

Final Report:
**ORIGINS, CREATION, AND EVOLUTION OF THE FRUIT & VEGETABLE DISPUTE
RESOLUTION CORPORATION**

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EXECUTIVE SUMMARY

Implementation of the North American Free Trade Agreement (NAFTA) is among the factors that have reordered trade relationships between Canada, Mexico and the United States in recent years. Some of the most profound changes trace to agriculture and fruit and vegetable (F&V) production in particular. These sectors have been increasingly transformed into a unified and integrated market. The transformation has featured rapid expansion in regional agricultural trade across a broad range of products, substantial cross-border investments in the fresh and processed food industry, and timelier cross-border price transmission. Unfortunately, growth in the F&V trade also increased the potential for private commercial disputes arising out of disagreements over product quality, timely reimbursement for product deliveries, breaches of contracts, and other related issues. While a dispute resolution system existed in the U.S. under the Perishable Agricultural Commodities Act (PACA), the pre-NAFTA regulatory system that prevailed in Canada proved to be ineffective in resolving the majority of disputes. On the other hand, no international dispute settlement mechanism existed in Mexico, meaning that disputes over Mexican imports left Canadian and U.S. trading firms little choice beyond the court system.

Anticipating the expected increase in trade disputes arising from market integration, the NAFTA produce industry and governments envisioned the creation of a unified system for F&V trade that would avoid trade irritants and facilitate effective trade dispute resolution. As a result, the Fruit and Vegetable Dispute Resolution Corporation (DRC) was established in February 2000 pursuant to Article 707 of NAFTA, which provided for the creation of a private commercial dispute resolution body for trade in agricultural commodities.

This study is a critical examination of the process that led to the creation of the DRC (1996-2000) and the evolution of this novel institution during the period 2000-2011. The study

highlights lessons learned from the DRC experience to better inform policymakers on the advantages and limitations of privately-run dispute resolution mechanisms designed to facilitate transactions involving perishable products.

The process leading to the creation of the DRC (1996-2000) was directed by the tri-national produce industry and facilitated by the NAFTA countries' governments. This process involved extensive consultations and deliberations that resulted in agreement on a tri-national dispute resolution model. Produce industry representatives and government agencies focused on mechanisms to minimize or eliminate trade irritants, thus encouraging businesses interested in expanding regional produce trade. The proposed DRC business model was largely patterned after the PACA system, which had a successful track record in the United States for several decades. The creation of the DRC was expected to mitigate a long-standing domestic problem with disputes in Canada while encouraging the development of an institutional infrastructure for the F&V trade in Mexico. Key components of that infrastructure included produce inspection, improved collaboration to facilitate harmonized quality standards in the trading zone, and training for Mexico's inspection staff. A motivating factor for the U.S. produce industry was an opportunity to extend a version of the protection offered on domestic transactions by the PACA to transactions with Canada and Mexico.

Although the creation of the DRC was an industry-led process, commitment and support from governments of the three countries was critical. The U.S. and Canadian governments, in particular, provided substantial financial, personnel, and technical assistance. Analysis of this process suggests that once an industry-wide consensus is achieved through extensive consultation and deliberation among market participants, a solution can be identified and implemented with government support. In the case of the DRC, the common interests of the

regional produce industry were recognized early in the process; subsequently, industry and government representatives embraced the task of charting out an effective framework for a dispute resolution organization for fresh produce trade in North America.

Analysis of DRC's evolution from 2000 to 2011 reveals many accomplishments, some disappointments, and certain hurdles to be overcome in the future. The DRC has developed a multi-stage, effective dispute resolution process that is valuable to certain but not all produce sectors in the region. Perhaps the most salient success of the DRC has been its contribution to a better produce trade environment in Canada. The majority of Canadian firms prefer to hold a DRC membership over a Canadian Food Inspection Agency (CFIA) license. Canadian firms embraced the DRC because it resembled the PACA system, which has been successful for many years in the United States. In addition, DRC has worked closely with all members of the supply chain, from small F&V growers to large food retailers, to garner their support and expand the Canadian membership. The Canadian government has also provided resources to investigate deficiencies in the Canadian system and has enacted changes in the regulatory framework based on DRC recommendations. Further, the DRC has conducted a series of special projects and initiatives to address structural and policy shortcomings in the Canadian system. These efforts have contributed substantially to improving the trade environment throughout the domestic produce supply chain.

