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PRIVATIZING DISPUTE RESOLUTION UNDER THE FREE TRADE AGREEMENT: TRUTH OR FANCY?

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Replete with evidence of extensive forum shopping, unending discovery procedures, and countless delays in the formal adjudicatory process, the case for an alternative, more specialized medium for the resolution of trade disputes between the United States and Canada has grown more pressing. The problem, however, is in being convinced that the alternative, embodied in the proposed Canada-United States Free Trade Agreement,[1] addresses the deficiencies in the existing medium for dispute resolution without introducing greater social and personal costs of its own.[2]

A government, in distancing itself from dispute resolution, also separates itself from the process through which social problems are resolved. Either it accepts that exclusion as impotence or it seeks to control the decisional process itself. The risk in both cases is to raise rather than reduce the cost of disagreement. The harm is that the inter-governmental agreement, formulated for resolving disputes, will actually encourage disputes. This problem is accentuated when the process of disagreement shifts from the differences between governments to differences between their "private" surrogates, i.e., between arbitrators who decide disputes in place of governments.[3] The conflict is also extended when panels of experts from whom arbitrators are chosen represent their nation state rather than the "rightful" claims of each disputing party.[4] Whether or not this perception

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1. Canada-United States Free Trade Agreement, Jan. 2, 1988, *reprinted in* 27 INT'L LEGAL MATERIALS 281 (1988) [hereinafter Free Trade Agreement]. For the Canadian publication of the Free Trade Agreement, see CAN. DEP'T OF EXTERNAL AFFAIRS, THE CANADA-U.S. FREE TRADE AGREEMENT (1988) [hereinafter CAN. DEP'T OF EXTERNAL AFFAIRS, Free Trade Agreement].

2. On the proposed Canada-United States Agreement from the Canadian perspective, see CAN. DEP'T OF EXTERNAL AFFAIRS, Free Trade Agreement, *supra* note 1; CAN. DEP'T OF FINANCE, THE CANADA-U.S. FREE TRADE AGREEMENT: AN ECONOMIC ASSESSMENT (1988).

3. *See* Free Trade Agreement, *supra* note 1, art. 1807 (panel arbitration and procedures).

4. The proposed Free Trade Agreement does seclude arbitrators, at least formally, from the political requirements of their nation states. Panels of arbitrators are not expected to advance the views of either party in making their awards. Their membership at large is, however, determined by the parties as distinct from institutions apart from them. *See id.* In addition, the Canada-United States Trade Commission, respon-

is wholly justified in fact, reality lies in the eyes of the beholder.

The effect, in each case, is to add mistrust to the process of dispute settlement itself. This occurs when decisionmakers threaten the supposed objectivity of the settlement process; or when they decide on the basis of politics masquerading as conflict avoidance.[5] Their neutrality grows increasingly suspect when they are expected to understand the particular political and economic interests of each party and yet never be biased by that understanding to the detriment of either. Knowledge of each party's interests or aspirations is to serve only as a means towards an objective choice, not a way of displacing that choice for more partial ends.[6]

This paper has two essential objects: first, to address the divide between political and strictly legal resolutions of inter-governmental disputes and, second, to consider the benefit of the private commercial mechanism of arbitration in relation to a seemingly "public" dispute. The goal is to assess the extent to which "private" arbitral remedies can effect solutions between nations that previously employed diplomatic channels or protracted litigation.[7]

I. STEREOTYPES OF FREE TRADE

Perceptions of free trade, government assistance, and unfair competition are all too often based on stereotypes. Largely unquestioned, the stereotypes reside in a static view of commercial adventurism and in a fixed sense of competitiveness. Canadians engage in social welfarism; Americans have resort to free market opportunism. Canadians highlight their cultural and economic mosaic. Americans

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sible for supervising the panels, itself consists of representatives of both parties. Indeed, the principal representative to that Commission is "the cabinet-level officer or Minister primarily responsible for international trade, or their designees." *Id.* art. 1802, para. 2.

5. The requirement that panels of arbitrators be chosen by the parties and be nationals of one or the other party, *see id.* art. 1807, *supra* note 4, displaces one of the central advantages of international commercial arbitration. Drawing arbitrators from diverse nationalities widens the perimeters of social and legal choice and diminishes the risk of national biases. In impeding this diversity, the proposed Free Trade Agreement is deficient. *See generally* Mendes, *International Commercial Arbitration: A Critical Evaluation*, in THE PEACEFUL SETTLEMENT OF DISPUTES 122 (1984).

6. For a discussion of a distinctive "arbitral jurisprudence," see Carbonneau, *Rendering Arbitral Awards with Reasons: The Elaboration of a Common Law of International Transactions*, 23 COLUM. J. TRANSNAT'L L. 201 (1985); Carbonneau, *Arbitral Adjudication: A Comparative Assessment of Its Remedial and Substantive Status in Transnational Commerce*, 19 TEX. INT'L L.J. 33 (1984).

7. For a discussion on the distinction between commercial arbitration and litigation, see generally de Vries, *International Commercial Arbitration: A Contractual Substitute for National Courts*, 57 TUL. L. REV. 42 (1982); Kerr, *International Arbitration v. Litigation*, 1980 J. BUS. L. 164; Ribicoff, *Alternatives to Litigation: Their Application to International Business Disputes*, 38 ARB. J. (n.s.), December 1983, at 3.

stress their rugged individualism.[8]

Supporting these stereotypes is the perception in the United States that the Canadian government engages in unfair trade practices by providing subsidies to its industries, companies, or subjects.[9] In contrast, the de facto assistance that the United States provides to its local constituencies supposedly falls short of unfair competition because it purports to promote competition in the long term.[10]

Another stereotype is that, by constraining inter-governmental "action," the proposed Free Trade Agreement protects Canadian interests from political subordination to the United States. The preamble to Chapter 18, prepared by External Affairs, Canada,[11] for example, maintains that

> binding settlement of disputes over trade . . . will make Canada an equal partner in the resolution of disputes and provide for fair and effective solutions to difficult problems. Canadians will know what the rules are and can be confident that they will have a voice in how they will be applied.[12]

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8. *See Canadian Activists in Solidarity against Trade Bill*, Wall St. J., Apr. 24, 1987, at 11, col. 3.

