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My mission in this paper is to draw upon what we know from the active and lively domestic dispute resolution movements in the United States, Canada, and beyond to identify some of the prospects for and potential problems in developing a dispute resolution system for Canadian-United States trade disputes.

Alternative dispute resolution (ADR) is flourishing in the 1980's. Increasing numbers of individuals as well as public and private programs identify their work as alternative dispute resolution. These include private mediation practitioners, ADR partners in major law firms, private organizations such as EnDispute, which will arrange mini-trials and other dispute resolution processes for corporate clients, and Maine's own public court mediation service, one of the pioneers in using court connected mediation in small claims and divorce disputes. Professional schools have incorporated dispute resolution teaching into their curricula, and training conferences for attorneys and others on dispute resolution topics abound. Attendance is increasing at national meetings such as those of the Society for Professionals in Dispute Resolution, and at the same time journals, newsletters, books, and articles about negotiation and mediation are proliferating. All of these signs suggest that the practice of domestic dispute resolution is prospering.[1]

The prospects for a thoughtfully designed dispute resolution system operating with regard to Canadian-United States trade issues would appear to be equally promising and, in light of the other papers in this symposium, even more necessary. Such an international system, however, should avoid some of the mistakes made in the domestic movement and must confront some special challenges.

Despite its promising outlook, domestic ADR activity suffers to some degree from its misleading name. What, afterall, is *alternative* dispute resolution? The movement appears to define itself in opposition to litigation and adjudication in the courts. Such a definition is problematic on several counts in the domestic context, however, and even more confusing in the international arena.

First, this implicit oppositional self-definition may tend to alienate some members of an important class of professionals whose training and identity are built upon the virtues of litigation and traditional adjudication. It would seem wise to avoid gratuitously in-

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1. *See, e.g.*, S. GOLDBERG, E. GREEN & F. SANDER, DISPUTE RESOLUTION (1985); Pearson, *An Evaluation of Alternatives to Adjudication*, 7 JUST. SYS. J. 420 (1982).

sulting the very attorneys who typically serve as the gatekeepers to the dispute resolution process.

Second, the ADR title, with its implicit rejection of litigation and adjudication, could further imply that the aspirations of the formal legal system may be dismissed or bypassed in the search for alternatives. Many would rightly disagree. Owen Fiss argues against settlement, for example, because it prevents the judicial process from working to articulate and clarify rights and principles of law, an essential societal function.[2] Others note that the quest for informality that so often drives ADR threatens the fairness of proceedings between parties of unequal power or resources and undermines the capacity of the less powerful to make law on their own behalf.[3] In theory, at least, formal legal proceedings empower the weak and diminish inequality before the bar of justice.[4] Thus, in its apparent rejection of adjudication and its implicit rejection of the aspirations of formal justice, ADR generates a series of powerful criticisms along with articulate and influential enemies.

Third, the ADR label fails to acknowledge what we all know—that much dispute resolution occurs in the context of litigation. For example, on many occasions, negotiated and mediated settlements occur as the case proceeds toward adjudication. In fact, much, probably most, dispute resolution occurs through negotiation, a form of bargaining that typically takes place in "the shadow of the law."[5] ADR somehow suggests radically new departures and discontinuity with the past when it is typically only an extension of a very strong tradition of informal dispute resolution.

Finally, the name, "alternative dispute resolution," is particularly misleading when applied to international dispute resolution. At least in the domestic context, the implied contrast to litigation and adjudication in state or national courts gives meaning—albeit somewhat misleading—to the word "alternative." In international trade, however, that contrast is far less clear. The formal procedures themselves are still evolving. Arbitration, often viewed as part of ADR in the domestic setting, may be one of the increasingly formal and inaccessible procedures for which alternatives are sought in the international arena.

All this is to point out what should be obvious: dispute settlement procedures are indeed interconnected, and adjudication of some form (this includes arbitration) plays a fundamental role in these

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2. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

3. *See, e.g.*, Abel, *Contradictions of Informal Justice* in 1 THE POLITICS OF INFORMAL JUSTICE 267 (R. Abel ed. 1982).

