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Food Fight: An Appraisal of the Fruit and Vegetable Dispute Resolution Corporation[†]

Tammy Smith*

INTRODUCTION

Large trucks filled with perishable goods from Canada, Mexico, and the United States cross national borders making deliveries to fellow NAFTA countries. Although this shipment process is vital to the agricultural industry, adequate dispute resolution has historically been lacking when problems arise. Finding existing laws in Canada, the United States, and Mexico inadequate to address these problems, a NAFTA Advisory Committee recommended the creation of the Fruit and Vegetable Dispute Resolution Corporation (FVDRC) in Canada.

This Article examines what motivations compelled NAFTA members to enact Article 707, a provision that mandated the creation of the Advisory Committee on Private International Disputes Regarding Agriculture (Advisory Committee).¹ Part II describes the circumstances in Canada that led to the FVDRC's creation. Parts III and IV briefly recount the difficulties challenging agricultural producers in the United States and Mexico. Parts V and VI describe the creation of the FVDRC and the methods through which it resolves claims. Part VII analyzes the long-term feasibility of the FVDRC and Part VIII discusses the obstacles facing acceptance of the FVDRC in Mexico.

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1. See FVDRC, EXECUTIVE SUMMARY, at <http://www.fvdr.com/main-e.htm> (last visited Mar. 11, 2002).

I. PERISHABLE FOOD AND DISPUTE RESOLUTION IN NORTH AMERICA

The process by which most fresh fruits and vegetables reach consumer tables in North America is extraordinary. Within days of harvest, huge quantities of perishable produce² are loaded onto trucks and shipped great distances to depots where they are packaged and sold in short order.³ During this process the produce often crosses national borders and enters new jurisdictions with different legal regimes. At the point of crossing into a different country, the produce is subject to Customs inspection and clearance.⁴ A government agent notifies the importer of the condition of the goods, providing the importer an opportunity to accept or reject the produce. If accepted, the produce will continue on its way to consumer tables.

This process involves hundreds of thousands of actors, including agricultural producers, shippers, retailers, and consumers across the continent, all of whom share a stake in moving large inventories of fruit and vegetables from field to table in minimal time. Any delay is cause for concern. Rejection of an international produce shipment can spell disaster for actors up

2. The Fruit and Vegetable Dispute Resolution Corporation defines "perishable agricultural commodity" as "includ[ing] all fresh and chilled fruits and vegetables, fresh cuts, edible fungi and herbs, but exclud[ing] any fresh fruit and vegetable which is frozen or sold for seed." FVDRC, TRADING STANDARDS § 17 ¶11(o), at <http://www.fvdr.com/trading-e.htm> (April 30, 2001).

3. See Brian Rattray, *A Canadian Perspective on North American Agricultural Trade Flows (1988-98)*, in TRADE LIBERALIZATION UNDER NAFTA: REPORT CARD ON AGRICULTURE 64, 71, available at http://www.farmfoundation.org/sandiego/nafta_report_card.pdf (2001).

Canadian imports of fruits and vegetables (excluding potatoes) from the United States reached \$2.482 billion in 1998, down from \$2.579 billion in 1997 but up 76% from \$1.611 billion in 1988. Canadian exports of fruit and vegetables to the United States reached \$765 million in 1998, up 27% from \$601 million in 1997, and up 296% from \$193 million in 1988. *Id.* (citations omitted); see also ECONOMIC RESEARCH SERVICE, U.S. DEP'T AGRIC., *NAFTA: The Record to Date*, AGRIC. OUTLOOK, Sept. 1999, at 13 (reporting that U.S. trade in agricultural products with Canada and Mexico has increased substantially since 1993).

4. Customs inspection and clearance are regulated in part by NAFTA trade provisions for agricultural goods. These trade provisions were negotiated bilaterally, so there are separate provisions for trade between Canada and the United States and the United States and Mexico. NAFTA incorporates the provisions of the *Canada-U.S. Free Trade Agreement* for trade between Canada and the United States. Section B of NAFTA Annex 703.2 relates to trade between Canada and Mexico and Section A of NAFTA Annex 703.2 relates to trade between the United States and Mexico. See North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 605 [hereinafter NAFTA].

and down the chain of transfer, something opportunistic importers might seek to exploit. The time-sensitive nature of the fresh produce industry increases the possibility of rapid financial loss; consequently, there is a need for speedy and effective dispute resolution.

II. THE CANADIAN SYSTEM OF AGRICULTURAL DISPUTE RESOLUTION: A TROUBLED PAST AND THE NEED FOR A SOLUTION

A. REGULATION OF INTERNATIONAL AND INTER-PROVINCIAL TRADE

Canada's legislative powers are divided between the federal government and the provinces.⁵ Since confederation in 1867, the federal government has maintained primary authority over regulation of trade and commerce.⁶ This includes the regulation of international and inter-provincial trade.⁷ The individual provincial governments, however, control intra-provincial trade, provided that the regulation does not significantly infringe upon a valid federal power.⁸

The Supreme Court of Canada explained the ambit of this provincial control over intra-provincial trade and commerce in *Reference Respecting the Farm Products Marketing Act*.⁹ In a later decision the Court summarized the principles of the *Reference Respecting the Farm Products Marketing Act*.¹⁰

5. Those powers enumerated in section 91 of the Constitution fall under the exclusive authority of the federal government, while those powers enumerated in section 92 fall under the exclusive authority of the provincial governments. See CAN. CONST. (Constitution Act, 1867) pt. VI (Distribution of Legislative Powers), §§ 91-92. Nuances in each of these sections are beyond the scope of this Article.

6. See *id.* § 91(2).

7. See *Citizens Ins. Co. v. Parsons*, [1881] 7 App. Cas. 96 (Can.). The Privy Council stated that the federal trade and commerce power included the "regulation of trade in matters of intraprovincial concern." *Id.* at 113; see also *Attorney-General for Manitoba v. Manitoba Egg & Poultry Assoc.*, [1971] S.C.R. 689, 709 (Can.) (Laskin, J.) ("It has been put beyond doubt that Parliament's power under s.91(2) is exclusive so far as concerns the prohibition or regulation of exports to and imports from other countries, and that a province may not, as legislator, prohibit or regulate the export of goods therefrom.")

8. See *R. v. Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401 (Can.).

9. See *Ref. Respecting the Farm Prod. Mktg. Act*, [1957] S.C.R. 198 (Can.).

10. See *Manitoba Egg & Poultry Assoc.*, [1971] S.C.R. at 709 (Can.).

“[R]egulation of the marketing, or the processing and marketing of products in a province for consumption therein is within provincial competence.”¹¹ However, the scope of the individual provinces’ power does not extend to “regulation of the marketing of provincial produce intended for export or sought to be purchased for export”¹²

The principles set out in the *Reference Respecting the Farm Products Marketing Act* made it clear that provincial governments have the power to legislate with respect to contractual relations and marketing of goods produced and consumed within their province.¹³ Therefore, the holding in the *Reference Respecting the Farm Products Marketing Act* raised the possibility that a federal regulation impinging on protected intra-provincial contractual relations might be reach beyond the constitutionally permissible scope of federal power.