For a discussion of the particular relationship between Canadian and American societies, see Lipset, *Revolution and Counter Revolution: The United States and Canada*, in CANADA: A SOCIOLOGICAL PROFILE 24 (2d ed. 1971).

9. *See generally* A. WILSON, CANADA-U.S. FREE TRADE AGREEMENT (Economics Division, Congressional Research Service Issue Brief No. IB87173, Feb. 8, 1988); W. NISKANEN, STUMBLING TOWARD A U.S.-CANADA FREE TRADE AGREEMENT (Cato Institute Policy Analysis No. 88, June 18, 1987). This perception of a "hands on" approach adopted by the Canadian government is evidenced, more globally, in the Uranium Information Security Regulations, 3 Can. Consol. Reg. ch. 366, at 2347 (1978) (in Atomic Energy Control Act). There an American court sought to acquire sensitive documents concerning Canadian involvement in the International Oil Cartel. *See also Re* Westinghouse Electric Corp., 78 D.L.R.3d 3 (1977). For a general discussion on the use of subsidies, countervailing duties and dumping in international trade, see G. HUFBAUER & J. SHELTON ERB, SUBSIDIES IN INTERNATIONAL TRADE (1985); Butler, *Countervailing Duties and Export Subsidization: A Re-emerging Issue in International Trade*, 9 VA. J. INT'L L. 82 (1969).

10. William Niskanen, Chairman of the Cato Institute, for example, stresses that Canadians "perceive correctly that the growing protectionist sentiment in the United States has led its government to implement legal trade remedies more aggressively and to put extralegal pressure on other governments to impose 'voluntary' export restraints." W. NISKANEN, *supra* note 9, at 15. *See also* A. WILSON, *supra* note 9, at 8. Notwithstanding lip service to the contrary, "administered protection" of trade practice was implicit in American governmental policy well before the proposed Free Trade Agreement. *See* Finger, Keith, Hall & Nelson, *The Political Economy of Administered Protection*, 73(3) AM. ECON. REV. 452 (1982). *See also* A. RUGMAN & A. ANDERSON, ADMINISTERED PROTECTION IN AMERICA (1987). For a discussion on arbitration as a distinctively "American" institution, see J. AUERBACH, JUSTICE WITHOUT LAW? 95-114 (1983); J. COHEN, COMMERCIAL ARBITRATION AND THE LAW (1918); F. KELLOR, AMERICAN ARBITRATION 125-63 (1948).

11. CAN. DEP'T OF EXTERNAL AFFAIRS, Free Trade Agreement, *supra* note 1, ch. 18, at 259-60 (preamble).

12. *Id.* part VI, ch. 18 (preamble) (parenthesis omitted).

Conflicting with this view is the Canadian perspective that the United States will continue to dominate trade settlement either by dictating the mechanisms for dispute resolution or by directing the process of decisionmaking once it is instituted.[13] The Canadian fear of American domination is reinforced by stressing the disproportionately larger population and gross national product of the United States. The stereotype includes the picture of subtle statist pressures being brought to bear on a Canadian government that is subdued at the "bargaining" table. The comprehensive image is of Canada as an economic satellite of the United States, politically subjugated and economically dependent upon it, at best a middle power acting according to the directives of a superpower. Applied to the Free Trade Agreement, "[t]he primary barriers are the United States' record of indifference to Canadian concerns and Canada's record of extraordinary sensitivity about its independence from the United States."[14] The proverbial icing on the cake lies in the perception of Canada as a neophyte in commercial arbitration. Only recently exposed to arbitration in international trade, Canada is perceived as a potential victim, suffering at the hands of a sophisticated adversary.[15]

The expectation, then, is that the Canadian government would keenly support the dispute resolving mechanism in the proposed agreement because it is modeled upon private law neutrality. The United States, in contrast, would seemingly desire to perpetuate the

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13. This domination is likely to occur, for example, if the United States government is able to have a disproportionately greater impact upon "consultations," as prescribed by article 1804 of the Free Trade Agreement. Article 1804 states, "Either party may *request* consultations regarding any actual or proposed measure . . . that it considers affects the operation of this Agreement . . . ." *Id.* art. 1804, para. 2 (emphasis added). Giving force to this "request" is the further expectation that "[t]he parties shall make every attempt to arrive at a mutually satisfactory resolution of any matter through consultations under this Article . . . ." *Id.*

14. *See* W. NISKANEN, *supra* note 9, at 1. *See also* D. DEWITT & J. KIRTON, CANADA AS A PRINCIPAL POWER (1983); P. LYON & B. TOMBLIN, CANADA AS AN INTERNATIONAL ACTOR (1979); CANADIAN FOREIGN POLICY SINCE 1945: MIDDLE POWER OR SATELLITE (1969).

