercial arbitration. Whether the status quo ante will change is dependent upon the attitude of the business and legal communities. Most lawyers I speak to lack training and experience in arbitration, and the business community has yet to be convinced of the merits of arbitration. Despite the developments at the legislative level, there are substantial questions as to whether the practice of international commercial arbitration will actually take root in Canada.

In a related vein, I would like to discuss the concerns about international commercial arbitration that I have encountered in my personal experience. In my estimation, international commercial arbitration represents a crisis of confidence. There is the view that there is a need for arbitration and that it must be different from litigation. At the same time, however, arbitration should not represent a loss of the advantages of the judicial process. Parties would like to feel that the decisionmaker is credible, the arbitral procedure is efficient, and the arbitral determination is equitable. We have learned from realists and post-realists that the life of the law lies in large part in experience. It is precisely from this emphasis on experience that we evaluate arbitration. After all, arbitrators are supposedly people with expertise in the commercial and arbitral process. Moreover, they should understand the need for adjudicatory speed, informality, efficiency, and fairness.

As a commercial arbitrator who feels some sympathy for the critics of commercial arbitration and who also finds advantages to a perfected system of arbitration, I have a number of reservations about arbitration. First, when I began to arbitrate disputes, I came to the process with some preconceived ideas. Although international commercial arbitration involves certain fundamental principles, there are so many variables in arbitration that generalizations are perilous. One must evaluate arbitration by taking into account the willingness of the parties to arbitrate, the experience of the arbitrators, the wisdom and selection of arbitrators, the suitability of the particular arbitration process used, and the forum where the arbitration is held and its atmosphere.

Second, what is in fact the difference between litigation and arbitration? The question restates the classic Canadian-British dilemma: Why are arbitrators better than judges? Why is arbitration better than judicial adjudication? At least half of the arbitrations in which I have been involved have been every bit as long as any judicial process I have experienced. Arbitrations have the procedural paraphernalia of judicial adjudication: in arbitral proceedings, there is a great deal of repetitiveness, discovery, testimony of witnesses, and a great deal of argumentation and posturing on both sides. I am not saying that international commercial arbitration does not work or that it does not work well in any situation. What I am saying is that, in many cases, arbitration does not work because ar-

bitrators lack situational sense, and parties try to emulate the judicial process. Ideally, the parties should perceive arbitration as different from the judicial process.

As a matter of practicality, one should have a sense of the virtues of arbitration before incorporating an arbitration clause into a contract. In other words, parties need to be forewarned about the particularities of arbitration. Many parties, when they enter into arbitration agreements, do not appreciate the nature of what they are selecting. For example, parties very often choose to have a three-member arbitration panel, composed of two party-appointed arbitrators and a neutral arbitrator selected by the two appointed arbitrators. Frequently, party-appointed arbitrators become advocates for the party appointing them. The composition of the arbitral tribunal, in effect, reproduces the two-sided character of the dispute within the arbitral structure. The result often is an arbitration within an arbitration, with the neutral arbitrator acting as a sole arbitrator who has the responsibility of resolving two disputes: the one between the party-appointed arbitrators and the other between the parties themselves. Parties should select arbitration, the type of arbitration, and their arbitrators with such eventualities in mind.

Other considerations include the place of arbitration and the applicable law. There are great variations in both substantive and procedural law among different fora. In all likelihood, the American Arbitration Association has a different process and attitude toward arbitration than other arbitration centers. Arbitration in East-West trade matters before the Moscow or Scandinavian Arbitration Associations should be quite different from ICC arbitration. There are significant differences also among national arbitration laws.

Many people see arbitrators as lawyers. If that is the case, arbitration may well emulate a judicial process by having arbitrators who advocate for positions. Moreover, if the arbitrators are going to be experts, what sort of expertise should they possess? One suggestion is to establish a panel of arbitrators that has as much expertise as possible in the particular commercial area. Such a procedure can save time and money expended for expert witnesses. Experts (even those who adjudicate), however, can disagree, and party-appointed arbitrators will usually advocate a particular party's point of view.

Another consideration is the possibility that the credibility of the arbitral process is diminished by the sometimes enormous disparity in fees between arbitrators and the attorneys who appear before them. Also, should the bar envisage arbitration as a stepping-stone to litigation or merely another form of litigation that includes somewhat less complex discovery practices?

Finally, how much guidance should arbitrators provide at the outset? A large problem with arbitration is that the various actors go into the process with different expectations. Neutral arbitrators have their expectations, as do the parties and party-appointed arbi-

trators, and lawyers themselves have different expectations. To what extent does or can the arbitrator provide guidance in the process? To what extent should the ground rules be established at the outset?

Questions and Answers:

Question: (audience) Professor Trakman mentioned that very few cases at this point go to arbitration in Canada. What happens to the other cases?

Answer: (Professor Trakman) Essentially, it is the parties' choice. The parties themselves decide at the outset what process they will choose. Canadian parties invariably choose a judicial forum so they ultimately end up in a court of law.

Question: (Dr. Colgan) Does the fact that so much of Canada's commercial relations are with the United States influence the choice between arbitration and litigation? Canadians are right next door to the United States; they have access to lawyers and courts in this country that they might not have in Europe or Asia. Has that influenced the relative preference for litigation over arbitration and is that likely to change in the future?

Answer: (Professor Trakman) It is a difficult question to answer for the simple reason that, although we have continually traded with the United States, arbitration which has effectively occurred in the United States has not seemed to filter over into the Canadian legal culture. Is it likely to change? I am not sure. A part of me says yes, because I think Canadians recognize that they are behind the times. Even the British views on arbitration have been modified over the last several years. There has been a far greater transnational acceptance of arbitration.

How quickly and to what extent will arbitration be accepted in Canada? Let me give you an example. British Columbia has tried desperately to establish an arbitration center and to train lawyers to arbitrate disputes. Until now, they have dealt with very few international commercial arbitration cases. I think many Canadian lawyers do not understand arbitration well enough to participate in it, and most of the business community has not accepted the virtues of arbitration ideologically. Members of the business community simply cannot see what arbitration can provide for them. In part, some of their fears are justified. It is bad enough to go to international commercial arbitration with lawyers who do not understand arbitration, and it is even worse to have arbitrators who are themselves lawyers with that problem of incomprehension.

Are the Americans likely to change Canadian attitudes? Or, rather, are Canada's trading partners in general likely to change Canadian attitudes? I expect that the answer depends on the success of arbitration in foreign settings, and I do not really know how successful arbitration has been in these settings. In the several arbitrations that I have dealt with recently, my sense is that arbitration ends up

to be every bit as costly and time-consuming as litigation. From the parties' point of view, arbitration is not as satisfactory as they would have liked. This situation represents a real stab in the back of commercial arbitration because it serves to widen the credibility gap. I think right now that the Canadians remain unconvinced. Although they feel that they should make a change, they are not convinced that the change is something that is going to help them.