B. THE CANADA AGRICULTURAL PRODUCTS STANDARDS ACT

In 1955, the Canadian federal government promulgated uniform agricultural product production, marketing, and selling standards with the passage of the Canada Agricultural Products Standards Act [CAP Act].¹⁴ The CAP Act regulated a wide spectrum of the Canadian agricultural industry, from inspection to disposal. The CAP Act regulated grading, marking, inspection, and fees associated with the industry.¹⁵ The legislation also sought to regulate importation and exportation both inter-provincially and internationally.¹⁶ Agricultural dealers were required to obtain licenses in accordance with the CAP Act.¹⁷ In addition to these provisions, section eight of the CAP Act provided general authority to issue regulations necessary to carry

11. *Id.* at 713.

12. *Id.*

13. See *Reference Respecting the Farm Products Marketing Act*, [1957] S.C.R. at 269, 292, 312; see also *Citizens Ins. Co.*, [1881] 7 App. Cas. at 96 FN 56 (discussing the relationship between interprovincial trade and the federal trade and commerce power).

14. Canadian Agricultural Products Standards Act, R.S.C., ch. A-8 (1970) (Can.). The CAP Act contained specific provisions authorizing certain types of regulations regarding agricultural products, including grading, importation and transportation, seizing of and disposing, and licensing of dealers and importers. Under the CAP Act, members of the agricultural industry had to be licensed. A license could be revoked for various reasons, including failure to comply with a Board of Arbitration decision or regulations promulgated under the CAP Act.

15. See *id.* § 3.

16. See *id.* § 5.

17. See *id.* § 6.

out the purposes and administration of the Act.¹⁸

The broad authority the CAP Act allowed respecting the promulgation of administrative regulations raised the familiar question of the permissible limits of legislative delegation.¹⁹ This issue arose because federal authorities found it necessary to form a standing Board of Arbitration in order to resolve disputes arising out of the extensive scheme of agricultural regulation and licensing set out in the CAP Act. The Board of Arbitration was a quasi-judicial body that heard disagreements between CAP Act licensees who failed to comply with regulations promulgated under the Act.²⁰

18. See *id.* § 8. "The Governor in Council may make regulations for carrying out the purposes and provisions of this Act and for prescribing anything that by this Act is required to be prescribed." *Id.*

19. In *Canada (A.G.) v. Ontario (A.G.)*, [1937] D.L.R. 673, the Judicial Committee of the Privy Council noted that federal and provincial powers in Canada's Constitution were mutually exclusive. Lord Atkin noted that the powers enunciated in Canada's Constitution were "water-tight compartments which are an essential part of her original structure." *Id.* at 684. However, as Patrick J. Monahan notes, "[t]his restrictive approach significantly limits the extent to which Parliament can effectively regulate trade (even purely interprovincial and international trade), since effective regulation often requires controls over the entire production and marketing of a product." P.J. MONAHAN, *CONSTITUTIONAL LAW* 47 (1997). Monahan later notes that "it might have been thought that it should be open to Parliament to regulate local trade when such regulation was necessary or inextricably bound up with a regulatory scheme whose primary purpose . . . was the regulation of interprovincial and international trade . . . This is the position in the United States, where Congress has authority to regulate local trade where such regulation is an 'appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce.'" *Id.* at 51 (quoting *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942)). In a series of decisions in the early 1980s the Supreme Court of Canada altered the "watertight compartments" approach to be more in keeping with that of the U.S. approach. In *R. v. Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401 (Can.), the Court set down the factors that the federal government must meet for a legislative enactment to meet the "National Concern" test. This approach also appears to follow the Court's pronouncement in *Manitoba Egg & Poultry Assoc.*, [1971] S.C.R. at 709 (Can.), where the Court held that the provinces could not legislate in such a way as to impede the free flow of goods. In 1972 the provinces, in a federally-arranged scheme, were able to implement those provisions related to intraprovincial trade.

20. See *Canada Agricultural Products Standards Act, Product Licensing Regulations*, P.C. 1967-2265, SOR/67-605 § 20(1) (Regulations). Disagreements could be heard with respect to licensees who (1) misrepresented the type of license issued to them; (2) failed to maintain accurate records; (3) failed to allow examination of their records; (4) failed to forward the proceeds from the sale of produce belonging to another; (5) destroyed or discarded more than five percent of any lot of produce belonging to another without evidence the produce had no commercial value; (6) acted fraudulently under their license; (7) failed to account for a transaction; or (8) failed to deliver contracted produce without reasonable cause. See *id.* According to this subsection a complaint could also be made with regards to licensees who failed to

It is important to note that the CAP Act itself did not contain provisions establishing the Board of Arbitration. Instead, the Board of Arbitration was created under the broad authority the CAP Act allowed through the issuance of administrative regulations.²¹ The gap between the broad range of regulatory authority allowed under the CAP Act and limits on permissible legislative delegation under the Constitution laid the foundation for the Steve Dart Company's application for a writ of prohibition²² against the Board of Arbitration in 1974.

C. *STEVE DART CO. V. CANADA*

After receiving a shipment of corn from a U.S. dealer, the Steve Dart Company advised the shipper that due to the poor quality of the product they were requesting that Canada's Department of Agriculture inspect the goods.²³ The corn was inspected and subsequently the shipper filed a formal complaint with the Department of Agriculture claiming non-payment.²⁴ The Board of Arbitration advised the Steve Dart Company that it had to pay the shipper's claim or file a notice contesting the claim.²⁵ Instead, the Steve Dart Company applied for a writ of prohibition, asserting

that the Regulations issued pursuant to the [CAP Act], insofar as they [purported] to set up the [Board of Arbitration] and to provide for its composition, by the granting to it of judicial or quasi-judicial powers and . . . for the making by it of findings as to issues of liability arising between individual parties and for the enforcement of such findings, are *ultra vires* in that the [CAP Act] does not provide authority for any such Regulations to be made.²⁶

The Federal Court Trial Division noted the divergence between the CAP Act and the Regulations regarding the formation of a Board of Arbitration. It held that there was an absence of

comply with sections thirteen to sixteen of the Regulations.

21. *See id.* § 31.

22. "Prohibition" is "[a]n extraordinary writ issued by an appellate court to prevent a lower court from exceeding its jurisdiction or to prevent a nonjudicial officer or entity from exercising a power." BLACK'S LAW DICTIONARY 1212 (7th ed. 1999).

23. *Steve Dart Co. & D.J. Duer & Co.*, [1974] 46 D.L.R. (3d) 745, 747.