15. This problem is accentuated by Canada's recent adoption of the New York Convention on Foreign Arbitral Awards. Indeed, Canada is the last of the major industrialized powers to adopt it. France ratified the Convention in 1959; the Soviet Union in 1960; Japan in 1961; West Germany in 1967; the United States in 1970; and Great Britain in 1975. On Canada's adoption of the Convention, see United Nations Foreign Arbitral Awards Convention Act, 1986 Can. Gaz. ch. 21. *See also* Chaisson, *Canada: No Man's Land No More*, 3(2) J. INT'L ARB. 67 (1986). For a general discussion on the Convention, see Roth, *Application of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 8 FORDHAM INT'L L.J. 194 (1984); Sanders, *A Twenty Years' Evaluation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 13 INT'L LAW. 269 (1979); Trooboff & Goldstein, *Foreign Arbitral Awards and the 1958 New York Convention: Experience to Date in the U.S. Courts*, 17 VA. J. INT'L L. 469 (1977).

status quo. Each would be motivated by self-interest, not altruism. Affirming each position would be the apparent "logic" of strategic action. A nation that has more to gain from the political resolution of differences is more likely to seek continuation of the political process and to exclude a more neutral, private law system of arbitration. In contrast, a nation, like Canada, that has more to lose than gain from the unequal negotiation of settlements is more likely to favour a non-political forum, institution, or process in which to resolve its disputes.[16]

The problem with these stereotypes, however, lies precisely in their typecast classifications. Each trade relationship is abstracted to a unified national spirit. Each nation is seen to possess distinctive qualities that demonstrate its superiority or inferiority in relation to the other.

In reality, each national stereotype is unduly simplistic since the inferences drawn from each is not necessarily exclusive nor logically determinate.[17] The composite picture is a generalization that rationalizes ex post facto the views of the interpreter. The hard evidence identifies many national differences of degree that fall short of disparities of kind. Thus Canada, not unlike its American counterpart, is built in some measure upon principles of market economics. Both economic systems, in turn, accept economic welfarism as at least one requisite of the good life.[18] Attributing a fixed national character to

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16. This anxiety is at the core of debate in Canada over the general acceptance of international commercial arbitration. *See First International Trade Law Seminar: Proceedings* (Department of Justice, Canada, October 1983). The proceedings are introduced thus: "The Canadian businessman or woman who sets out for the first time to test the murky waters of international business would undoubtedly be shocked by the myriad of complexities that come into play in his dealings with business people from foreign states." *Id.* at v. In fairness, however, the introduction adds:

> However, the relatively low levels of forecasted economic growth throughout the world and increased competition for sales, along with the increasing complexity and sophistication of world trade practices, make it essential that Canadian business, if it is to compete successfully in the sphere of international trade, adapt itself quickly to the rules of international business.

Id. at 5. For a discussion of Canadian "attitudes" towards international trade arbitration, see Brierley, *International Trade Arbitration: The Canadian Viewpoint*, in CANADIAN PERSPECTIVES ON INTERNATIONAL LAW AND ORGANIZATION 826 (1974); Chaisson, *supra* note 15; Mendes, *Canada: A New Forum to Develop the Cultural Psychology of International Commercial Arbitration*, 3 INT'L ARB. 71 (1982).

17. Recent literature increasingly recognizes the superficiality of the stereotyped differences between Canadian and American cultures. In particular, the stereotype of Canada as a mosaic of tolerated differences is complicated by inequalities in its indisputably multi-ethnic and multi-religious communities. *See* E. KALLEN, ETHNICITY AND HUMAN RIGHTS IN CANADA 155-63 (1982); TWO NATIONS, MANY CULTURES (2d ed. 1983); L. Driedger, *Conformity vs. Pluralism: Minority Identities and Inequalities*, in MINORITIES AND THE CANADIAN STATE 157 (1985).

18. Thus Canadians often accept free trade as an inherently rational constituent of market economics, see *supra* note 16; while Americans draw attention to a history

trade relations decontextualizes the functional nature of trade itself. The effect is to ignore that successive governments, whether Canadian or American, are not commensurate in political ideology with their predecessors. Changes in government inevitably alter political positions, including the attitudes displayed by governments towards dispute resolution itself.

Whatever is depicted as the xenophobia of the United States or the subservience of Canada, the nature of binational trade is far more eclectic and certainly far less representative of a unified national identity. Given the cultural similarity, geographic proximity, and economic interdependence of Canada and the United States, it would be strange indeed if national differences were elevated to irreversible differences of kind.

II. COMPROMISE OR CAPITULATION?

Dispute resolution between Canada and the United States is constrained by a mutual faith in a medium of settlement that both believe satisfactorily represents their interests. The belief that one nation state, Canada or the United States, will somehow gain more than the other from the proposed agreement on dispute resolution is tenable only so long as *both* identify an even more pervasive common benefit that accrues to each as a result of employing it. This identification entails the conviction that agreement over the mechanisms for dispute resolution advances the substantive ends that each nation state seeks. In addition, these ends are expected to surpass the mere process that is used to resolve particular disputes between them. The proposed agreement thus identifies as its "basic objectives" the need "to promote fairness, predictability and security by giving each Partner an equal voice in resolving problems through ready access to objective panels to resolve disputes and authoritative interpretations of the Agreement."[19]

The endorsement by either the United States or Canada of a panel of arbitrators to settle disputes is no more than a means by which each believes that its preferred conception of justice will likely prevail. "Justice" is measured variously, as the immediate minimization of economic loss for one or the other, or more abstractly, as advancing trust and cooperation between them. Most often, arbitration is favored for promoting informality in decision-

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of "contingent protectionism" in the United States. *See, e.g.*, A. WILSON, *supra* note 9, at 5; W. NISKANEN, *supra* note 9, at 15. For a discussion on the apposition between "pure" capitalism and social welfare in the United States, see J.K. GALBRAITH, AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER (1952); F. KNIGHT, INTELLIGENCE AND DEMOCRATIC ACTION (1960); J. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY (1942).