Question: (Dean Wroth) What about other ADR mechanisms in international commerce?

Answer: (Professor Wilner) Not all business disputes ought to be resolved through arbitration or through any one particular system of adjudication or alternative adjudicatory method. There are some business disputes that ought to go to court, and I believe there are others that ought to be the subject of other kinds of alternative dispute resolution systems, depending on the parties' relationship, the subject matter of the dispute, and other factors. It is interesting to note that the American Arbitration Association does not have thousands of cases per year; there are maybe 125 or 150 cases. That may sound like many, but we are talking about the entire range of United States business activities. The International Chamber of Commerce has somewhat more; in Western Europe, there is the London Court of Arbitration in Great Britain, arbitration facilities in Switzerland, and East-West arbitration. There is also some arbitration of an international nature in Sweden. The number of arbitrations is not huge, because parties bring their disputes before someone else. They just try to deal with the problem themselves. I am told that in Japan parties would rather lose than confront each other in certain instances. So, I think that the system that we live with is a very complex one.

I congratulate Canada for coming into the fold with respect to arbitration statutes and the New York Arbitration Convention. This now allows the Canadian business community the possibility of using arbitration as a means to settle disputes with others. The last point that ought to be made is that arbitration is voluntary in the international context in the sense that it is based, as Professor Carbonneau suggested, on an agreement between parties to use that system to settle their disputes. So, I think that we ought to bear in mind, as Dean Wroth suggested, that, in fact, there are many avenues toward the settlement of disputes in international transactions.

Answer: (Professor Carbonneau) A recent article on the subject of international commercial arbitration in the *Revue d'Arbitrage*[11] stated that international commercial arbitration has become so similar to court adjudication that it will eventually be replaced by re-

11. *See* Jarvin, *La loi-type de la C.N.U.D.C.I. sur l'arbitrage commercial international*, [1986] 4 REV. L'ARBITRAGE 509, 513.

course to conciliation or mediation. The mini-trial, which is becoming popular domestically, may also eventually replace arbitration in the international sector.

The issue of international dispute resolution will become more complicated when Dr. Colgan and Professor Wilner discuss international conflict resolution. Once state interests become involved in the process, other mechanisms are required. State parties have an ace: every time a state does not want to submit to dispute resolution, it lays claim to the sovereign immunity defense. As a consequence, a variety of much more complicated mechanisms are necessary to deal with disputes that involve sovereign parties. So, in theory at least, the more mechanisms that are available, the better dispute resolution needs are served, unless there are so many dispute mechanisms that the mechanisms themselves become a source of conflict.

Question: (audience) Listening to your description of these arbitrations, it occurs to me that there are many instances where trade would be inhibited simply because of the cost of potential dispute resolution. I wonder if you could address this observation and the prospect of more economical approaches to dispute resolution.

Answer: (Professor Trakman) In response to the question, one problem is that the parties to a contract often choose arbitration at a time they hope or believe that no dispute will arise. Arbitration clauses are usually standard fare in international contracts. Parties, therefore, really have not thought about the costs of dispute resolution when they agree to arbitrate. The costs of dispute resolution are not anticipated and the arbitration clause is a precautionary provision added to a contract. In a commercial context, everyone assumes that arbitration will be cheaper and better than litigation.

As a rule, parties place too many expectations upon arbitration without understanding enough about it. Arbitration can be more economical than otherwise if the parties appoint arbitrators who are well suited to deal with the particular problem. Under the current process, however, there is not a clear way of knowing beforehand how arbitrators will handle a particular issue. Some arbitrators will allow all forms of evidence gathering to take place, even to the point of allowing experts from all over the world to testify, obviously at substantial cost to the parties. Other arbitrators are simply unwilling to consider anything beyond documentary evidence. There is, therefore, a great deal of variation among arbitrators, but knowledge of the variations can only be obtained with hindsight. The American Arbitration Association does not have a clear set of rules and recommended approaches as to how to deal with these matters. One does not know with any degree of certainty the cost of an arbitration until the process is over. It is impossible to predict the length of the arbitration process, and how the process will unravel. Contracting parties should consider these problems when they choose arbitra-

tors, the forum, and the process.

Answer: (Professor Wilner) These problems are certainly real and they can be frightening. Many trade associations or trade groups—the corn oil trades and some of the grain trades—try to avoid individual arbitration agreements by providing in their bylaws that disputes arising out of buyer-seller dealings will be settled by arbitration in accordance with rules established by the trade association and under the jurisdiction of the officers of the association. The American Arbitration Association sometimes administers these rules; at other times, the trade association itself administers the rules. This system applies even to trading in stocks. The New York Stock Exchange, for example, has its own arbitration rules and arbitration system;[12] arbitrations are conducted at no cost to the parties.

Although these procedures usually occur in a national setting, there is no reason why such a system could not exist transnationally in respect to particular traders. Such a system is an inexpensive, efficient, and excellent alternative if the parties in the trading group are willing to accept the discipline of the trading association. It can resolve some of the problems that might otherwise occur in ad hoc, contract-by-contract arbitration. In any pattern of trading, there will not be separate contracts, just dealings that are deemed to be contractual in nature. By joining the trading association, therefore, the parties agree that those kinds of dealings will be subject to the association's system of arbitration. This system of arbitration is peculiar in the sense that it does not have all the paraphernalia associated with the independent kind of arbitration that Professors Trakman and Carbonneau have been discussing. Obviously, all systems have their risks, but this may be the one that is adapted to the kind of problem that you were addressing.

Answer: (Professor Carbonneau) The other point to be made in relation to cost and predictability is that, comparatively speaking, litigation offers even less in the way of dispute resolution predictability. As a result, it can become exorbitantly expensive. These same considerations arise not only in private commercial transactions, but also in relation to public law disputes. Accordingly, we should now move on to the second panel and ask Dr. Colgan to comment upon whether alternative mechanisms are available and useful in state-to-state relations: for example, where states are negotiating issues of trade policy.

B. *Panel on Canada-United States Trade Relations.*

Dr. Colgan: I am going to speak briefly about the convergence of

12. *See* New York Stock Exch., Inc., Dep't of Arbitration, Arbitration Rules. *See also* Axelrod & Co. v. Kordich, Victor & Neufeld, 451 F.2d 838, 841-43 (2d Cir. 1971) (holding that a member of the New York Stock Exchange must abide by the Exchange's arbitration rules).

private and public law considerations in the context of the current Canadian-United States trade relations and negotiations. More specifically, my remarks focus upon an area of dispute resolution in international trade that lies in a middle ground between private contractual disputes and state-to-state disputes. I can only describe this area of trade relations as disputes between industries.