24. *Id.* The Court only briefly discusses the inspection by the Department of Agriculture. The Court makes no mention of the findings of the Department; instead, it focuses on the decision by the Steve Dart Company to apply for a writ of prohibition instead of contesting the shipper's claim or making payment. *See id.*

25. *Id.*

26. *Id.*

statutory authority for the formation of the Board of Arbitration and the writ of prohibition should issue for that reason alone.²⁷ The court noted that the Regulations, by establishing the Board of Arbitration, set out a procedure to “try the merits of any complaint,” to “grant awards of damages arising out of such claims,” and to “enforce the awards by means of an automatic forfeiture of license in the event of non-compliance with an award.”²⁸ The Court reasoned that there was no statutory authority for such an adjudicatory body under the CAP Act, stating “exercise of a power to revoke a license in order to enforce a finding as to a claim between individuals which the [Board of Arbitration] has no statutory power to make is an *abusive and illegal use of such power*.”²⁹

The *Steve Dart Co.* decision removed the Board of Arbitration’s enforcement power and its ability to effectively regulate agricultural disputes ceased.³⁰ Any Board of Arbitration findings subsequent to *Steve Dart Co.* could be ignored by the wrongdoer, leaving the court system as the only effective avenue for enforcement. The Canadian government made various legislative attempts to fill the adjudicative vacuum left in the wake of the decision, but all attempts failed.³¹ Even if the legislative attempts had come to fruition, it is very likely that they also would have been unsuccessful in establishing a lasting mechanism for expedited adjudication of agricultural disputes in Canada. The rationale for the futility of a purely legislative solution is found in the closing comments of *Steve Dart Co.* There, in dicta, the court stated

27. *Id.* at 749 (noting that the Court “has a power to grant such relief against a body which, although not legally constituted, purports to be and to act and exercise powers as a federal board or tribunal pursuant to federal Regulations and a federal Act”).

28. *Id.* at 751.

29. *Id.* (emphasis added).

30. Subsequent to the decision in *Steve Dart Co.*, the Board of Arbitration continued to exist, albeit with a significantly curtailed jurisdiction. The Licensing and Arbitration Regulations, promulgated subsequent to *Steve Dart Co.*, do not provide that the failure to comply with the Regulations is grounds for cancellation of one’s license.

31. Following *Steve Dart Co.*, it appeared that the only thing that remained to be done was to seek agreement with the provinces, given that any Board of Arbitration’s power would deal with a matter of provincial competence. Because contractual relations are substantially a matter coming under provincial authority, the provinces would have to collaborate with the federal government and all of the other provinces such that national legislation could be enacted. See also Reference Respecting the Farm Products Marketing Act, [1957] S.C.R. at 312.

[e]ven if all of the provisions contained in the Regulations were actually embodied in the [CAP Act], it might possibly still be argued successfully, having regard to the fact that such extensive powers in a board of arbitration would not really be required to properly administer the provisions of the [CAP Act], that the purported granting of such powers might constitute an infringement of the property and civil rights provisions contained in s. 92 of the [Constitution Act 1867].³²

Thus, in addition to the question of valid legislative delegation under the CAP Act, there existed further concerns as to whether the federal government possessed the power to legislate such a broad agricultural adjudicative and licensing scheme without encroaching upon provincial privileges under the Constitution. The rationale used in the *Steve Dart Co.* decision strongly suggests that had the federal government correctly and completely promulgated the regulations that established the Board of Arbitration, those regulations would have encroached on constitutionally protected provincial powers.³³

D. POST-STEVE DART CO.: THE NEED FOR A SOLUTION

Following *Steve Dart Co.*, the judicial system was the only remaining Canadian mechanism for enforcement of intra-provincial or international contractual disputes in the agricultural industry. Unfortunately, the sale of fruits and vegetables does not lend itself to full-scale litigation due to the small amount of money typically at issue and the perishable nature of the product.³⁴ Although an injured party might ultimately receive a favorable judgment from a court, costs stemming from the action could easily outstrip the recovery. Consequently, after the *Steve Dart Co.* decision many produce disputes in Canada went unresolved.³⁵

Although individual produce shipments are small, fruits and vegetables comprise the largest portion of agricultural trade

32. *Steve Dart Co. & D.J. Duer & Co.*, [1974] 46 D.L.R. (3d) 745, 751.

33. See R. DYCK, *CANADIAN POLITICS: CRITICAL APPROACHES* 69-91 (1996); R. Gibbons, *Federalism and Regional Alienation*, in *CHALLENGES TO CANADIAN FEDERALISM* (Scarborough: Prentice-Hall 1998); P.H. RUSSELL, *CONSTITUTIONAL ODYSSEY: CAN CANADIANS BECOME A SOVEREIGN PEOPLE?* 34-52 (1993). Because both the federal and the provincial governments jealously guard their respective areas of authority, federal-provincial cooperation would be required in this area. It is unlikely that the federal government could gain the agreement of each of the provinces on these issues as each provincial jurisdiction would have its own agenda.

34. The *Steve Dart Co.* dispute is one example of this, as the amount at issue was \$3992.10. *Steve Dart Co. & D.J. Duer & Co.*, [1974] 46 D.L.R. (3d) 745, 746.

35. Telephone Interview with Stephen Whitney, President and Chief Executive Officer of the Fruit and Vegetable Dispute Resolution Corporation, (Mar. 2, 2001).

between the United States and Canada.³⁶ Thus, after *Steve Dart Co.* the Canadian produce industry was thrust into a difficult position. The Board of Arbitration had been rendered ineffectual. Aggrieved parties had no choice but turn to the judicial system for a costly and inefficient remedy. Ever-increasing levels of continental agricultural trade, coupled with the significant deterioration in private commercial relations, provided the impetus for Canada's support of NAFTA Article 707, designed to address this problem.³⁷

III. THE UNITED STATES AND THE PERISHABLE AGRICULTURAL COMMODITIES ACT

The United States enacted the Perishable Agricultural Commodities Act (PACA)³⁸ in 1930 with a mandate to promote fair and ethical trading practices in the fruit and vegetable industry.³⁹ With few exceptions, U.S. law requires buyers and sellers trading in fruits and vegetables have PACA licenses.⁴⁰ These licenses can be revoked if the licensee is found to be involved in unfair trading practices.⁴¹

The PACA primarily addresses disputes within the United

36. See Rattray, *supra* note 3, at 71-72; see also "NAFTA: The Record to Date," *supra* note 3, at 14-15.

37. It is worth noting that the Canada-United States: Free-Trade Agreement, Jan. 2, 1988, U.S.-Can., 27 I.L.M. 281 [hereinafter *CUSFTA*] did not contain a provision similar to Article 707. The *CUSFTA* was also negotiated after the *Steve Dart Co.* decision, essentially in the midst of deteriorating national and international private commercial relationships. It may be that because the *CUSFTA* was an agreement negotiated by governments to effect freer trade practices on the part of governments, an extension into private commercial relationships was not considered as an option until *NAFTA*.

38. Perishable Agricultural Commodities Act, 7 U.S.C. § 499 (2002).

39. See Brenda Branaman, *The Perishable Agricultural Commodities Act (PACA)*, at <http://www.cnie.org/NLE/CRSreports/Agriculture/ag-85.cfm> (last visited Feb. 12, 2001).

40. 7 U.S.C. 499C(a).