19. CAN. DEP'T OF EXTERNAL AFFAIRS, Free Trade Agreement, *supra* note 1, ch. 18, at 258 (preamble).

making, while avoiding costly and protracted litigation.[20] To this is added the benefit of an international hearing before a binational tribunal that has authority to make binding awards.[21]

Consequently, the case for inter-governmental agreement on dispute resolution, first and last, is directed at reducing the costs of disagreement. In seeking to satisfy their different interests, the goal is to disappoint neither party ex ante in order to benefit the other ex post. Reducing economies of scale in dispute settlement assumes that each believes that the mechanisms for their reconciliation of difference favors neither party ab initio at the expense of the other. The need is to find a common denominator in the mechanics of decisionmaking that, in negative terms, is not unacceptable to both.

III. PUBLIC ACTION, PRIVATE REMEDY

Idealized dispute resolution often rests on the ability to "objectify" trade relations, both between nation states and among their private and artificial subjects. The supposition is that a formally reconstituted method of dispute resolution assures each nation state that its differences can be resolved by impartial and detached means. This objectification is reflected in the choice of panels of arbitrators under the Free Trade Agreement. "In all cases, panelists shall be chosen strictly on the basis of objectivity, reliability and sound judgement and, where appropriate, have expertise in the particular matter under consideration."[22] In particular, in distancing itself from the forum of decisionmaking and by relying upon third-party intermediaries, each government presumably ceases to be directly responsible for decisional consequences that favour or disadvantage a particular segment of its society.[23]

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20. For a discussion on the advantages of informal proceedings in relation to, inter alia, commercial arbitration, see R. ABEL, THE POLITICS OF INFORMAL JUSTICE (1932); J. FOLBERG & A. TAYLOR, MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION (1984). *See also* Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637 (1976); Thensted, *Litigation and Less: The Negotiation Alternative*, 59 TUL L. REV. 76 (1984). For a discussion of the cost advantages of arbitration, see Franaszek, *Justice and the Reduction of Litigation Cost: A Different Perspective*, 37 RUTGERS L. REV. 337 (1985); Karrer, *Arbitration Saves! Costs: Poker and Hide-and-Seek*, 3 J. INT'L ARB. 35 (1986); Perlman, *The Prevention and Resolution of Disputes in International Business Transactions: An Overview*, in PRIVATE INVESTORS ABROAD—PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS IN 1984 163 (1984).

21. *See* Bager, *Enforcement of International Commercial Contracts by Arbitration: Recent Developments*, 14 CASE W. RES. J. INT'L L. 573 (1982); Thieffry, *The Finality of Awards in International Arbitration*, 2 J. INT'L ARB. 27 (1985).

22. Free Trade Agreement, *supra* note 1, art. 1807, para. 1.

23. Compulsory arbitration under the Free Trade Agreement further excuses each party from decisional responsibility. The Agreement specifically mandates arbitration in relation to disagreement over the interpretation and application of its safeguard provisions, *id.* art. 1103, as well as in respect to all other disputes where both parties

The private model of international commercial arbitration is reinforced by the conception of a "global village"[24] in which faith is placed in the universality of social and business practice. Domestic courts are mistrusted as embodiments of an indigenous and self-interested good, separated from the commercial attributes of international transactions.

This separation between governmental actor and legal remedy is often rationalized in political terms. Fearful of accentuated mistrust and disharmony between governments, a "private" method of dispute resolution seemingly isolates the decision itself from the government that advances it. Responsibility for unpopular results thereby shifts from the government to a third-party panel that supposedly is autonomous of the government that is responsible for its initial appointment.[25] Applying the private law model to United States-Canada disputes, each party bows out of the remedy of self-help. Each finds solace in the belief that a third-party forum, an arbitration panel, settles disputes to the exclusion of governments. These arbitrators, in turn, determine the nature of party rights, without attempting to recreate them in light of either party's political interests.

This simulation of statist inaction is reconstituted in non-political terms as a practical and logical necessity. First, a "private" arbitral method of dispute resolution is chosen because pre-existing inter-governmental settlements have failed to produce satisfactory results. Second, the "private" method dispels the "public" ill that gave rise to it. Public solutions are sacrificed in order to shield those who are actually harmed from the political interests of those who would exploit them through a public medium of settlement.[26]

The private law method stresses the sanctity of a priori rights that each party possesses. These are treated as indisputable facts, lacking normative qualities that do not already inhere within them. Thus inter-governmental disputes are resolved according to the rights of actors who are most immediately affected and, conceivably, most seriously harmed by unfair trade practices. Arbitrators are neutral as between disputants, objective in regard to their rights, disinterested in their interests, and unimpeded by external barriers erected by

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mutually agree. *Id.* art. 1806.

24. The construction of the "global village" was originated in Canada by Marshall McLuhan. *See* M. MCLUHAN & Q. FIORE, THE MEDIUM IS THE MESSAGE 66-68 (1967).

25. For a discussion of the requirements for the panels in the Free Trade Agreement, see *supra* notes 4-5.

26. This "privatization" of arbitration does not displace its "public" role in providing an allegedly trusted and reliable method of resolving differences in bilateral and multilateral trade. *See generally* J. WETTER, THE INTERNATIONAL ARBITRAL PROCESS: PUBLIC AND PRIVATE (1979). *See also* Ettinger, *The Public Relations Value of Arbitration*, 2 ARB. J. (n.s.) 304 (1947).

governments to impartial settlement between them.[27]

Privatizing the medium by which inter-governmental disputes are resolved raises the fear that governments will manipulate the "private" process. They will either hide beyond the neutrality of the decisional process, or will attempt to activate it in their favour.[28] In both cases the risk is that public-as-politics will continue to dominate decisionmaking. Being largely free to decide when to grant access to the dispute resolving forum, the harm to farmers, fishermen, or low income consumers will flow from the willingness of governments to support the claims of others who are politically better connected. The ultimate harm is that each government will seek to recreate a "private" process wholly in its own image. Not only will the "private" process derive from a pre-selected public interest, the arbitral method will become a creature of government. Arbitrators will mirror an immediate political will, nothing more, and perhaps a great deal less. These fears, however, display a false faith in the capacity of a private law system to redress all the ills of a public regime. In particular, the fear is based on a tenuous distinction between free will and sovereignty, and ultimately, between public and private.