Such disputes surface between the United States and other countries in the context of the administration of United States unfair trade practice laws.[13] In the last several years, there has been a substantial increase in the number of cases filed under these laws. As a consequence, these laws have received a great deal of attention. In United States-Canadian relations between 1980 and 1986, for example, there were twenty-two anti-dumping cases, fourteen countervailing duty cases, and six escape-clause cases affecting in total some $6.5 billion worth of trade.[14] A number of those cases were successful; some of them were "tried" two or three times during this period, with different outcomes in the various litigations.

In the current free trade talks, the increase in litigation and the perception of ambiguity in American trade law led Canada to negotiate for alternative dispute settlement mechanisms on trade issues. Canada has suggested that disputes pertaining to countervailing duties, dumping, and other trade-injury issues be settled, not in national courts or before national agencies as they are now, but through a bilateral alternative dispute settlement mechanism.

Why has Canada advanced such a proposal? The Canadians have come to call the American unfair trade practice laws "a contingency protection," meaning that these laws are designed to protect American industries on the contingency that these industries feel that they are being damaged. These laws are not outrightly protectionist, but are protectionist in nature when adverse circumstances arise. Canadians worry a great deal about contingency protection for a couple of reasons. One is the disparity in size between the United States and Canada in terms of the trading relationship. While the United States and Canada have the world's largest bilateral trading relationship, United States exports to Canada constitute only about

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13. This is a body of statutory law, consisting principally of anti-dumping law, 19 U.S.C. §§ 1673-1675, 1677-1677h, (1982 & Supp. IV 1986), the countervailing duty law, *id.* §§ 1671-1671h, 1675-1677h, and certain tariff law, *id.* § 1337. *See generally* Zeitler, *A Preventative Approach to Import-Related Disputes: Antidumping, Countervailing Duty, and Section 337 Investigations*, 28 HARV. INT'L L.J. 69 (1987); Knoll, *United States Antidumping Law: The Case for Reconsideration*, 22 TEX. INT'L L.J. 265 (1987).

14. *See, e.g.*, Certain Softwood Lumber Products from Canada, 51 Fed. Reg. 37,453 (Int'l Trade Admin. 1986) (prelim. affirm. countervailing duty determination) (the Softwood Lumber case was settled without a final ITC determination); Carbon Black from Mexico, 51 Fed. Reg. 30,385 (Int'l Trade Admin. 1986) (final admin. review).

twenty percent of total United States exports, whereas Canadian exports to the United States account for about seventy-five percent of Canada's total exports. Accordingly, Canada is likely to be affected a great deal more by these kinds of provisions in its trading relationship than is the United States.

Second, the Canadians are disturbed by what they perceive to be confusion and arbitrariness in the United States process. I mentioned situations in which some trade cases were tried twice. The most famous example of that is the *Softwood Lumber* case.[15] In 1983, the American softwood lumber industry brought a countervailing duty suit against Canada, claiming that Canadian lumber produced from public or crown lands was subsidized because of artificially low stumpage or removal prices for the saw logs taken from the public lands. The International Trade Administration of the Department of Commerce rejected the American industry's claim.[16] In 1986, following the International Trade Administration's decision in *Carbon Black from Mexico*, which raised the same issue of public provisions for a different natural resource product,[17] the softwood lumber industry refiled its case. This time, it won a decision from the Department of Commerce which concluded that stumpage prices and practices constituted a subsidy.[18]

If the United States and Canadian governments had not negotiated an agreement in late 1986 under which the Canadian government imposed an export tax in lieu of the duty that would have been imposed under United States law,[19] that subsidy finding would most likely have gone into effect as a matter of American law. It outraged the Canadians that they had won the case in 1983 and lost it on exactly the same issue three years later.

Canadian authorities are also disturbed by the direct access that American companies have to the United States government through private party litigation. Consequently, Canada, in the current trade talks, is arguing for a dispute settlement mechanism that reflects mutually accepted rules, a mechanism that is comprehensive, exhaustive of remedies, and binding: in effect, a mechanism that institutes restitution rather than retaliation.

Although I find the Canadian criticism of the American process to be overly harsh and wrong, there is merit to the idea of alternative dispute resolution for this kind of issue. In other words, I believe the

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15. Certain Softwood Lumber Products from Canada, 51 Fed. Reg. 37,453 (Int'l Trade Admin. 1986) (prelim. affirm. countervailing duty determination).

16. Certain Softwood Products from Canada, 48 Fed. Reg. 24,159 (Int'l Trade Admin. 1983) (final neg. countervailing duty determinations).

17. Carbon Black from Mexico, 51 Fed. Reg. 30,385 (Int'l Trade Admin. 1986) (final admin. review).

18. Certain Softwood Lumber Products from Canada, 51 Fed. Reg. 37,453 (Int'l Trade Admin. 1986) (prelim. affirm. countervailing duty determination).

19. *See* statues cited *supra* note 13.

Canadians wind up in the right place, but get there from the wrong direction. The American process is consistent with mutually agreed upon rules of adhesion to the General Agreement on Tariffs and Trade (GATT).[20] The private access to the government that the Canadians complain about is part of those rules. There is review of the decisions, albeit through a national process. There is the opportunity to take the decision to GATT, although such a provision is obviously not binding. There is also review of decisions within the United States and before the Court of International Trade. These procedures have a fair amount of due process. In fact, one of the things that the Canadians have complained about is the amount of process in terms of litigating these disputes. This situation, however, applies to United States companies as well as to Canadian industries, and United States industries must pay an amount about equal to what the Canadians or other countries have to pay in legal costs, with the sole exception of travel costs and perhaps some exchange rate problems.

There is merit, however, to the Canadian claim that these trade issues can be dealt with more appropriately through a form of alternative dispute resolution. The issues of subsidies, dumping, and injury are not clear-cut, easily resolved economic or legal concepts. There is a great deal of room for legitimate debate and argument over these issues. In United States law, the *Softwood Lumber*[21] case hinged on the question of whether the subsidy practices were "targeted" to the softwood lumber industry. In 1983, the International Trade Administration of the Department of Commerce decided that the subsidy practice was not targeted to softwood lumber because pulp and paper and other forest products industries enjoyed the same access.[22] In 1986, the Commerce Department found that the pulp and paper industry was part of the same forest products associations as the softwood lumber industry, and that the two industries negotiated with many of the same labor unions. The Commerce Department determined, therefore, that pulp and paper and softwood lumber were part of the same industry.[23] It is not at once obvious whether or not the pulp and paper industry and the softwood lumber industry are the same industry.