In contrast, the performance of the DRC in Mexico has been a disappointment. Only a very small number of Mexican firms exporting to Canada are DRC members today, despite multiple efforts to develop membership and create inspection service infrastructure in that country. Mexican firms exporting to the U.S. are already protected by the PACA and do not have incentives to hold a DRC membership. Perhaps public and private DRC promoters in the United

States and Canada underestimated how difficult would it be to develop the necessary infrastructure for a reliable dispute resolution system in Mexico. Promoters may have not fully considered the business culture in Mexico. That culture has traditionally favored informal approaches to solve trade disputes. The approach of the Mexican Ministry of Agriculture to promote the DRC in 2002, centered on subsidizing the membership for Mexican produce firms, proved to be inappropriate. This approach did not address the root of the problem in that country: the lack of human and physical infrastructure to operate a formal, effective dispute resolution system. Garnering support from the Mexican Government to develop a reliable inspection system and convincing the domestic produce industry of the benefits from belonging to an effective formal trade dispute system remain two of the primary challenges to a truly tri-national, unified dispute resolution system in the NAFTA region.

In the United States, the DRC is relevant primarily to produce firms that seek PACA-like protection when exporting to Canada and Mexico. The DRC's effectiveness in Canada has been responsible for the steady increase in U.S. membership over the past 10 years, driven primarily by increased U.S. produce exports to Canada. However, efforts to increase the scope of DRC membership among U.S. firms have had only modest impacts. The industry has been highly satisfied with the protection services provided by the PACA, on the one hand, but concerned about the failure of membership development initiatives targeting Mexico. All considered, the DRC has led to substantial positive efforts to eliminate trade irritants and to mediate trade disputes in the NAFTA region. Today, the DRC has more than 1,400 members and it has successfully resolved over 1,300 disputes over 2000-2010, for an approximate value of \$33 million. These accomplishments attest for the substantial positive effects of the DRC on produce trade in the NAFTA regions. However, the DRC has not yet evolved into a truly tri-national

organization with capacity to provide a harmonized dispute resolution framework in North America.

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I. Background

On January 1, 2008, the implementation of the North American Free Trade Agreement (NAFTA) was officially completed, thus marking an end to a 14-year process whereby Canada, Mexico, and the U.S. gradually removed a multitude of barriers to trade, including trade in agricultural commodities (Rosa 2003). As an outcome of the NAFTA agreement, the agricultural economies of the North American countries have been increasingly transformed into a unified and integrated market, with rapid expansion in regional agricultural trade across a broad range of products, hefty cross-border investments in the fresh and processed food industry, and speedy cross-border price transmissions.

With the implementation of NAFTA, the number of international and domestic transactions between fresh fruit and vegetable (F&V) firms operating in Canada, Mexico, and the U.S. increased dramatically. While climatic and geographic conditions imposed natural barriers to production in certain parts of North America, increased F&V trade enabled year-round availability of a wide assortment of high quality F&V for consumption in all three countries. As trade in fresh F&V grew, so did the potential for private commercial disputes arising due to disagreements over product quality, non-payment of invoices, breach of contracts, and other related issues. While a dispute resolution system existed in the U.S. under the Perishable Agricultural Commodities Act (PACA) of 1930, the regulatory system that prevailed in Canada was ineffective in resolving the majority of disputes, including disputes pertaining to contract law and non-payment, and disputes of an intra-provincial nature. On the other hand, no

international dispute settlement mechanism existed in Mexico which meant that in the event of a dispute, Canadian and U.S. trading firms had no choice but to resort to the court system. In anticipation of an increase in the number of commercial trade disputes, industry stakeholders and governments of the three countries recognized the need for establishing an international mechanism to resolve disputes effectively and efficiently among fresh F&V firms in Canada and Mexico. Such an international dispute resolution body was deemed necessary to fix the Canadian problem of incomplete regulatory coverage, establish a dispute resolution system in Mexico, and enhance trading relationships among fresh produce dealers across the NAFTA region.

As a consequence, the Fruit and Vegetable Dispute Resolution Corporation (DRC) was established in February 2000 pursuant to Article 707 of NAFTA, which provided for the creation of a private commercial dispute resolution body for trade in agricultural commodities. The DRC is an outcome of the relentless, collaborative efforts of North American produce industries and the governments of Canada, Mexico, and the U.S. to establish an organization for the effective resolution of disputes pertaining to fresh F&V trade in the region. A non-profit, industry-led organization, the DRC's membership base includes growers, packers, shippers, produce brokers, wholesalers, fresh processors, food service distributors, retailers, transportation brokers, freight contractors, and carriers in North America as well as in certain regions outside North America. The DRC is dedicated to promoting fair and ethical trading within the NAFTA region and to resolving commercial disputes that arise between member companies in a cost-effective and timely manner.