41. See 7 U.S.C. § 499H(B)(2). Pursuant to § 499b of the PACA, unfair trade practices include rejecting, without reasonable cause, produce bought or contracted to be handled on consignment, § 499B(2), failure to promptly pay the agreed price of produce that complies with contract terms, discarding, dumping or destroying without reasonable cause any produce received to be sold on behalf of another firm, § 499B(3), the failure or refusal to account truly and correctly or to make full payment promptly for produce shipped on consignment, § 499B(1) or on joint account and misbranding or misrepresentation of grade, quality, quantity, weight, state or country of origin of fruits and vegetables, § 499B(5).

States among its own traders.⁴² The PACA is also available to Canadian and Mexican exporters to resolve disputes with U.S. importers as well.⁴³ However, the scope of the PACA is limited and it is of little benefit to U.S. *exporters* involved in disputes with Canadian or Mexican importers.⁴⁴ Under the PACA, few options are open to a U.S. exporter involved in such a dispute beyond voluntary negotiation or seeking recourse in Canadian or Mexican courts.⁴⁵

It was the PACA's jurisdictional powerlessness and the concurrent inability of the Canadian and Mexican judicial systems to adequately address disputes involving U.S. exporters and Canadian and Mexican importers that created the impetus for a more secure produce trading environment in North America. The opportunity to establish a secure continental marketplace developed with the initiation of talks aimed at the creation of a North American free trade zone encompassing Canada, the United States and Mexico.⁴⁶ During these negotiations, the agricultural industry of the United States lobbied for the creation of NAFTA Article 707 with the expectation that the resultant Advisory Committee would find a way to effectively bridge the existing jurisdictional gaps that had developed.⁴⁷

IV. MEXICO'S UNDERDEVELOPED DISPUTE RESOLUTION SYSTEM

Prior to NAFTA, adjudication of produce disputes in Mexico, as in Canada, relied heavily on the judicial system. There is no Mexican equivalent to the CAP Act or the PACA, designed to expedite perishable produce dispute settlement.⁴⁸ As an exporter of great importance to its southern neighbor, the United States in particular wanted Mexico to create a more regular, formal and transparent system.⁴⁹

42. See Questions and Answers, at <http://www.fvdr.com/qa-e.htm> (last visited Mar. 10, 2002).

43. See *id.*

44. See *id.*

45. See Stephen McCarron, Packer Article-Organization, at <http://www.mccarronlaw.com> (last visited Feb. 11, 2002) [hereinafter McCarron].

46. See J.R. JOHNSON, ESSENTIALS OF CANADIAN LAW: INTERNATIONAL TRADE LAW 31 (1998).

47. See Whitney, *supra* note 35.

48. See McCarron, *supra* note 45.

49. Technology Trade and Commerce Agency, Agriculture, at <http://www.commerce.ca.gov> (last visited Mar. 10, 2002).

Since NAFTA took force in early 1994, Mexico has made significant strides in increasing the consistency of its agricultural import system.⁵⁰ Nevertheless, the desired degree of consistency has not always been achieved and, as of the time of this writing, Mexico has yet to introduce PACA-style legislation.

V. THE BIRTH OF THE FVDRC

A. ESTABLISHING AN ADVISORY COMMITTEE

During NAFTA negotiations only the United States had a viable system of expedited dispute resolution for perishable produce.⁵¹ The Canadian system did not efficiently address domestic or international disputes in the produce industry.⁵² Mexico similarly lacked a system to address agricultural disputes.⁵³ This dearth of viable dispute resolution mechanisms culminated in the creation of the Fruit and Vegetable Dispute Resolution Corporation (FVDRC). Established in May 2000 and headquartered in Ottawa, Canada, the FVDRC is a private, non-profit organization of produce companies trading in North America.⁵⁴ Its mission is to provide the North American produce industry with the policies, standards, and services necessary to resolve disputes in a timely and cost-effective manner.⁵⁵

The FVDRC is derived from Articles 2022 and 707 of NAFTA. Article 2022 commits the treaty's signatories to promote, to the best of their abilities, expeditious means of dispute settlement among private commercial parties in their jurisdictions.⁵⁶ This broad obligation is particularized within the agricultural field by NAFTA Article 707, which provides that

[t]he Committee [on Agricultural Trade, established in Article 706] shall establish an Advisory Committee on Private Commercial Disputes regarding Agricultural Goods, comprising persons with expertise or experience in the resolution of *private* commercial disputes in agricultural trade. The Advisory Committee shall report and provide recommendations to the Committee for the development of systems in the

50. Technology Trade and Commerce Agency, Case Study—Agriculture, at <http://www.commerce.ca.gov> (last visited Mar. 10, 2002).

51. See discussion *supra* Part III; see also PACA 7 U.S.C. § 499.

52. See discussion *supra* Part II.

53. See discussion *supra* Part IV.

54. See FVDRC, EXECUTIVE SUMMARY, at <http://www.fvdr.com/main-e.htm> (last visited Mar. 10, 2002).

55. *Id.*

56. NAFTA, at art. 2022(1).

territory of each Party to achieve the prompt and effective resolution of such disputes, taking into account any special circumstance, including the perishability of certain agricultural goods.⁵⁷

Thus, Article 707 mandated the creation of the Advisory Committee on Private International Disputes Regarding Agriculture (Advisory Committee) to address discrepancies in the Canadian, United States and Mexican systems of dispute resolution arising from private commercial transactions in fruits and vegetables.⁵⁸ The Advisory Committee was to generate recommendations for the development of territorial dispute resolution mechanisms with respect to the perishable produce industry.⁵⁹ The Advisory Committee, comprised of members from both industry and government from each of the three NAFTA countries, first met in February 1997.⁶⁰

B. PHASE ONE OF ARTICLE 707 IMPLEMENTATION: IDENTIFICATION AND ANALYSIS

Initially the Advisory Committee divided the process of creating a common adjudicatory mechanism into two phases. In the first phase the Advisory Committee identified industry requirements and objectives for expedited produce dispute resolution; implementation of the system was left to the second phase.⁶¹ The first phase of the Advisory Committee's plan was completed with the promulgation of Terms of Reference.⁶²

According to the Terms of Reference, the main issue facing the Advisory Committee was to identify, facilitate, promote and utilize alternative dispute resolution methods, specifically arbitration.⁶³ The Advisory Committee identified the fruit and vegetable industry as one that would particularly benefit from the

57. *Id.* at art. 707 (emphasis added).

58. *Id.*

59. Article 2022 also provides for the establishment of an Advisory Committee on Private Commercial Disputes. The Advisory Committee on Private Commercial Disputes in Agriculture was to report to the committee set up pursuant to Article 2022. Analysis of the Article 2022 Committee is beyond the scope of this Article.

60. The Advisory Committee first met in Mazatlan, Mexico, from February 16-18 1997. Their second and final meeting occurred in Anaheim, California, October 21-22 1997.

61. Advisory Committee on Private Commercial Disputes Regarding Agricultural Goods, USDA, *Backgrounder to Terms of Reference*, April 30 1996, provided by S. Whitney [hereinafter *Backgrounder*] (on file with author).

62. Advisory Committee on Private Commercial Disputes Regarding Agricultural Goods, USDA, *Terms of Reference*, April 30 1996, provided by S. Whitney (on file with author).