The *Groundfish* case,[24] which was decided in 1986, also greatly

20. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187. *See generally* K. DAM, THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION (1970); J. JACKSON, WORLD TRADE AND THE LAW OF GATT (1969).

21. Certain Softwood Lumber Products from Canada, 51 Fed. Reg. 37,453 (Int'l Trade Admin. 1986) (prelim. affirm. countervailing duty determination).

22. Certain Softwood Lumber Products from Canada, 48 Fed. Reg. 24,159 (Int'l Trade Admin. 1983) (final neg. countervailing duty determination).

23. Certain Softwood Lumber Products from Canada, 51 Fed. Reg. 37,456-57.

24. Certain Fresh Atlantic Groundfish from Canada, 51 Fed. Reg. 10,041 (Int'l

upset the Canadians. In this case, the International Trade Administration determined that a loan program benefiting the Canadian groundfishing industry constituted a subsidy. In a previous case involving pork,[25] such a loan program was held *not* to constitute a subsidy. The different result in each case hinged on a finding by the Department of Commerce that fishing is an "industry," but that agriculture is not.

There is room for reasonable disagreement on these points. There is a great deal of work that could be done in elaborating mutually agreed upon rules and definitions that would help to unravel conflicting unfair trade practices. These areas of disagreement need to be worked out because both sides will continue to subsidize, offering regional and local economic development incentives and a whole variety of government assistance programs. Some subsidies are more important than others. A successful policy would at least provide for such distinctions, identify essential needs, and circumscribe points of agreement.

The true difficulty resides in devising an appropriate structure for an alternative dispute resolution mechanism. There are a number of unresolved questions that will have to be answered if an alternative dispute resolution mechanism is going to be implemented as part of the free trade arrangement, assuming that a free trade arrangement is put in place. These questions involve access for private parties, the force and effect of the mechanism's determinations in domestic law, and the composition of the decisionmaking body. In addition, what will be the basis for decision in the alternative dispute resolution framework? Access to and discovery of evidence also need to be addressed in any proposed scheme. Will rules be fashioned on an ad hoc or a permanent basis? What effect will stare decisis have upon these rules?

In addition to advancing the ADR proposal to settle disputes arising from subsidation, Canada also proposed that below-market selling, i.e., dumping, issues be dealt with through domestic court adjudication. Each country would grant the other country's industries and companies access to its courts, and suits would be brought under the anticompetition laws of the country where a suit is commenced. Accordingly, predatory pricing and other practices, which are considered dumping under international trade laws and which are illegal under domestic anticompetitive laws, would be adjudicated domestically rather than internationally. That suggestion is related to the alternative dispute resolution mechanism that the Canadians have proposed, but it has a slightly different twist to it.

Trade Admin. 1986) (final affirm. countervailing duty determination).

25. Live Swine and Fresh, Chilled and Frozen Pork Products from Canada, 50 Fed. Reg. 24,097, 24,107 (Int'l Trade Admin. 1985) (final affirm. countervailing duty determination).

Finally, the position of the United States on all of these questions must be addressed. The United States history on the question of the binding nature of dispute resolution mechanisms is not a happy one. In the post-World War II period, when the current international trade mechanisms were being established, the United States led an attempt to establish an organization called the International Trade Organization (ITO). This organization was to function as a binding dispute settlement mechanism. The United States Senate, however, refused to ratify the treaty establishing the ITO.[26] Moreover, the United States Congress is not presently inclined to limit United States sovereignty in trade matters. The current trade agreement between the United States and Canada, if it comes to fruition, may, however, break new ground in the area of international alternative dispute resolution, particularly as it applies to trade. The trade talks bring this gray area of disputes between industries into an international arena that really has not existed before and should open up a whole new fertile ground for my colleagues in the legal profession to begin their plowing work.

Professor Wilner: I will address myself to the general proposition of the kind of settlement mechanisms that are available for either state-to-state or state-to-industry disputes in the context of the United States-Canada situation. There is a history of cooperation between Canada and the United States. At one time, there were treaties between the countries that established mixed arbitral claims commissions.[27] These treaties were allowed to lapse in the 1920's, but there still is that history of cooperation. There is also, of course, the International Joint Commission. There has been cooperation over a period of time to deal with the problem of the environment. Although no treaty has been forthcoming, the two countries held discussions out of which grew a uniform law, a model law, defining environmental injuries and providing access to courts. This model law has been put into effect in some states and at least one province in Canada, if not two. Both the United States and Canada are members of GATT. Although GATT has no dispute settlement mechanism as such, it has dispute settlement mechanisms. These mechanisms create the possibility of going to the contracting parties and having them make a determination about a problem or conflict. Even within GATT, there is at least a beginning, although unfortunately the ideal to which Dr. Colgan referred never came about.

We also have to throw into the hopper the experience of other trading groups. The multilateral system in the European communities may be too advanced for us to really consider adopting. The

26. C. WILCOX, A CHARTER FOR WORLD TRADE 153-60 (1949).

27. *See generally* S. LEA, A CANADA-U.S. FREE TRADE ARRANGEMENT: SURVEY OF POSSIBLE CHARACTERISTICS app. A (1963).

Europeans have a permanent court with supranational powers.[28] I doubt whether, at this stage of the game, either the United States or Canada is ready for that type of institution. There are, however, free trade agreements, in which certain dispute mechanisms are provided, between Australia and New Zealand on the one hand and the United States and Israel on the other hand. In the Australia-New Zealand situation, there is a commission which will appoint dispute settlement persons to deal with particular types of disputes relating to tariffs, unfair trade practices, and dumping.

This is all background to the particular kind of dispute that can arise, that is, a dispute in international trade. Such disputes are not unusual. Trade disputes between Canada and the United States and resentment on the part of one country of the national adjudicatory bodies of the other are not new to the two countries. How can one deal, then, with the existing problem?

We need to deal with the problem at two levels. At the interstate level, Canada and the United States could reach a variety of agreements. The nations might aim for an all-encompassing agreement at the outset or eventually reach such an agreement on a piecemeal, sector-by-sector basis by dealing with the problems in a composite of stages. We also might approach the problem in terms of an agreement with respect to certain aspects of trade such as tariffs, some nontariff barriers, or all nontariff barriers. Under any of these possibilities, however, the same question arises: do we leave it to the national authorities to decide the meaning of the agreement or do we find some mechanism to deal not only with the meaning of the agreement, but also with the settlement of disputes under a mutually accepted definition?