Headquartered in Ottawa (Canada), the DRC was designed based on existing dispute resolution services in the U.S. (under the Perishable Agricultural Commodities Act, PACA); and it aimed to fill the gaps within the Canadian and Mexican dispute resolution systems that

severely impeded international F&V trade transactions. Since its inception, the DRC's mediation and arbitration services have helped DRC members resolve almost 1,300 disputes in fresh F&V trade, covering transactions with an estimated value of approximately USD 32 million.¹

Over the past ten years of operation (2000-10), the DRC has earned a reputation for promoting fair, ethical and efficient trading practices within North America, and working in collaboration with North American governments on issues of critical importance to trade in fresh produce. The DRC's mission is to establish harmonized trading standards and procedures within the NAFTA partners and provide services necessary to forestall and resolve commercial disputes in a timely and cost-effective manner. It's multi-step dispute resolution process, beginning with preventative activities and cooperative problem-solving, and gradually moving on to more binding measures, is intended to provide an effective and time-tested dispute-resolving mechanism. Total membership in the organization has steadily increased over time, with more than 1,300 members at year-end 2010. At present DRC members are located primarily in Canada and the U.S. However, membership is expanding in certain Latin American and European countries.

The overall objective of this study, commissioned by the Agricultural Marketing Service (AMS)/Fruit and Vegetable Programs, U.S. Department of Agriculture (USDA), is to establish a historical record of the creation and evolution of the DRC. To accomplish this, the study begins by describing recent trends in fresh F&V trade among the NAFTA countries. It then outlines the dispute resolution mechanisms that existed within the regional produce industry prior to the DRC. Next, it documents the origins of the DRC (1996-2000), including the composition and deliberations of the tri-national task force which was convened to give life to the provisions of Article 707, and the process whereby which the recommendations of the tri-national task force

¹ F&V Dispute Resolution Corporation Records, November 2010.

were then transformed into the DRC. The study then goes on to document the DRC's evolution (2000-2009), discussing membership composition, governance and administration, DRC's core business of providing trading assistance, and its major contributions in terms of dispute resolution and harmonization of trading standards. The final section of this study elucidates key lessons for public-private sector partnerships in promoting intra-regional trade in other sectors by reviewing the elements that led to the success of the DRC.

II. Fruit and Vegetable Trade in the NAFTA Region

Agricultural trade among the North American countries has more than tripled since the beginning of NAFTA's implementation in 1994. In particular, integration of North America's fresh F&V markets has proceeded at a fairly rapid pace and F&V trade among the NAFTA countries has increased quickly since the agreement's initial implementation. The increase in fresh produce trade has been particularly remarkable. Fresh F&V trade between Canada and the U.S. has quadrupled since 1990², increasing from 3.4 million metric tons (USD 1.75 billion) to 6.1 million metric tons (USD 6.75 billion) over 1990-2009 (USDA 2010)³. Over the same period, the growth in fresh produce trade between Mexico and the U.S. has been even more spectacular. From an initial volume of 2.8 million metric tons and a value of USD 1.7 billion in 1990, F&V trade between the two countries had grown to 6.6 million metric tons in volume and USD 6.8 billion in value by year-end 2009 (USDA 2010). On the other hand, fresh produce trade between Canada and Mexico expanded by nearly six times over the past two decades (Statistics Canada 2010)⁴. Although regional trade in fresh produce has been increasing since the early