63. *See id.*

use of arbitration.⁶⁴ Arbitration offers several advantages over litigation for the produce industry because it is generally cheaper and expeditious when compared to formal adjudicative proceedings.⁶⁵

From its inception, the Advisory Committee envisioned that its recommendations would be consistent with the original NAFTA mandate and objectives.⁶⁶ As such, the Advisory Committee's recommendations were not designed to mirror judicial or adjudicatory systems already in place.⁶⁷ Instead, a dispute resolution mechanism focusing on arbitration was created to complement them.⁶⁸ "[K]ey elements [included] the formation of an organization operated and supported by industry, and the maintenance of a list of participating firms which trade across borders within the free trade area."⁶⁹

The Advisory Committee focused on developing an efficient mechanism to address the existing gaps in the resolution of private contractual produce disputes.⁷⁰ As one member of the Advisory Committee noted, the central idea behind the mechanism was to ensure the parties to a transaction get paid.⁷¹ To this end, the Advisory Committee recommended the creation of a corporate entity known as the Fruit and Vegetable Dispute Resolution Corporation.⁷²

The heavy governmental regulation that already exists in the agricultural industry makes an independent corporation an unlikely ideal international dispute resolution mechanism.

64. See Press Release, USDA Agricultural Marketing Service, NAFTA Commercial Disputes Advisory Committee Makes Progress, *available at* <http://151.121.3.151/news> (Mar. 24, 1997).

65. See A.J. PIRIE, *ALTERNATIVE DISPUTE RESOLUTION: SKILLS, SCIENCE, AND THE LAW* 87 (2000).

66. See Backgrounder, *supra* note 61.

67. This would include systems such as the PACA (discussed above), the Blue Book, and the Red Book. The Blue Book is a service providing credit and marketing information regarding firms in the produce industry, including growers, suppliers and transportation businesses. Similarly, the Red Book is a credit-reporting agency for the produce industry. The Blue Book provides information about businesses in Canada, the United States, and Mexico, whereas the Red Book provides information about international businesses.

68. See Press Release, USDA, NAFTA Agricultural Advisory Committee Recommends Tri-National Private Commercial Dispute Resolution System, *available at* <http://www.usda.gov/news> (Oct. 29, 1997).

69. *Id.*

70. See Backgrounder, *supra* note 61.

71. See Whitney, *supra* note 35.

72. See Press Release, Conflict Resolution Network Canada, New ADR Body Fills Dual Role, *available at* <http://www.cnetwork.ca/news> (July 25, 2000).

However, the voluntary organization taking a corporate form appears to have been the most effective instrument available to address all types of disputes, particularly in light of the Canadian federal government's inability to regulate both international and intra-provincial disputes.⁷³

VI. THE STRUCTURE OF THE FVDRC

A. CORPORATE STRUCTURE

The FVDRC was incorporated October 7, 2000 as a non-profit⁷⁴ corporation with a paid membership under the Canada Business Corporations Act.⁷⁵ The FVDRC defines its mission as “deal[ing] with all types of disputes including condition, contract and payment issues. . . . [and providing] the North American produce industry with the trinational policies, standards and services necessary for resolving disputes in a timely and cost effective manner.”⁷⁶ The goods covered includes “all fresh and chilled fruits and vegetables, fresh cuts, edible fungi and herbs, but excludes any fresh fruit and vegetable which is frozen or sold for seed.”⁷⁷ The Board of Directors, currently comprised of leading figures from the produce industry who were heavily involved in the creation of the entity, oversee the operation of the FVDRC. The appointment of the Board of Directors was undertaken in this way to provide continuity between the process of creating and the process of overseeing the FVDRC. Pursuant to the FVDRC Membership Bylaws, a new Board of Directors will be elected from the FVDRC membership after two years of op-

73. *Id.*

74. See *Tri-National Dispute Resolution Mechanism for Horticulture, ADAPTATION UPDATE* (Agriculture and Agri-Food Canada), Nov./Dec. 1998, available at http://www.agr.ca/policy/adapt/adaptation_update. Initially the Canadian government provided a one-time cash infusion to the FVDRC of \$873,000 over three years (1998-2000) through the Canadian Adaptation and Rural Development Fund. See *id.* The funds were provided to ensure that the Canadian Horticultural Council and Canadian Produce Marketing Association could assist in the development of an improved dispute resolution mechanism pursuant to NAFTA Article 707. However, according to Mr. Stephen Whitney, President and CEO of the FVDRC, the corporation currently operates exclusively on funds derived from annual membership fees. Whitney *supra* note 35.

75. See Canada Business Corporations Act, R.S.C., ch. 44 (1985) (Can.).

76. *FVDRC Homepage*, Fruit and Vegetable Dispute Resolution Corporation, at <http://www.fvdr.com/b-text-e.htm> (last visited January 30, 2002)

77. *Id.*

eration.⁷⁸

In Canada, the transition from the CAP Act licensing scheme to the FVDRC is designed to be both smooth and voluntary. Currently, the FVRDC is operating under a two-year phase-in period. The mandatory licensing system⁷⁹ promulgated by the CAP Act will be totally deregulated in 2003. This two-year phase-in period enables current Canadian license holders to voluntarily migrate to the industry-run FVDRC, while simultaneously maintaining familiar regulatory services. Only those dealers opting to retain their old licenses will be governed by the existing Regulations, with those opting to join the FVDRC being subject to its dispute settlement rules.⁸⁰

78. See *id.*; see also *Membership By-Laws*, Fruit and Vegetable Dispute Resolution Corporation, at <http://www.fvdr.com/main-e.htm> (last visited Mar 10, 2002).

79. See, Canada Agricultural Products Standards Act, Licensing and Arbitration Regulations, C.R.C., ch. 292 (1978), *revoked* by S.O.R./84-432 (Gaz. 13.6.84, at 2642) (1984) (Can.). These regulations were promulgated under the CAP Act. In essence they replaced the Produce Licensing Regulations. According to both the CAP Act and the Licensing and Arbitration Regulations, every dealer engaged in inter-provincial and/or international trade of fruits and vegetables must have a produce dealer license from the Canadian Food Inspection Agency, subject to minor exemptions. Interestingly, under the new FVDRC regime membership is voluntary and licensing is not a requirement to trade inter-provincially and/or internationally in fruits and vegetables.

The Licensing and Arbitration Regulations are set up similarly to the Produce Licensing Regulations. Because of the *ultra vires* nature of the Produce Licensing Regulations the Licensing and Arbitration Program is unable "to deal effectively with the non-payment of invoices between buyers and sellers, the inability of the Board of Arbitration to deal with disputes between buyers and sellers involving elements of contract law, and the inability to extend coverage to dealers engaged in intra-provincial trade." *Regulatory Impact Analysis Statement*, Canadian Food Inspection Agency Homepage, at http://www.cfia-acia.agr.ca/english/reg/consultation/99019ria_e.shtml (last visited Mar. 10, 2002).