As to the meaning of the agreement, have the United States and Canada had experience on an interstate level with respect to dispute settlement? Recently, the United States and Canada settled an important marine boundary dispute through a chamber of the International Court of Justice.[29] Canada and the United States sat down together and in effect said: "We will choose a group of judges in whom we have confidence and ask them to make the decision for us." In some sense, this sort of recourse makes it easier than having American and Canadian delegates settle the dispute. Someone else has decided the controversy. In political terms, therefore, each government can justify the result to its public by saying: "Look, we went to this neutral body; they gave us the answer. We now must live with it. We have both agreed to abide by the decision of the International Court." This sort of recourse, however, will not work all the time. Not all disputes can be taken to the International

28. *See generally* D. WYATT & A. DASHWOOD, THE SUBSTANTIVE LAW OF THE EEC 25, 53-55 (1980).

29. *See* authorities cited *supra* note 2.

Court of Justice. The process is expensive and time-consuming and, of course, only states may appear before the International Court of Justice.

This means that we must decide what kind of system we will use both to define the agreement as between the two states and to deal with particular problems as they arise. One obvious method is the tried and true system of mixed arbitration panels. Panels could be composed of nationals of both countries with a neutral third party. Mixed arbitration is one way of dealing with construction of agreements and resolution of disputes, but it leads to adjudication. There might be other, nonadjudicatory methods of dispute settlement. I think we need to explore nonadjudicatory dispute resolution more fully. Adjustment in terms of discussions, beginning with negotiations and going on to consultations between the two states or the authorities of the two states, is an option. This process could be ongoing; not a process for the adjudicatory settlement of disputes, but a process for the adjustment of such disputes.

There is a possibility of creating a permanent United States-Canadian international trade court, which would consist of persons who would make specific findings. The decisions of the group would have precedential value, and this characteristic obviously would be very helpful. I have a strong feeling, however, that at this conjuncture, the establishment of such a court is ambitious. What we really need to do is to find the means for the adjustment of these specific disputes through a system that generates something less than binding decisions. There has been a lot of talk about the possibility of leaving dispute resolution ultimately to a sense of comity, i.e., the states' sense of the need to work together to make sure that disputes do not fester.

Dr. Colgan mentioned one thing that is very clear: unlike purely transnational commercial disputes, disputes between the United States and Canada or disputes among states cannot end the relationship between these states. Those relationships, especially in the case of countries like the United States and Canada, must continue. I think those relationships would be facilitated by the kind of mechanisms that would be based on the adjustment of the disputes. It is quite true that states cannot be obligated to carry out their international obligations, but there are, as GATT and other kinds of economic relationships show, many other ways for states to pressure each other to fulfill the obligations that each has undertaken or to turn to the mechanisms that each has agreed upon to bring about the kind of adjustment that I have been talking about.

This is merely the tip of the iceberg. The comments that were made by Dr. Colgan certainly are most stimulating and need to be addressed specifically. I understand that there is some hope that the Canada-United States agreement could be ready by September 1987. I think that is perhaps too optimistic. In the meantime, there

is still room for lawyers, economists, and for those in the industries involved to give their own input to make sure that the agreement is not merely pro forma, but actually works. I think it needs this adjustment mechanism for it to work.

Questions and Answers:

Comment: (Professor Trakman) There were two matters that came out of Dr. Colgan's discussion that I would like to comment on very briefly. These observations are not in any way intended as disagreement, but rather are intended to reflect a concern about the arbitral process.

Result determinism, I believe, has hampered alternative dispute resolution processes. When there is an identifiable dispute framework, there is a tendency among parties to seek the process that best furthers their political interests. Each party wants to resort to a process that increases the likelihood of a decision that is favorable to its interest. Accordingly, we may find that the choice of an alternative mechanism will be determined in large measure by the inclination of parties to propose a system, scheme, or process that they feel is most likely to favor their position. On this score, I found Professor Wilner's comments particularly interesting, especially the suggestion that there should be some externalization of dispute resolution remedies. Rather than rely upon the concept of country-appointed mediators or arbitrators, we should seek some external process, such as the International Court of Justice.

My principal concern is that, in the quest for a single ideal mechanism, choices will be reduced to one. As a consequence, some parties will be reluctant to accede and will thereby generate a dispute about the dispute mechanism. Such circumstances would defeat the whole purpose of international ADR, and the dispute resolving mechanism itself will become useless and of no practical consequence.

Response: (Dr. Colgan) I think the general notion that one will seek the dispute settlement mechanism that most favors one's interests is a valid one. The notion, however, can be considered from a variety of perspectives. In terms of constitutional principles, an ADR mechanism in a bilateral trade agreement between the United States and Canada would involve devising rules to accommodate restrictions and fundamental values on both sides. One can also look at ADR in terms of the existing process. The disparity in trade patterns leads Canada to seek a bilateral mechanism that will remedy perceived disadvantages in the current system. There are many more Canadian exports that are subject to a national determination within the United States than United States exports that are subject to a national determination within Canada. Canada, therefore, wants to establish an equivalency of status in a binding arbitration or a binding dispute settlement mechanism. At least, that is Canada's announced position.

The United States, on the other hand, seeks to preserve its advan-

tage by maintaining the status quo. I have tried to indicate that some industries would benefit from an alternative dispute settlement mechanism. Given the way trade flows between the United States and Canada, however, keeping the existing process, which is subject to the GATT rules, is not at all bad. I imagine that each side will try to seek its comparative advantage in the establishment of a new mechanism. The existing system works to the same end.

Response: (Professor Wilner) I have just a couple of points to make. With respect to the agreement between the United States and Canada, the parties can leave matters of interpretation to a neutral adjudicatory body, a chamber of the World Court in the Hague or a special panel. Once a particular dispute arises, however, policy judgments come to the fore, and the issues are no longer legal determinations. In these circumstances, a neutral system may well break down because it does not cater to the interest of at least one of the parties to have a system that does not take policy into account. Both sides probably would want to participate in ongoing policymaking with respect to the settlement of particular disputes in various sectors and industries. It would be unrealistic to exclude policymakers from the system for the adjustment of particular disputes because these adjustments will serve as precedents. For example, a decision that subsidies apply to softwood lumber but not in the fishing or corn industries has tremendous precedential value. I suspect that policymakers will not want to relinquish entirely their control over these matters.