4. *But see* Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y 95 (1974).

5. *See* Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

interconnections. We must not forget adjudication's key role in domestic dispute resolution, especially when contrasting the situation of international trade where the nature of adjudication is unclear at best. In fact, precisely because one cannot take for granted the presence of a powerful adjudicatory body in the international context, it is important to acknowledge explicitly the virtues of adjudication in domestic disputing. Only with that more complete understanding can one begin to build a workable international system where adjudication's role may be somewhat different from what it is in the domestic context.

The importance of adjudication results in part from the paradox that at some point it may appear unavoidable to one or more parties (that is, one party can always hale another party into court by filing a suit) and that under most circumstances all parties wish to avoid it. Thus, on the one hand, the presence of adjudication serves to bring a reluctant party into the dispute settlement process. On the other hand, because of its uncertain outcome, costs, delay, and public character, the threat or initiation of litigation often prompts settlement negotiations or sets in motion other processes such as mini-trials or mediation when they are available. The prospect of adjudication indeed casts a long shadow on the domestic dispute settlement process.

At the same time, adjudication uniquely serves to develop and clarify rules and rights, thereby creating a body of law. As a public process, adjudication can also engage the interests of the state in decisionmaking. It is also presumably authoritative and final, thus leading to decisions where none are possible through consensual processes. In this sense, adjudication also removes the burden of decision from parties—especially governmental bodies—who, for political reasons, may find it difficult to compromise and settle, for fear that they will appear to sell some of their constituents down the river. As a consequence of these factors, adjudication serves an important role for the few cases that proceed to judgment and the many which do not.

An opposing view in the debate on the role of adjudication is the belief that many disputes are not readily susceptible to adjudicatory decision. In many conflicts there may be justice on both sides and no clear governing principle to guide a binding decision. Some sort of mechanism that allows for mutual accommodation and recognition of conflicting but valid interests should ideally be available under these circumstances. It will do little good in these instances to impose a principled decision that alienates one or both of the parties and may make future use of the forum less probable.[6]

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6. *See, e.g.*, Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637 (1976); Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1979); Fuller, *Mediation—Its Forms and Func-*

Our theories, experience, and occasional bits of empirical research suggest, in fact, that consensual processes—either mediation or negotiation—serve parties in conflict particularly well by accommodating conflicting rights and interests, by reconciling parties in conflicting relationships, and by binding parties to an agreement. Consensual processes also allow one to avoid some of the absurd procedural elaborations that are requisite when the process is in some sense formal and authoritative. Yet we also know that the advantaged party in a conflict seldom enters into consensual processes unless threatened with the prospect of adjudication.

Knowing then that mediation, negotiation, mini-trials, and the like cannot be understood and certainly cannot be put into effect without examining their close dependence upon adjudication, one must refrain from seeking a single, optional alternative for dispute resolution for international trade conflicts and from making facile and potentially misleading extensions from domestic ADR to the international context. Rather, in thinking about the future of international trade dispute resolution, one must endeavor to develop a more or less rational *system* of interconnected processes that recognizes both the vital role of adjudication and the reality of its ambiguous status in international trade disputes.

In addition to acknowledging the special character of international dispute resolution institutions, one must design such a system with a view towards the particular qualities of the kinds of cases and parties involved in international trade disputes. Because empirical research on these disputes appears to be lacking, we can only speculate on some of these characteristics.

First, international trade disputes often involve governments directly or indirectly as parties to the conflict. International economic relationships are matters of important public policy concern. Disputes about these policies, and their application may arise between states. Private disputes may also have implications for the implementation of these policies. In theory, adjudication would appear to be the dispute process best suited to developing and clarifying a body of rules and precedents.

Second, international trade disputes, like domestic commercial disputes, often involve parties with continuing relationships—national or state governments or private businesses with continuing mutual interests and contractual ties. When these bonds are present, the mutual hope to continue a relationship provides an incentive to enter into dispute resolution without being forced to do so by suit. When continuing ties are not present, however, the threat of adjudication is a powerful incentive to bring parties to the table to resolve their dispute.