80. See Press Release, *supra* note 72. According to the dispute resolution announcement in ONTARIO FARMER, as of summer 2000 the FVDRC had 564 member companies, with 405 being Canadian, 6 Mexican, and the balance from the United States, primarily from California. Further, in a telephone conversation with Mr. Stephen Whitney, he stated that as of the end of 2000 the FVDRC had captured 66% of all Canadian licensees. It is his belief that the balance would join in 2001. See Whitney, *supra* note 35.

There is some concern that not all of the current licensees will opt into the new system. It may be that some of the larger, or even some of the medium or smaller organizations, will not participate in the voluntary system. If this were to happen it could destabilize the entire process. However, an examination of the consequences if current licensees choose not to opt into the new system is beyond the scope of this Article.

B. MEMBERSHIP

Membership in the FVDRC is open to any grower, buyer, or seller of produce in the United States, Mexico and Canada. "In Canada and Mexico, it is expected that all traders would want to join because the DRC offers a valuable service not available anywhere else."⁸¹ The FVDRC will also be of particular value to U.S. exporters who, as discussed above, cannot seek redress under the PACA when doing business abroad.

C. A MANDATORY DISPUTE RESOLUTION CLAUSE

To ensure compliance with the FVDRC mandate, members must enter into a binding contract with the organization. This contractual relationship requires members to adhere to the Mediation and Arbitration Rules of the Dispute Resolution Corporation (FVDRC Rules). The FVDRC Rules require that regular members

agree that *any* dispute, controversy or claim with a regular or an associate member, arising out of or in connection with any transaction involving fresh fruits and vegetables as defined in the by-laws of the Corporation *shall* be resolved *exclusively* in accordance with these Rules . . .⁸²

The FVDRC Rules put in place a mandatory mechanism for the resolution of disputes between members of the FVDRC. They can only be circumvented when membership differences, the nature of relief sought, or pre-existing legislation permit. The FVDRC Rules apply to "any dispute, controversy or claim between a member and one or more non-members where the parties agree in writing to their application."⁸³ Members may seek recourse in court when the dispute arises with a non-member who has not agreed to application of the FVDRC Rules.⁸⁴ Court action is also permitted when a member is seeking interim relief. Interim injunctive relief can be used to prevent dissipation of assets covered by the PACA trust.⁸⁵

81. McCarron, *supra* note 45. Certainly the United States PACA provides a similar service, but that service is only available for disputes where the importer is from the United States. Even then the legislation is of no value to an United States exporter in a dispute with a Canadian or Mexican importer. As such, the FVDRC fills a void that may have hindered U.S. traders in the past.

82. Rules, art. 2.3 [emphasis added].

83. *Id.* art. 3.1.

84. *See id.* art. 2.5.

85. *See id.* art. 2.4. The PACA trust is a mechanism that creates a "statutory trust consisting of a buyer's produce-related assets which are to be held for the bene-

D. THE DISPUTE RESOLUTION PROCESS

1. *The Six Stages of Dispute Resolution under the FVDRC*

The FVDRC Rules went into force on October 29, 2000.⁸⁶ They provide for a six stage, graduated process of dispute resolution. Initially, the parties are educated by the FVDRC with respect to their rights, remedies and obligations.⁸⁷ From there the disputants may engage in unassisted negotiations and problem solving.⁸⁸ Assistance, advice, case analysis, information, and counseling are available at the third stage.⁸⁹ During these initial stages, the parties are at liberty to determine the pace of the process.⁹⁰

If the dispute continues to escalate, a party may trigger an informal mediation mechanism by filing a Notice of Dispute.⁹¹ The Notice must be filed within nine months of when the claim arose or when the claimant should reasonably have known of its existence.⁹² At this point, all parties must forward supporting documentation to the FVDRC for the purpose of informal consultations.⁹³ If informal mediation fails to solve the problem within twenty-one days of filing the Notice of Dispute, the claim is moved into either the formal mediation process for claims of \$15,000 or more or into expedited arbitration for claims of \$15,000 or less.⁹⁴ It is important to note that the procedural rules for settlement of disputes under the FVDRC vary significantly between formal mediation (\$15,000 or more) and expe-

fit of unpaid produce suppliers that have preserved their trust rights." *Id.* If a business fails, the trust assets, belonging to the beneficiaries, are unavailable for distribution to other creditors.

86. See Rules, art 1.

87. See *Fruit & Vegetable Dispute Resolution Corporation Procedures Manual: DRC Dispute Resolution System*, Fruit and Vegetable Dispute Resolution Corporation, at <http://www.fvdrc.com/procedures-manual-e.htm>, § 4 (last visited Mar. 10, 2002) [hereinafter *Procedures Manual*].

88. See *id.* § 5.

89. See *id.* § 6.

90. The *Procedures Manual* and the *Rules* detail timelines for disputes that have proceeded to and past the informal mediation stage. However, there are no specific timelines that must be met prior to the informal mediation stage.

91. The Notice of Dispute must contain the names of the parties involved, counsel, if any, addresses for service, and a statement of the facts and the remedies sought. After receiving the Notice, the respondent has seven days to reply and submit any counterclaims. See *id.* § 6.

92. See Rules art. 4.1.

93. See *id.* art 9.1.

94. See Rules art.15.1, 15.2.

dited arbitration (\$15,000 or less). However, if the parties agree, they may use the FVDRC rules of expedited arbitration for any dispute.⁹⁵

The FVDRC's formal mediation process is governed by the Commercial Arbitration and Mediation Center for the Americas Mediation and Arbitration Rules (CAMCA Rules).⁹⁶ These rules establish a more formal process than the FVDRC Rules for larger disputes. The Commercial Arbitration and Mediation Center for the Americas is an organization dedicated to resolving disputes that have escalated to the formal mediation stage.⁹⁷ Both the FVDRC Rules⁹⁸ and CAMCA Rules⁹⁹ have timelines guiding the stages of mediation and arbitration, although the timelines are less rigid under the CAMCA Rules.

In expedited arbitration, an independent third party immediately determines a binding settlement.¹⁰⁰ The timeframe for resolution in expedited arbitration ranges from 91 to 122 days depending on whether the respondent has submitted a counterclaim.¹⁰¹ The formal mediation process requires an assigned mediator to facilitate a voluntary settlement between the parties.¹⁰² If the formal mediation process fails to reach a voluntary settlement, the disputants proceed to a more formal arbitration process in which a third party determines a binding settlement.¹⁰³

2. Selection of Arbitrators

Both the FVDRC Rules and the CAMCA Rules have similar provisions for the selection of arbitrators. The FVDRC Rules

95. *Id.* art. 35.1

96. *Id.*

97. *See Rules* art. 14, 35.

98. *See* CAMCA Rules, Fruit and Vegetable Dispute Resolution Corporation, at <http://www.fvdrc.com/m-text-e.htm> (last visited Mar. 10, 2002).

99. *See id.* art. 14 (vaguely explaining process for terminating mediation and moving on to arbitration).