IV. Sovereign Versus Private Will?

Central to the private-public divide is the separation between the sovereignty of governments and the private will of individuals. Private trade relations are depicted as a condition of autonomy in which individuals seek their self-determination as persons, apart from states, and free from public shackles. The principle of consent, in particular, establishes that individuals decide with whom they wish to trade, on what terms, and subject to what constraints. In idealized terms, the private agreement commences and ends with the subject, whether the transaction is domestic or transnational. The agreement embodies personal free choices in respect of which governmental restraints are ancillary. Disputes are resolved between the parties in light of rights that they exercise freely and independently of all others, including governments.[29]

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27. *See supra* text accompanying note 22.

28. *See supra* text accompanying notes 22-23. *See also supra* note 5.

29. This follows the classic model of "free trade" in transnational dealings. Governments raise barriers to a trade that is already encumbered by geographic, political, linguistic, and cultural barriers. The seeming solution is to recreate a process of dispute resolution that is regulated more by shared commercial usages than by institutionalized rules of law. In historical terms, resort was had to the practices of merchant courts administering merchant law. Modern international arbitration owes much of its development to such medieval developments. *See generally* R. Lopez & I. Raymond, Medieval Trade and the Mediterranean World (1961); L. Trakman, The Law Merchant: The Evolution of Commercial Law 7-44 (1983); Berman & Kaufman, *The Law of International Commercial Transactions* (Lex Mercatoria), 19

Following this thesis, governments possess a priori rights that they, too, exercise freely in relation to all other persons, including other governments. Moreover, their rights cannot be denied them, except by due process of law.[30] Privatizing the inter-governmental dispute therefore perpetuates a mystique of private-style justice. Public solutions are transformed into private ones. Rather than construct public remedies ex post facto, private remedies exist ex ante as established rights, proven by established procedures.[31]

In practical terms, however, the divisions between private and public models of dispute resolution are overstated. In particular, they fail to appreciate the interface that exists between freedom of contract in inter-personal relations and sovereignty in inter-governmental affairs. Governments act much like individuals. They enter agreements, represent particular sectors of society in their actions, and express their economic preferences according to a selective rather than a general will. Their sovereign wills, like an individual's will, are discriminate. They choose whom to represent, when, and to what extent. They speak for some, but *not* for all of their subjects. They have recourse to a selective rather than an absolute freedom of action: and in so acting, their conduct resembles individual acts of free will.

Private agreements are *not* wholly consensual any more than governments are wholly sovereign. Sovereign acts of governments are based, at least in part, on individual interests, just as individual rights are themselves the product of the sovereign will of governments. Thus, private rights are bolstered by the institutional support that is provided them by public institutions. The perfected autonomy of the subject is preserved by the sovereign's willingness to impose legal restraints upon those who would otherwise impede that autonomy.

Similarly, like individuals, governments freely sacrifice their sov-

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HARV. INT'L L.J. 221 (1978); Goldstajn, *The New Law Merchant*, [1961] J. BUS. L. 12; J. Honnold, *The Influence of the Law of International Trade on the Development and Character of English and American Commercial Law*, in COLLOQUIM ON THE SOURCES OF THE LAW OF INTERNATIONAL TRADE 70 (1964); Trakman, *The Evolution of the Law Merchant: Our Commercial Heritage*, 12 J. MAR. L. & COM. 153 (1981) (Part II: The Modern Law Merchant).

30. These contentions are based on the presumption that governments, in contracting as individuals, acquire the rights of individuals. This presumption is somewhat undermined by the converse condition, namely, when individuals, particularly artificial persons, act as governments.

31. This model of public will, reconstituted as private will, is built upon the tradition of liberalism, in particular, deontologic liberalism. *See* J. RAWLS, A THEORY OF JUSTICE (1971). *See also* B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980); B. BARRY, THE LIBERAL THEORY OF JUSTICE (1973); R. DWORKIN, LAW'S EMPIRE (1986); R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977). *But cf.* A. MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY (1981); M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982).

ereignty by agreement, just as individuals forfeit their rights by acts of will. In endorsing the proposed Free Trade Agreement, for example, each government surrenders its sovereignty to a binding mechanism for dispute settlement beyond itself, to apply in futuro.[32]

Ultimately private will acquires its content from governmental sovereignty, while sovereignty hinges upon private will. Neither is independent of the other. Social action is based on the mutability of both the sovereignty of governments and the consent of individuals.

To reconstitute disputes between industries as wholly "public" because they are represented by government is to ignore their "private" roots in commerce, industry, welfare and labor. Each form of dispute, including its resolution, reflects the symmetry, as well as the asymmetry, of public and private interests that exist beyond purely private rights. No one interest is necessarily complete in itself. No one concern usurps all others.[33]

Actions by nation states, classically, are public only because states are formally constituted to represent a plurality of others beyond themselves. More realistically, however, "public" embraces any action that addresses interests beyond the instant parties, whether they be individuals or groups. Confining "public" to acts of state is formal only, since it bypasses multiple relations that affect parties that are not immediately associated with one another. A promisor—whether it be a private person, corporation, or government—that refuses to perform in respect of a particular customer on grounds of performance difficulty often influences the well-being of others who rely upon that performance. The promisee is forced to decline to perform in relation to its sub-purchasers; its employees risk losing their jobs; creditors are threatened with default, etc. Only in relational terms is the relationship between promisor and promisee separated from others. Their "private" relations are public. The refusal to perform in response to one impacts upon others.[34]