It is unrealistic, therefore, to think in terms of a thoroughly neutral system of dispute settlement. Such a system must take into account the policy interests on both sides. Dispute resolution in this context is an ongoing and relatively fluid process. To give up decisionmaking authority over the cases would be to give up control, to an appreciable extent, over one's trade policy. Although the United States has a history of cooperation with Canada, the two nations will not do what members of the European Economic Community have done; we will not give a supranational entity, such as the Court of Justice in Luxembourg, power to decide specific policy for our governments.

Question: (audience) Is it fair to say that one of Canada's major concerns with any kind of dispute resolution system is that these processes essentially dictate Canadian domestic economic policy? Since Canada is so dependent on the United States market, does United States trade law ultimately determine to a large extent Canada's domestic policy?

Response: (Dr. Colgan) Yes, I think that is true in two senses. First, it is true that this point is a Canadian concern. The *Softwood Lumber* case and the *Groundfish* case to a lesser extent heightened this concern. It is also true that United States trade laws do affect Canadian domestic economic policy. That influence, however, is the

inevitable result of adherence to the subsidies code under GATT[30] and the recognition that domestic subsidies, i.e., subsidies not explicitly tied to exports, are a matter for discipline under the GATT code to the extent that there is injury to the importing country.

By way of qualification, let me say that the influence on Canadian domestic law is not an inevitable result. The impact depends upon the twin conditions of the existence of a subsidy and a resultant injury in the importing country. If both of these conditions occur, however, the existing rules provide that the importing country has the right to countervail, to attempt to offset the subsidy that is doing injury. This does not mean that the exporting country cannot decide to turn to other markets to sell its products or that it cannot continue its subsidy practices and try to deal with the issue in some other manner. In Canada's case, they do have a problem in both the lumber and fish industries because the United States is its major market, but that problem is distinct from rules alone. I think the Canadians are right, but I also think the situation results from the rules with which they have agreed to live.

Comment: (Professor Wilner) Of course, that is the United States interpretation of the subsidies code as it applies in this particular case.

Response: (Dr. Colgan) As it applies in this particular case, you are right. Canada has applied the same rules against United States corn that the United States has applied against Canadian fish and lumber. As long as those rules are applicable and as long as there is a fair amount of confusion and room for disagreement over them, I think that the problem is going to continue to arise.

Comment: (Professor Carbonneau) If one were to be cynical, one could argue that it does not matter what sort of dispute resolution mechanism is in place—adjudicatory, adjustment, or alternative—because sovereign discretion and interests are ultimately controlling. The mechanism, it seems, cannot modify sovereign authority in such a way as to achieve consensus. Perhaps the disagreement precedes the mechanism and the mechanism implements the disagreement. There are further continuing difficulties because of the absolute nature of sovereignty.

Response: (Professor Wilner) No, because once one recognizes that the mechanism must deal with the fact of clashing policies, one cannot ask one person to make the decision. There is the need for an adjustment between the states involved and, in a sense, both states are the judges of the controversy. If the parties act in good faith and want to continue their relationship—the United States and Canada in this particular case—their officials will come up with a response

30. *See* Fourth Certification of Changes to the Schedules to the General Agreement on Tarriffs and Trade, Apr. 20, 1979, 30 U.S.T. 6675, T.I.A.S. No. 9576.

in most cases. Adjustment between states *is* an alternative way of settling the dispute. The process is more than a means of self-help by one party's resort to national courts and more than a determination by GATT or some other international organization that there has been a violation. Each state is under a good faith obligation to deal with individual problems through adjustment because of clashing policies.

I think this is a method of settling disputes, although we might not like the method because we like to have definitive answers. The adjustment of disputes produces justice on both sides. In the *Softwood Lumber* case, justice is on both sides. Deciding the case on the basis of equity is just as difficult as deciding it on the basis of law.

Comment: (Professor Trakman) I completely agree with Professor Wilner's statement. I just want to make a comment in light of Professor Carbonneau's observation. There appears to be a basic conflict between the adversarial ethic in law and Professor Wilner's suggested method of dispute resolution. Our legal tradition insists on absolute results. That is, one side wins and the other side loses. Professor Wilner suggests that we look at a dispute not in terms of winning or losing, but in terms of equitably balancing diverse interests and considerations. The best solution is to change cultural attitudes and intellectual dispositions toward disputes.

Response: (Dr. Colgan) I think the basic issue involves the role of national sovereignty in a free trade agreement. I do not subscribe to the notion that Canada will be absorbed into the United States as a result of a free trade agreement. The volume of the economic relationship between Canada and the United States and the continual increase in the mobility of capital goods, services, and labor between the two countries during the post-war years, however, bring into issue the role of national sovereignty and supranational institutions in furthering and regulating what is in essence an integrated North American economy. Although that question goes beyond the perimeters of the present discussion because it is so fundamental, one could argue that it is the rock bottom issue upon which the consideration of alternative dispute resolution rests. Professor Wilner is absolutely right in what he is saying: in the long run, it might be useful to have a supranational court or another institution to deal with these issues. The volume of transactions between the United States and Canada and the possibility of a free trade agreement pose the question about the role of the nation-state in that kind of economic relationship.

Professor Carbonneau: The third part of the workshop, which Professors White and McEwen are going to address, involves the domestic role of alternative dispute resolution. Their inquiry will include a consideration of what has been done and what might be done in the domestic area and also a reference to the private and public international experience to determine whether the interna-

tional experience either informs domestic experimentation or can be informed by its domestic analogue.

C. *Panel on the Future Role of ADR.*

Professor White: First, I would like to refocus the perspective of our discussion. My experience pertains primarily to the nonconflictual resolution of international resource management issues. The perspective is not limited to any particular set of resources, but considers the full scope and role of institutional structures, precedent political relations, economic and cultural situations in the various nations, and legal perspectives. We have discussed the timber trade and alluded to the *Gulf of Maine* settlement in regard to water boundaries. Other issues in the international arena quite frequently revolve around the management and utilization of boundary lakes and rivers. In this regard, there is quite a bit of historical precedent in European relations with respect to international rivers. The European region is currently dealing with the major issue of air quality. Fisheries disputes are also quite common. Resource management concerns also extend to more unique issues: the allocation of space for satellites, radio wave frequency allocation, and treaties regarding the Antarctic and the moon.

I studied these issues to find the processes that were implemented when disputes arose and to understand what conditions led to successful resolution. As a resource economist, I was looking at a variety of questions: Is this a sustainable solution? Do the parties agree to it and agree to carry out its mandate? Is the solution successful in that it did resolve contention in the management of that resource? Did it address the salient question and, if at all relevant, was it used as a model for further relations between the various countries? Did the resolution set a precedent for similar management issues?