100. Article 19 of the *Rules* provides for the appointment of the arbitrator. The FVDRC is to "establish and maintain a multinational panel of arbitrators experienced in resolving produce disputes." *Rules*, art 19.1. Article 19.2 further provides that "[i]f the parties are unable to agree to the selection of a particular arbitrator,] the Corporation shall. . .appoint an arbitrator from its panel of arbitrators." *Rules*, art. 19.2. If the FVDRC is required to appoint an arbitrator, they must "disclose the identity of the arbitrator to the parties and provide the parties with a summary of the arbitrator's qualifications and biographical data." *Rules*, art. 19.3.

101. *See Procedures Manual*, *supra* note 87, § 5b.

102. *See id.* § 5a.

103. *See Rules*, art. 13.1, 13.2.

provide that “[u]nless the parties have agreed to the selection of a particular arbitrator, the Corporation shall, within five (5) days of receipt of the Statement of Claim, appoint an arbitrator from its panel of arbitrators.”¹⁰⁴ Similarly, the CAMCA Rules allow the parties to mutually agree on the appointment of an arbitrator or method of appointment. However, if the parties do not mutually agree on an arbitrator or a method of appointment, the CAMCA Rules require the parties use an identical list of persons chosen from the multi-national CAMCA panel. The parties use this list to strike objectionable arbitrators and preferentially rank acceptable arbitrators.¹⁰⁵ If the parties continue to disagree regarding the arbitrator, the CAMCA arbitration administrator has the power to appoint an arbitrator without submission of additional lists.¹⁰⁶

E. LOCATION

Location of the arbitration proceeding is also covered by the FVDRC Rules and the CAMCA Rules. Under Article 23.1 of the FVDRC Rules the place of arbitration under the expedited arbitration process is “the principal office of the Corporation” in Ottawa, Canada, unless the parties agree otherwise.¹⁰⁷ According to the CAMCA Rules, the place of arbitration should be designated in the contract or agreed to in writing by the parties.¹⁰⁸ If there is no designation or agreement, the party commencing the arbitration shall notify the administrator of its desired place of arbitration.¹⁰⁹ Both parties are then given a period of twenty days to submit arguments regarding the place of arbitration to a neutral locale committee.¹¹⁰

104. *Rules*, art. 19.2. Fruit and Vegetable Dispute Resolution Corporation, Press Release, Multinational Panel of Mediators and Arbitrators at <http://www.fvdr.com/pr-oct26-med-arb-e.htm> (October 26, 2000). In the press release, the roster of individuals approved to mediate and arbitrate disputes consists of thirteen individuals and one corporation. The United States corporation, Produce Reporter Company, has maintained a three-person Board of Arbitration for many years to deal with produce complaints. As such, any of the members of this three-person panel may be selected. Of the sixteen individuals approved to mediate and arbitrate disputes, five are from Canada, ten are from the United States and one is from Mexico.

105. *See CAMCA Rules*, art. 7.2.

106. *See id.*

107. *See Rules*, art. 23.1.

108. *See CAMCA Rules*, art.14.

109. *See id.*

110. *See id.*

F. DEVELOPING CASELAW

Due to its ad hoc nature, arbitration is less reliant on the common law doctrine of precedent. However, many writers now recognize that arbitrators often refer to previous decisions, and that precedent does play a similar, if not “softer” role in arbitral decision-making. For this purpose the FVDRC is compiling a body of past arbitration decisions and making the decisions available to its members.¹¹¹ As decisions accumulate, they will provide some direction to future disputants such that potential disputes can be more easily concluded in a declaratory manner.

It is interesting to note that neither the FVDRC Rules nor the CAMCA Rules have appeal mechanisms. This is not unusual given that arbitration in almost all contexts is meant to be a final and binding procedure. Formal appellate arbitral mechanisms are rare.¹¹² The rules promulgated by the FVDRC and CAMCA do not contain any provision that could be even remotely considered a privative clause.¹¹³ However, the decisions of the Board of Arbitration under the Produce Licensing Regulations were subject to judicial review.¹¹⁴ It would appear that FVDRC decisions may be appealed to the courts, although the grounds under which they might be so appealed are admittedly limited.¹¹⁵ The International Commercial Arbitration Act¹¹⁶ lists several grounds for overturning an award including incapacity, lack of notice, lack of jurisdiction and repugnance to

111. As of March 16, 2002, the FVDRC website had posted ten arbitration decisions and a select list of complaints, complete with facts, which had been received and resolved to date.

112. *But see*, Rules of Arbitration, International Chamber of Commerce, at <http://www.iccwbo.org/court/english/arbitration/rules.asp> (January 1, 1998). The International Chamber of Commerce recognizes the inherent weakness in having a voluntary mechanism whereby parties may bring a dispute to arbitration. Article 27 of the Rules of Arbitration provides that all arbitration awards are to be reviewed by the courts. Once review is completed, however, the award is final and binding.

113. *See Rules*, art. 2.2, 2.3. Articles 2.2 and 2.3 of the *Rules* require that “any dispute, controversy or claim . . . be resolved exclusively in accordance with the Rules.” It may be that in the future these provisions will contemplate the inclusion of an appeal mechanism, but, to date, the decision of the arbitrator(s) appears final in respect of the appeal process. There appears to be recourse for an arbitral decision through judicial review, especially in light of the lack of a strong privative clause.

114. The *Produce Licensing Regulations* did not contain a privative clause preventing the courts from reviewing the Board of Arbitration’s decisions. Decisions of the Board of Arbitration could be reviewed by the courts where such review was sought, e.g., *Steve Dart Co.* [1974] 46 D.L.R. (3d) 745, 747.

115. *See Rules*, arts. 2.4, 2.5.

116. International Commercial Arbitration Act, R.S.O. 1990, c. I.9 (Can.).

public policy.¹¹⁷ The modern trend is to interpret these grounds narrowly and to uphold arbitral decisions.

G. ENFORCEMENT

After a settlement is reached through the mediation or arbitral process, the focus shifts to enforcement. The FVDRC Rules provide three mechanisms for enforcement: expulsion, award registry with the courts, and a published list of violators.¹¹⁸ The award or settlement can be registered in the appropriate court because Canada, the United States and Mexico are each signatories to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards,¹¹⁹ which provides for the enforcement of arbitral awards through domestic courts as though they were domestic court awards.¹²⁰ In addition, the perceptions of fellow members and the stigma of default should encourage compliance with FVDRC decisions.

VII. AN EXAMINATION OF THE FEASIBILITY OF THE FVDRC

The FVDRC's mediation and arbitration processes appear to be fulfilling the needs and expectations for which they were put in place. During its first two years of existence, 150 files were opened and 130 were resolved.¹²¹ The average time to reach a resolution was forty-five days.¹²² Only thirteen cases reached the arbitration stage, and the longest time for settlement among these was 177 days from start to finish.¹²³

The FVDRC may be useful as a model for other nations and organizations establishing a dispute resolution program. Glyn Chancey of Canada's Department of Agriculture has pointed out

117. *Id.* art. 36.

118. *See Rules*, art. 2.7.

119. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Jun. 10, 1958, 330 U.N.T.S. 38, 7 I.L.M. 1046.