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32. This flies in the face of a classical view of democratic theory in which sovereignty is conceived of as absolute, inalienable, and indivisible in nature. The reality suggests otherwise. Sovereignty is repeatedly divided between arms of government, among federal, provincial, and local governments, and between governmental and non-governmental institutions. This rationale is readily extended to international relations in which governments sacrifice components of their autonomy for some perceived common good that includes, but supersedes, each of them. *See generally* A. BENTLEY, THE PROCESS OF GOVERNMENT (1967); J. BRIERLEY, THE LAW OF NATIONS (6th ed. 1963); R. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956); A. DICEY, LAW OF THE CONSTITUTION (8th ed. 1926); C. LINDBLOM, THE INTELLIGENCE OF DEMOCRACY: DECISION MAKING THROUGH MUTUAL ADJUSTMENT (1965); G. MARSHALL, PARLIAMENTARY SOVEREIGNTY AND THE COMMONWEALTH (1957).

33. For a discussion on the public-private divide in general, see Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980); Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982); Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358 (1982).

34. This argument is best depicted as a comparison between individual relation-

Similarly, arbitration awards are seldom disassociated from their social consequences. Each award affects, not simply the parties, but buyers and suppliers in general, indeed, industries and economic communities at large. Commercial arbitrators who decide "private" corporate cases seldom restrict themselves exclusively to the fixed rights of immediate parties. Corporate affairs are local, regional, even national in nature. To ignore the social context in which "big business" is conducted is to constrain decisions to an incomplete frame of reference. To confine that frame to very specific disputes, parties and issues, to the exclusion of all else, is to superimpose finality upon a wholly partial process. It is to find finite solutions in the face of potentially infinite differences.[35]

In the sense that "private" decisions transcend absolute and predetermined rights, forcing choices among them, they are public. In that regard the privatization of the inter-governmental agreement on free trade can never be perfected—nor, arguably, should it be.

V. JUSTIFYING PRIVATE REMEDIES

Any assumption that disputes between Canada and the United States cannot effectively be resolved by private means, therefore, is based upon an artificial notion of private, and upon a false divide between the private and the public realm. This falsity stems from the belief that decisionmakers can somehow determine private rights as objective facts rather than as speculative beliefs. This image is most suspect in positing that "private" methods of deciding cases are founded upon principled methods of reasoning, absent subjective justification, while public methods are directed solely at perpetuating the political interests of each public actor.[36]

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ships and communal associations. Communities, including political unions, are constituted by individual relationships. The converse, however, is equally true. The actions of communities also constitute individual relationships. Thus governments are not simply organizations that bring subjects into mutual relationships. Governments actually constitute those relationships. For a discussion on "relationalism" as applied to agreements, see Macneil, *Economic Analysis of Contractual Relations: Its Shortfalls and the Need For a "Rich Classificatory Apparatus,"* 75 NW. U.L. REV. 1018 (1981); Macneil, *Power, Contract, and the Economic Model*, 14 J. ECON. ISSUES 909 (1980); Trakman, *Winner Take Some: Loss Sharing and Commercial Impracticability*, 69 MINN. L. REV. 471 (1985). *See generally supra* note 32.

35. For a discussion of the effect of diverse "interest" upon commercial arbitration, *see generally* R. MCLAREN & E. PALMER, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION (1982); THE ART OF ARBITRATION (J. Schultsz & A. van den Berg eds. 1982); A. WALTON & M. VITORIA, RUSSELL ON THE LAW OF ARBITRATION (20th ed. 1982); G. WILNER, DOMKE ON COMMERCIAL ARBITRATION (1984); Salter, *International Commercial Arbitration: The Why, How and Where*, 88 COM. L.J. 381 (1983).

36. This view is readily evidenced in analytical legal positivism, in the stress placed upon the unity of law as the principled medium through which rational legal thought is expressed. *See generally* J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 168-327 (1970); H. KELSEN, PURE THEORY OF LAW 1-54 (1967); L. WITTGEN-

The private allusion—or better still, illusion—is reflected in the belief that arbitrators, not unlike courts, decide international commercial disputes according to principles that center on rights. Each party is entitled to the benefits of those rights. No one other than the right-holder is free to usurp them. This image of a private method is extended further by allowing decisionmakers to establish "first principles." These protect private rights from social interests that would otherwise displace them, whether such intervention emanates from the state or from other private actors.[37]

Not reckoned with is the realization that so-called "principled" decisionmaking is itself subjectively constituted. The decisionmaker, in order to reach a final result, must accept the virtue of at least one of two alternatives. To decide in favour of Canada is not only to decide against the United States; it is also to establish some normative justification for electing between the two countries in the first place. Once the decisionmaker has constructed a formula for selecting between private rights, the rights chosen are enforceable only because the tribunal so maintains. The rights do not have qualities which naturally inhere within them. Arbitral choices, then, are based on policies and policies, in turn, decide "first principles," not vice versa.[38]

A belief in the purity of the processes by which decisions are reached flows from the myth that legal results speak for themselves. This assumes, falsely, that just results are inherent in the objective means of arriving at decisions. Free from statist leanings, arbitration is depicted as the embodiment of procedural fairness. As such, it is isolated from the substantive prejudices of nation states, free from their biases, and the predilections of their courts, but never impeded, it seems, by its own personal leanings. The arbitrator is presented inevitably as a minion of the system. Lacking in autonomy she decides as the process of decisionmaking directs, not as the creator of that process.[39]

STEIN, PHILOSOPHICAL INVESTIGATIONS (3d ed. 1967). This faith in a principled methodolgy is also reflected in conventional theory, particularly as faith in the coherence of a system of legal ordering. *See* R. Dworkin, *My Reply to Stanley Fish (and Walter Benn Michaels): Please Don't Talk About Objectivity Anymore*, in THE POLITICS OF INTERPRETATION 287 (1983); Dworkin, *Law As Interpretation*, 60 TEX. L. REV. 527 (1982); Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982).