International resource management issues are complex. Quite frequently, they involve an aggregation of sub-issues that are brought to negotiation. The kinds of resolution processes involved are more akin to diplomatic settlement than to anything in the realm of arbitration. When we focused the international ADR discussion on arbitration, we assumed that the parties who might invoke the process were unable to come to a mutually satisfactory agreement by themselves. The recourse to arbitration, in this sense, may be a sign of failure. Other processes I have examined are very long-term methods of dispute resolution. In fact, participants quite often expect to commit ten to fifteen years toward the resolution of the issue. This time frame perhaps speaks to the complexity of the problem or perhaps to the inertia of the institutional structures, or possibly both.

For example, the United States-Mexico relationship with respect to water and irrigation rights in the lower Colorado River involves a

1944 treaty between the United States and Mexico.[31] Mexico interprets the treaty to include water quality, while the United States does not. The Kennedy administration was the first United States administration to take up the issue as an agenda item. An accord for the quality of these waters was not reached until 1972, and the estimated date for achieving an agreed upon level of water quality maintenance is 1990. In sum, the problem will take nearly thirty years to resolve, and the financial cost of the resolution already is substantial at this point. Generally, most nations that engage in this process perceive high costs to be appropriate because the process is an important part of the maintenance of ongoing relations with the bilateral or multilateral community.

My golden rule about the resolution process is that there is no golden rule. I think the arbitrative process is very often eclectic in that there is not necessarily a single procedural format. Many steps that generally apply are quite important. The first step is to define clearly the issues of contention between the parties. It often takes some time for one nation to recognize the validity of the other nation's claims. The second step involves the collection and verification of an adequate data base to support the negotiation process. Coalition building within each nation and across nations also takes place. In the context of environmental issues, for example, coalitions often are built bilaterally among citizen groups and nongovernmental organizations that enter the process and make judgments both about the quality of the information and the merits of the different arguments. The number of players in the process and their interactions expand over time. Quite often, there are pilot projects and feasibility studies that resolve some of the technological issues. These studies help to develop common principles that are accepted by the different parties, principles that may eventually result in a basic codification either through legislation or treaty law. These are obviously very lengthy processes, and in any of these steps there may be points of mediation or arbitration over particular elements.

In many cases, the issue that emerges affects small interest groups, communities, or economic segments such as farmers, fishermen, and lumbermen. Many of these issues can be formulated in terms of affected parties. Even though an issue is international, the perceived sources of the problem and of the solution might be local. The affected parties or locale may have a very different agenda for a solution than the nation-states that try to resolve the problem at an international level. A greater amount of factionalism and diversity among interest groups increases the complexities involved in reaching a solution. Arbitrations involving two well-defined parties can

31. Treaty Respecting Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, Feb. 3, 1944, United States-Mexico, 59 Stat. 1219, T.S. No. 994.

take place relatively quickly. Also, European nations have a great deal more difficulty resolving issues than South American, Central American or African states, since the latter tend to be much more authoritarian when dealing with such issues. The broad democratic approach tends to develop a lasting structure for reaching solutions, however, because more key players are involved in the process. This characteristic enhances the commitment to resolution.

Of somewhat greater relevance are the institutional structures that contend with resource management issues. Quite often, there is no recognized or applicable institutional structure with which to manage these issues. The structures emerge in a vacuum between nations, particularly in the developing world. States reinvent the wheel each time they address an issue of this kind. In many of the developed nations and in some of the developing nations, there are institutional structures that readily assume authority over some of these questions. Despite problems of this nature, institutional structures tend to provide a procedural forum and a recognized authority to clarify and deal with issues, providing stability and rationality in the solution-achieving process.

Questions of parity among the players in terms of incentive to solve a problem are very significant. If both parties are equally affected by a particular issue or perceive the effects of a particular issue equally, they can move more smoothly towards a resolution than if one party must convince the other to come to a settlement. Both parties must feel that they have reason to resolve the problem. In the circumstances of the Colorado River controversy, Mexico was negatively affected by the water quality problem, but the United States was not. The states did not achieve a satisfactory resolution of the water quality issue until a parity of interest was established upon the discovery of a vast quantity of natural gas in Mexico. The United States wanted to import natural gas from Mexico and the two issues became merged.

With respect to European air pollution questions, Sweden initially took the leadership role as spokesperson for the group of nations that advocated controlling nitric oxide emissions throughout the European community. Germany led the opposition, which consisted of France and Great Britain. At that stage, Germany did not believe that it was harmed by nitrous oxide emissions. More recently, however, Germany attributed the dramatic decline of its forests to air pollution and joined forces with those nations that called for action. More recently, Great Britain began to see itself as an equally interested player because it has noticed a decline in its bird population.

The issue of trade between the United States and Canada fits into this context. Canada perceives the trade problem differently from the United States simply because there is no true parity in the positions of the partners. Although the two nations have a great deal in common culturally, the United States, being the dominant party,

does not perceive that some of these issues are urgent from a Canadian perspective. With respect to the law of the sea, many commentators stated that the United States did not fully participate in the final resolution on the Law of the Sea Convention[32] because it saw itself as being placed at a disadvantage by the Convention. A smooth resolution of international resource management issues requires that both nations or all nations involved have an equal interest in the resolution of the problem.

The Director of the Institute for European Environmental Policy recently stated that international action can be characterized basically as governments making rules for themselves and that this simplicity renders the system unstable and promotes state inaction. He further stated that one solution is to make international arrangements more complex, to make cross-linkages for agreements and bilateral acts very complex.[33] That may explain why the United States and Canada are in a good position to resolve some of these issues. The two countries have a wealth of interactions on the political, cultural, and international security levels, i.e., a full range of cross-relations. None of the trade issues is likely to cause a collapse in those relationships or lead to inaction. We have problems, however, when we are dealing with nations with which we have a dearth of cross-actions. Trade with developing countries, for instance, is much more precarious. This is perhaps a reason to strive towards establishing many ways of dealing with dispute resolution.

Professor McEwen: My experience has been chiefly as a mediator in the Maine court system, working with small claims and domestic relations cases. My research deals with mediation of small claims cases in the United States and community dispute resolution in San Francisco.

Professor Carbonneau asked me to address two major questions dealing with the relationship between domestic and transnational dispute resolution. Does the international experience teach us anything about domestic dispute resolution? The answer is no. Does the domestic experience teach us anything about international dispute resolution? The answer is yes.

Although these answers require elaboration, my time is limited and I will adopt a hit-and-run strategy that borders on the adversarial by challenging some of the working assumptions of today's discussion.