120. For instance, Article 11(1) of the Ontario International Commercial Arbitration Act, R.S.O. 1990, c. I.9, provides that "[a]n arbitral award recognized by the court is enforceable in the same manner as a judgment or order of the court." *See FVDRC Frequently Asked Questions*, at <http://www.fvdr.com/qa-text-e.htm> (last visited Mar. 12, 2001).

121. *Chairman's Report*, FRUIT AND VEGETABLE DISPUTE RESOLUTION NEWSLETTER, Jan. 2002, available at <http://www.fvdr.com/main-e.htm> (last visited Mar. 10, 2002).

122. *Id.*

123. *Id.*

the successes the Advisory Committee had in "bringing the parties, both government and industry, to the table and identifying on a very fundamental level their mutual interests."¹²⁴ He noted that the interests of Canada, the United States, and Mexico were better served and protected in the others' markets by the FVDRC.¹²⁵ As a result, "there is a very fundamental political incentive for the governments and parties to facilitate the process, and for industry to participate."¹²⁶ He further noted that the FVDRC is a voluntary organization that could, over time, "establish a standard that could be reflected in national standards."¹²⁷

Shirley Coffield, a Washington trade lawyer and commentator, has rejected the idea of the FVDRC model as generally applicable to other situations. It is her contention that legitimate negotiation is a "far better way of achieving accommodations among different standards, rather than the dispute resolution model, which sometimes comes out a winner or a loser."¹²⁸

In rejecting the use of the dispute resolution model, Coffield fails to recognize that legitimate negotiation forms the initial stages of the process. As Chancey notes, each party identifies its mutual interests on a fundamental level.¹²⁹ It is the identification of mutual interests that leads to negotiation progress and movement toward an ultimate solution to the dispute. It is this forward momentum that may eventually bring the various parties into a mutually satisfactory resolution. Reflection upon the stages of the FVDRC process and FVDRC's belief in party-centered dispute resolution, it stands to reason that the process should remain consistent through the arbitration stage, leading to a reasonable, compromising arbitral decision.¹³⁰

The FVDRC is essentially a voluntary dispute resolution process with each participant voluntarily working toward achieving a mutually acceptable resolution. By joining the FVDRC, parties are placing their proverbial cards on the table. The parties have equal incentives to complete the FVDRC dis-

124. Proceedings of the Canada-United States Law Institute Conference: *Sovereignty Revisited as Canada and the United States Enter the 21st Century*, Cleveland, Ohio, April 17-19, 1998, Discussion After the Speeches of Shirley Coffield and James McIlroy, 24 CAN.-U.S. L.J. 253, 259.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. See Pirie, *supra*, note 65, at 105-6.

pute resolution process and accept the final result, whether achieved through negotiation, mediation, or arbitration. Moreover, in the interests of efficiency and cost, the FVDRC model offers significant advantages. As the interconnectedness of international economies increases, so will the desire to resolve private disputes. Hopefully, the global marketplace will embrace the FVDRC modal as an effective means of resolving conflict.

VIII. FUTURE CONSIDERATIONS: THE MEXICAN WILDCARD

One drawback arising from the voluntary nature of the FVDRC is its inability to make Mexican inroads. From the beginning of NAFTA discussions, Mexico's interest in a process for agricultural product dispute resolution was relatively lukewarm.¹³¹ Mexico's Secretary of Commerce and Trade who was involved in the negotiations surrounding NAFTA Article 707, not the Mexican Secretary of Agriculture.¹³² When the Advisory Committee on Private Commercial Disputes Regarding Agriculture met, the Mexican government sent representatives from the agricultural sector as a whole, with no specific focus on perishable produce.¹³³ Mexican membership in the FVDRC is negligible, with only ten FVDRC members based in Mexico.¹³⁴ The FVDRC considered forgoing further efforts to expand into Mexico in 2000.¹³⁵ However, the corporation decided that "[t]o forgo any further efforts at [that] time risk[ed] a loss of credibility for the Corporation as a trilateral entity, and could undermine the objective of integrating the Mexican industry."¹³⁶

Recent elections installed a new party in the Mexican presidency for the first time in more than seventy years.¹³⁷ Mexico's

131. Telephone Interview with Stephen Whitney, President and Chief Executive Officer of the Fruit and Vegetable Dispute Resolution Corporation, (Apr. 30, 2001).

132. *Id.*

133. *Id.*

134. *Membership Report*, FRUIT AND VEGETABLE DISPUTE RESOLUTION NEWSLETTER, available at <http://www.fvdc.com/news-jan2001-e.htm> (Jan. 2002).

135. *Id.*

136. *Id.*

137. *Historic Mexican election sweeps long-ruling PRI party from power*, CABLE NEWS NETWORK, at <http://cnn.com/2000/WORLD/americas/07/03/mexico.elections.04> (last visited Apr. 30, 2001). On July 20, 2000, Vicente Fox of the Partido Accion Nacional became the president of Mexico. This was the first time in seventy-one years a party other than the Partido Revolucionario Institucional was given a mandate to govern Mexico.

new Secretary of Agriculture, Javier Usabiaga Arroyo, has commented positively on the FVDRC. He has acknowledged the usefulness of the FVDRC.¹³⁸ He has also made plain a willingness to work with the FVDRC to move it forward in Mexico.¹³⁹

Mexican industry needs to witness the benefits derived from membership in the FVDRC before it will believe in and join any new system. In its newsletter in November 2000, the FVDRC set out the strategy the Board established for building its membership in Mexico. "The key elements of the strategy centered around finding and working with key Mexican industry representatives from the various sectors of the industry across Mexico."¹⁴⁰ It is hoped that over time, by focusing on selected members of the industry, Mexican groups will incrementally develop a trust that allows them to build a viable dispute resolution system.¹⁴¹ Mexico needs to have in place a system that protects Canadian and United States exporters in the event of a dispute over perishable goods that have been shipped to Mexico.¹⁴²

IX. CONCLUSION

Since the genesis of the FVDRC, its members have enjoyed a greater degree of certainty regarding how disputes about transactions among them would be resolved. Members from all three countries can rely on the private dispute settlement mechanism to ensure that any disputes are resolved in a timely manner.

The emphasis of this Article is the importance of the FVDRC *mechanism*. The process is conducive to dispute settlement, and it is the mechanism that provides for input and negotiation from all parties. Only if a dispute reaches an impasse must an independent arbitrator finally impose a resolution. This model appears to be effective as a means of resolving disputes in a cost-effective and efficient manner. It avoids the previous governmental constraints and jurisdictional arguments.

138. *Mexico Project*, FRUIT AND VEGETABLE DISPUTE RESOLUTION NEWSLETTER, available at <http://www.fvdr.com/news-may2001-e.htm> (last visited Mar. 10, 2002).

139. *Id.*

140. *Fruit and Vegetable Dispute Resolution Newsletter*, MEXICO REPORT, Nov. 2000, vol. 1, No. 2.

141. *Id.*

142. Telephone Interview with Stephen Whitney, President and Chief Executive Officer of the Fruit and Vegetable Dispute Resolution Corporation, (Apr. 30, 2001).

This private commercial process accounts for and reflects the interests of both the individual business person and the wider community.