37. According to this thesis, rights are predetermined on the basis either of a divine or a logical order. They are fixed in the subject-as-individual, not in an external human agency. Moreover, as a plurality, they constitute, rather than are constituted by, the good. *See* M. SANDEL, *supra* note 31, at 15-103.

38. *Id.*

39. *See generally* Higgins, Brown & Roach, *Pitfalls in International Commercial Arbitration*, 35 BUS. LAW. 1035 (1980); Kerr, *Arbitration and the Courts: The UNCITRAL Model Law*, 34 INT'L & COMP. L.Q. 1 (1985). For a discussion of the purported neutrality of arbitration, see Glick, *Bias, Fraud, Misconduct and Partiality of the Arbitrator*, 22 ARB. J. 161 (1967); Hunter & Paulsson, *A Code of Ethics for Arbitra-*

The reality is otherwise. Arbitrators chosen to decide inter-governmental disputes do not realistically make awards in the absence of preconceived ideas about the responsibility of governments to economic groups or individuals, and vice versa. Nor can nor should they feasibly ignore the relationship between the remedy sought and the economic or political consequences that will likely flow from it. Rights are contextualized, and the right-holder becomes one interested person or group among a number of other interested persons or groups. The choice is not between a separate government or private actor. The claim by the United States or Canada that particular trade practices are unfair hinges upon the decisionmakers' perceptions that those practices have negative qualities within specific industries. They affect identifiable commercial and consumer groups as well as governments. The claim to softwood lumber or lobster fishing "rights" hinges upon different perceptions of lumber and fishing practices, including explanations for them and the perceived harm that flows from them. Desiring to win translates into a belief in the social virtue of winning.[40]

The interpretation of a government subsidy or unfair competition is judged by a pre-selected standard of permissibility. Each standard is constituted according to the interpreter's views of justified forms of private and public action within *that* context, as *that* interpreter comprehends it. The "private" arbitral remedy does *not* exclude the political solution. The substantive rationale behind each award is "affected" by each arbitrator's views on the nature and effect of wrongfulness, harm, and liability. In addition, their views have a cumulative impact upon the decisional context itself.[41]

The function of arbitral awards therefore resides *not* in a fixed medium, but in different degrees of receptiveness of arbitrators to particular claims. Arbitral decisions are contingent upon the social conditioning of arbitrators and their acclimatization to and respect

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tors in International Commercial Arbitration?, 1985 INT'L BUS. LAW. 153.

40. For a discussion on the softwood lumber and Atlantic groundfish disputes, see Rugman & Porteous, *The Softwood Lumber Decision of 1986; Broadening the Nature of U.S. Administered Protection*, 1 REV. INT'L BUS. LAW 35 (1988); Rugman & Anderson, *A Fishy Business: The Abuse of American Trade Law in the* Atlantic Groundfish *Case of 1985-1986*, 13 CAN. PUB. POLICY 152 (1982).

41. This contextualization of decisionmaking is based on a belief, inter alia, in a social unity that derives from recognizing differences in social, including economic, practice. Legal unity derives, not from rules that are directed to attaining homogeneity in human relations, but from the endorsement of diverse methods of determining economic interest. This approach is readily illustrated in the evolution of commercial practice before merchant courts well prior to the development of modern arbitration. Thus the "law merchant" was modeled upon commercial usage. Legal institutions were rooted in commercial institutions, and procedures before them reflected economic demands before formal legal requirements. This thesis has been carried over into modern commercial arbitration. *See* L. TRAKMAN, *supra* note 29, at 7-44. See in general the references cited in *supra* note 29.

for the dispute mechanism itself. They are affected by their personal and professional experience, whether as lawyers, accountants, or laborers, and whether as political, religious, or family members. They are influenced by the capacity of each party to communicate to them a different conception of history, cause, and harm. Indeed their awards hinge upon their professional and personal reactions to those very communications. The legal effect of Canadian or American subsidies is thus the product of contingent choices that particular arbitrators choose to make. They are *not* conclusions that must necessarily be drawn from specific government relations and practices.[42]

As a potentially diffuse body, panels of experts, at best, are unified by their differences. Their strength as a panel lies in their capacity to find more than a single right answer based upon their otherwise disparate conception of the human good. The Free Trade Agreement does *not* neutralize their differences. Rather, dialogue over rights and interests likely shifts to accommodate their differences. Those differences, in turn, shift to accommodate the Agreement.

VI. A DEFENCE

The privatization of dispute mechanisms in inter-governmental agreements is neither contradictory nor, indeed, in conflict with trade practice. The public or private classification is no more magical than the divide between "sovereign" government and contractual "free will."[43]

The resistance to private methods of settling disputes between governments occurs instead on a wholly different level. The consternation is that through mediated solutions, governments will lose autonomy over their affairs in relation to other "sovereigns" or even in respect to their own subjects. The converse fear is that by acting "for" industry, governments will regulate industry. Both qualms introduce the peril that the Free Trade Agreement ultimately will result in an "arbitration within an arbitration," with panels assuming adversarial roles in relations among their own members.[44] This

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42. On the subjective medium of decisionmaking in alternative methods of dispute resolution, including arbitration, see Delgado, Dunn, Brown, Lee & Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359. *See also* Galanter, *Reading the Landscape of Disputes: What We Know And Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983).

43. *See supra* text accompanying notes 28-29.