The phrase alternative dispute resolution raises the question: "al-

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32. United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, U.N. Doc. A/CONF. 62/122, *reprinted in* 21 INT'L LEGAL MATERIALS 1261 (1982).

33. Address by Konrad von Moltke, Former Director of the Institute for European Environmental Center, Acid Deposition Conference (Sept. 12, 1984, New England Center, Durham, N.H.)

ternative to what?" In some of the discussion, the question is more properly whether there is *any* dispute resolution, not what the alternatives are. Arbitration in this context is seen as something new and as an alternative. Arbitration, however, may be part of the problem to which we are seeking alternatives, rather than an alternative that will lead us to a better day. In the discussion of the Canadian experience, arbitration sounds very much like formal adjudication. Concerns about cost, time, formal procedures, and unpredictable outcomes of arbitration are raised in the domestic context. Given the problems, parties might not resort to arbitration very frequently. One problem with the ADR movement is that people somehow think of alternatives, such as arbitration and mediation, and limit their choices to these processes.

Absent from much of our discussion has been a careful discussion and examination of negotiation. Negotiation is a fundamental ADR technique used both domestically and internationally to resolve contract disputes. In fact, the most common way of resolving disputes is through some kind of negotiation process. I think we need to know a lot more about negotiation, that is, how it is carried out in the international context and how it is flavored and shaped by formal procedures such as resort to national courts or to arbitration.

Why are we interested in ADR? Dispute resolution in different contexts raises different problems. In domestic ADR, there are a whole series of problems, and the kinds of solutions one seeks depends upon the definition of the problem. In the international context, does case load pressure—a driving force behind the resort to ADR in the domestic context—exist? Courts are interested in ADR because they can rid themselves of small claims and domestic relations cases. Or is international ADR concerned about a lack of access to justice, i.e., means by which conflicts can be aired quickly, cheaply, and fairly? Do rules need to be clarified? If the absence of agreed upon rules is a problem, mediation, for example, may not be the best solution because its methodology tends to keep those rules hidden. Moreover, mediation procedures do not set precedents. In different areas, whether interstate, private party, corporate, or industrial disputes, there may be different definitions of the problem. We need to move toward a clear definition of issues and of actual problems before we can talk more clearly about ADR and appropriate future directions.

Let me move to a series of more specific questions concerning the kinds of techniques and the issues related to choosing or designing techniques for dispute resolution. The most prominent question pertains to the incentives for parties to get involved in dispute resolution. To what degree are these incentives built into the dispute itself and into the relationships between parties? Let me list four or five incentives. As a matter of policy, one needs to ask to what degree are these incentives manipulable and to what circumstances are

these incentives applicable.

If parties are suffering equally, it has been suggested, there is a greater incentive to go forward toward resolving the dispute than if only one party is affected. What incentive is there for one party to get involved at all if the problem is solely another party's loss? Professor White suggested that parties could move across areas of conflict in order to arrive at a position of parity and a context that is riper for dispute resolution. For example, if Switzerland is suffering because a lake has been polluted by France, maybe there are things that Switzerland is doing in other areas that cause pain to the French. Can the parties bring these grievances together rather than confining dispute resolution to narrow topics, avoiding one-sided loss and thereby creating an incentive for both parties to voluntarily resolve the dispute?

Another incentive is the continuation of a relationship between the two states. Parties or nation-states have an interest in continuing relations with one another. To what degree is the continuity of the relationship placed in jeopardy by nonresolution? Is the factor of continuing relations also applicable to private contractors? Community pressure, i.e., pressure from those in the community who suffer from the lack of resolution, might constitute another incentive for resolution. In the Iran-Iraq War, for example, both parties are expending enormous sums of money, but they are also driving up the price of oil. Their conduct affects the world community. To what degree can the world community bring pressure to bear on the disputing parties to resolve their dispute? In the old-fashioned small community, mediation was a prominent dispute resolution technique. Pressure from kin and other community members compelled parties to go forward to resolve their disputes. To what degree can one create or mobilize such mechanisms in the international business or political community?

The major driving force for alternative dispute resolution in the domestic context is the threat of an uncertain judgment by a third party. One party unilaterally sets in motion a court proceeding. Neither party knows what the ultimate outcome of the proceeding will be. To control conflict, one party threatens to impose a loss on the other party. We have a litigation process that becomes a shadow in which alternative dispute resolution takes place. What are the shadows in the international sphere? Perhaps arbitration casts such a shadow. Are there any shadows thrown by formal dispute resolution processes in the international community? In the domestic context, the characteristics of legal adjudication often drive the parties to more informal dispute resolution.

There are a whole series of issues relating to the question of representatives in the dispute resolution process. If one takes my experience with small claims and domestic relation cases, the people who are engaged in the dispute resolution processes are the actual dispu-

tants. In so many of the international cases that have been described, the issues have been left to and argued by legal representatives. To what degree might dispute resolution processes be more effective if chief executive officers dealt head-to-head with one another, rather than employing attorneys to work out the dispute in a more removed setting? Face-to-face dispute resolution between the key decisionmakers might facilitate decisionmaking through more informal procedures.

The concern about parties and representatives leads to a consideration of awkward cases. How does one devise an informal process where private parties and representatives of larger interest groups are involved? Can these varied perspectives be reconciled? In an important critique of settlement, Professor Owen Fiss argued that settlement was a bad idea in part because so many cases involve large groups.[34] Who empowers individuals to represent those large groups, to negotiate for them, and to commit them to settlement? This is a major issue in environmental cases: self-appointed representatives of the public interest negotiate away everyone's right to clean air. Are these circumstances in which adjudication or arbitration might provide better remedies? There, a third party makes a binding decision and this relieves the problem by removing the responsibility for representing and making binding decisions for others.

Professor Carbonneau: Thank you, Professor McEwen for what I think is an appropriate way to conclude the presentations. I think you have raised a lot of very appropriate questions. As one who is interested in seeing ADR processes come about, I think lawyers look at ADR seriously because of the adversarial ethic. The adversarial ethic is irrational in its conception and, therefore, it does not achieve very efficient or salutary dispute resolution results. I think the analogue to that deficiency in the international commercial sphere is the need for neutrality. Domestic courts are inappropriate when the parties involved in the dispute are of different nationalities.

At the end of this discussion, I am struck by the diffuse nature of ADR and the magnitude of the challenge to find a generic framework for ADR mechanisms and contexts. I am also impressed by the extreme necessity and the tremendous difficulty of adopting an interdisciplinary perspective on these problems. Lawyers will look to their bottom-line consideration: Who has authority to make a decision? Who will adjudicate and on what basis? Sociologists and economists, in contrast, will look at the problem from an entirely different vantage point.[35]

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