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tions, 44 S. CAL. L. REV. 305 (1971).

Third, disputes about policies or their application have a political life and visibility that may, under some circumstances, make it particularly difficult for them to be resolved consensually through negotiation. As Professor Wilner pointed out in our workshop last May, such compromise may be perceived as selling a local industry short and thus may be politically unpalatable.[7] Under such conditions a binding decision by a third-party can take government officials off the hook.

Despite these features, most of which suggest the need for adjudication in the international trade arena, accessible third-party agencies which use a commonly shared set of rules, principles, and precedents for adjudication appear to be lacking. Instead, we have multiple court and rules systems creating the possibility of simultaneous pursuit of cases in several forums. What then can be done to build a dispute resolution system without first having constructed an adjudicatory process to which one can then append "alternatives"? In fact, given the domestic experience, one might ask whether non-adjudicatory dispute processes could operate effectively in the international trade sphere without there being the long shadow cast by a single, strong adjudicatory mechanism. Perhaps the shadows of multiple courts serve the same function. Another important question is whether the proposed binational panels of Chapters 18 and 19 of the pending Canada-United States Free Trade Agreement will serve this same function?[8]

I suggest two answers to these questions. First, one might devote substantial energy to developing these panels or some form of joint United States-Canadian trade court. At the same time one would want to recognize the desirability of supporting and encouraging consensual settlements outside this formal process and, thus, design a system of mediation or conciliation that would operate in its shadow. The existence or nonexistence of such a formal body should have significant implications for the arrangement of other dispute resolution mechanisms.

Alternatively, one might think of trade arbitration as the already available adjudicatory process to which many parties bind themselves contractually, and design ways both to strengthen arbitration and to make more accessible, rapid, less costly, and less formal mechanisms available for dealing with the problems of increasingly formal arbitration procedures. In the workshop last spring, Professor Trakman pointed out a series of difficulties with trade arbitration

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7. *Alternative Dispute Resolution in International Trade and Business*, 40 MAINE L. REV. 225, 245-46 (1988) [hereinafter *Alternative Dispute Resolution*].

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

that were reminiscent of the critique of courts made prominent by the domestic ADR movements: adjudication in courts is often tightly bound by procedural rules, preceded by costly discovery, punctuated by long delays, and burdened by extreme costs.[9] Can arbitration be restructured so that it works more effectively for parties, serves the broader public interest, and casts a longer shadow in which other nascent processes may work?

It is important to underline that any adaptations of arbitration and additions of other ADR techniques—essentially private processes—would have to take account of the special need in international trade conflicts to engage public policy concerns appropriately. When national sovereignty and international trade agreements or policies are implicated in the private disputes of parties, how should policymakers enter into the dispute resolution process? If arbitration, mediation, negotiation, or even mini-trials are private, how can public concerns be raised and policies established and clarified? Does this mean that any dispute resolution system that evolves must build in mechanisms for the participation of representatives of state, provincial, or federal governments? How would such participation be received by private disputants and how would it shape their use of the system?

The answer to these questions depends in part upon the answer to another, which it seems to me is the essential one to which we must return: What in fact is the character and frequency of trade disputes between the United States and Canada and between businesses and individuals across national boundaries in general? How are these currently pursued? If we are to do more than theorize about what dispute resolution systems are needed, we must take a rather careful inventory of disputes and dispute processes. This analysis must be undertaken in order to learn how the parties to these disputes currently perceive the alternatives they face and how they choose among the alternatives in order to deal with their conflicts. Dispute resolution must be designed not so much in terms of procedures, rules, and court decisions, but in terms of the needs and interests and strategic choices of disputing parties.

Clearly, I have far more questions than I have answers. The domestic experience with dispute resolution grows out of creative efforts to deal with perceived shortcomings of a formal adjudicatory system, but its success depends, paradoxically, upon the strength and character of that system of adjudication. International trade disputes occur in a rather different context. One cannot simply transport practices from domestic to international application with-

9. *Alternative Dispute Resolution, supra* note 7, at 234-35.

out recognizing those differences and understanding their implications. This Conference has made an important beginning in this ambitious task.