44. For a discussion of adversarialism in relation to litigation, see S. LANDSMAN, THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE (1984); J. LIEBERMAN, THE LITIGIOUS SOCIETY (1981); *Litigation in America*, 31 UCLA L. REV. 1 (1984). For insightful commentary on the consequences of a "litigation explosion," see M. DOMKE, COMMERCIAL ARBITRATION 10-12 (1968); Galanter, *The Legal Malaise; or, Justice Ob-*

threat is most conspicuous in the latitude given to arbitrators to establish their own procedures[45] and in the comparative absence of express mechanisms to resolve internal dissension. The cost advantages of arbitrating inter-governmental disputes, in such circumstances, is offset by the potential cost of arbitrating itself.[46] In this respect, institutionalized private arbitration, such as occurs before the American Arbitration Association, among other tribunals, offers a better developed framework to guide decisionmaking.[47]

The dread of privatized dispute mechanisms is fueled further by a suspicion that the process of decisionmaking will be directed, not by common law rules that endorse, inter alia, sovereign immunity, but by the personal predilections and nuances of arbitrators. The risk is expressed as a cost of mistrust. The threat is the recycling of disagreement at an arbitral level. The harm is the diminished credibility of both panels of experts and governments who decide to bring or not to bring claims before those panels for "questionable" political reasons.[48]

These fears are based upon the somewhat overstated incongruity between public and private methods of dispute resolution. This is especially so in asserting that the sovereign power of the state is wholly different in nature from the power of the individual to represent herself. The private world is not sacred, any more than the world of government is representative of every conceivable social stratum. Private life is not confined within itself, broken off from all other worlds, nor is it separate from third parties, including governments. Nation states like Canada and the United States are restrained in their domestic actions by their private actions as con-

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served, 19 L. & Soc'y Rev. 537 (1985).

45. *See* Free Trade Agreement, *supra* note 1, art. 1807, para. 4.

46. The Free Trade Agreement provides, for example, that the parties should have "the opportunity to provide written submissions and rebuttal arguments," *id.*, and "[w]here feasible . . . afford the Parties opportunity to comment on its preliminary findings of fact prior to completion of its report." *Id.* art. 1807, para. 5. The potential effect, as in commercial arbitration, is to reconstitute a litigious framework in which adversarialism displaces principles of amiable settlement. *See generally* Branson & Tupman, *Selecting an Arbitral Forum: A Guide to Cost-Effective International Arbitration*, 24 Va. J. Int'l Law 917 (1984); McLelland, *International Arbitration: A Practical Guide for the Effective Use of the System for Litigation of Transnational Commercial Disputes*, 12 Int'l Law. 83 (1978).

47. For a discussion on the American Arbitration Association, see R. Coulson, Business Arbitration — What You Need to Know 121-37 (3rd ed. 1986); Meade, *Arbitration Overview: The AAA's Role in Domestic and International Arbitration*, 1 J. Int'l Arb. 263 (1984). *See generally* International Commercial Arbitration in New York (1986).

48. For a discussion of the pitfalls commonly associated with international commercial arbitration, see Ehrenhaft, *Effective International Commercial Arbitration*, 9 L. & Pol'y Int'l Bus. 1191 (1977); Fletcher, *Unrealized Expectations — The Root of Procedural Confusion in International Arbitration*, 2 Int'l J. Com. Arb. 7 (1985); Higgins, Brown & Roach, *supra* note 39.

tractors, and in their public affairs by the so-called sovereign will of other nation states who interact with them. Each "sovereign" seeks its own self-determination in multilateral and bilateral relations. Outside of such bilateral relations, governments compete with private and public actors in the marketplace of ideas, trade, or industry.[49]

Neither public nor private methods of dispute resolution provide a wholly self-determined framework in which disputes are settled. The sovereignty of governments, such as the United States and Canada, is no more absolute than the rights of "private" players who happen to reside or be incorporated within one or the other jurisdiction.

Within this construct, the "private" method of dispute resolution in the Free Trade Agreement is acceptable only because it embodies public imponderables. No matter how seemingly objective the procedural instruments are that are employed to decide cases, normative choices of a "public" nature inescapably influence the "private" process of decisionmaking.

VII. CONCLUSION

Surrendering inter-governmental disputes to a panel of experts does not jettison all subjective means of deciding cases. Rather, the subjective debate over just entitlement shifts from the constrained priorities of governments to the normative predilections of panelists-come-arbitrators.

Once decisionmakers themselves accept that specific decisions follow from normative choices, the barrier between private and public grows tenuous. Arbitrators themselves recognize that rights exist, not a priori, but in their capacity and willingness, as decisionmakers, to identify them. The intent to displace an amorphous bureaucracy with third-party arbitrators gives rise to the bureaucracy of arbitration itself.

Arbitration under the Free Trade Agreement is likely to produce three primary changes in binational trade. First, dispute resolution will likely be formally, but not substantively, reconstituted as supervision of binational trade shifts from state to arbitral institutions. Second, social interest groups will reformulate rather than forego strategic action in seeking to influence the process of decisionmaking. Third, arbitrators will be influenced variously by deference to state authority in the Canadian Tory tradition, by a preoccupation with social democracy, as well as by a faith in the autonomy of the individual citizen. Ultimately, arbitral awards will be affected as much by a desire to reformulate the process by which justice is dispensed as by a wish to secure substantive moral ends through it.

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49. *See supra* text accompanying notes 30-32.

Arbitrators probably will have considerable difficulty in reaching a consensus under these circumstances. They will be hard pressed to make awards in terms of either strict legal "rights" or more flexible social interests. They will often be expected to decide according to "formal" legal entitlements. They will, however, disagree upon the substantive justification for each entitlement on account of differences in their normative beliefs.

No one suggested that the method by which arbitrators reach decisions would be easy. Nor, surely, should we expect otherwise. Privatizing the method of dispute resolution in the Free Trade Agreement does not suddenly reduce complex multi-party interests into fixed, a priori rights, no matter how vividly we might dream.