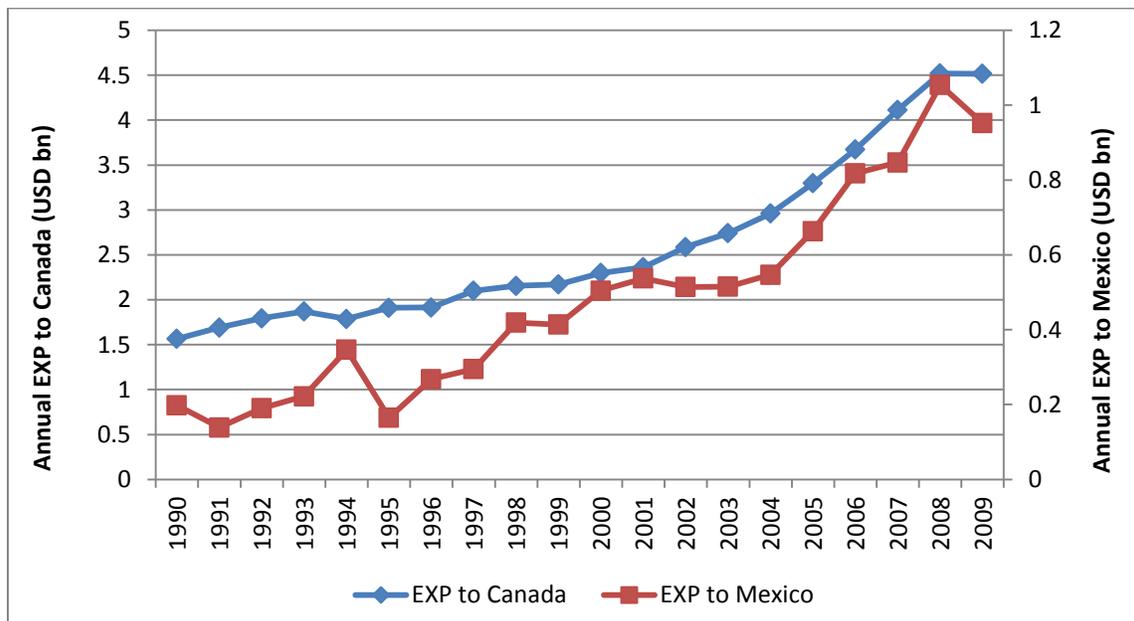
² Bilateral trade refers to total exports and imports between two countries.

³ U.S. Department of Agriculture, Foreign Agricultural Service, Global Agricultural Trade System

⁴ Canadian International Merchandise Trade Database, Statistics Canada

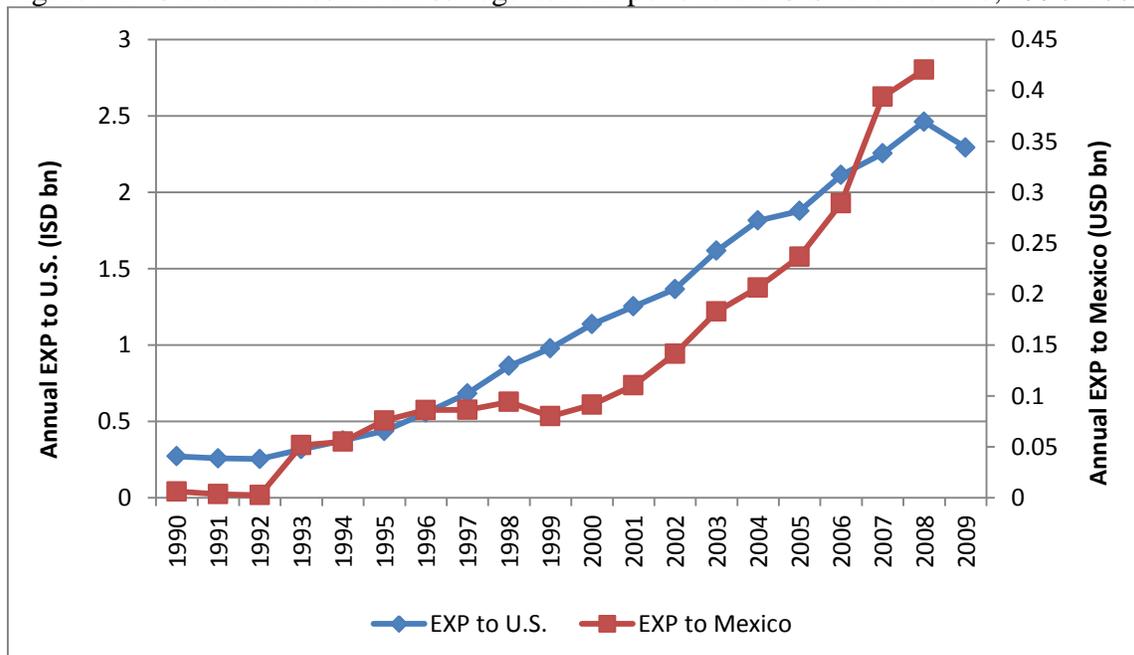
1990s, the growth in trade value and volume has been particularly dramatic beginning in 2000 (see Figures 1.1, 1.2, & 1.3).

Figure 1.1: U.S. Fresh Fruit & Vegetable Exports to Canada and Mexico, 1990-2009



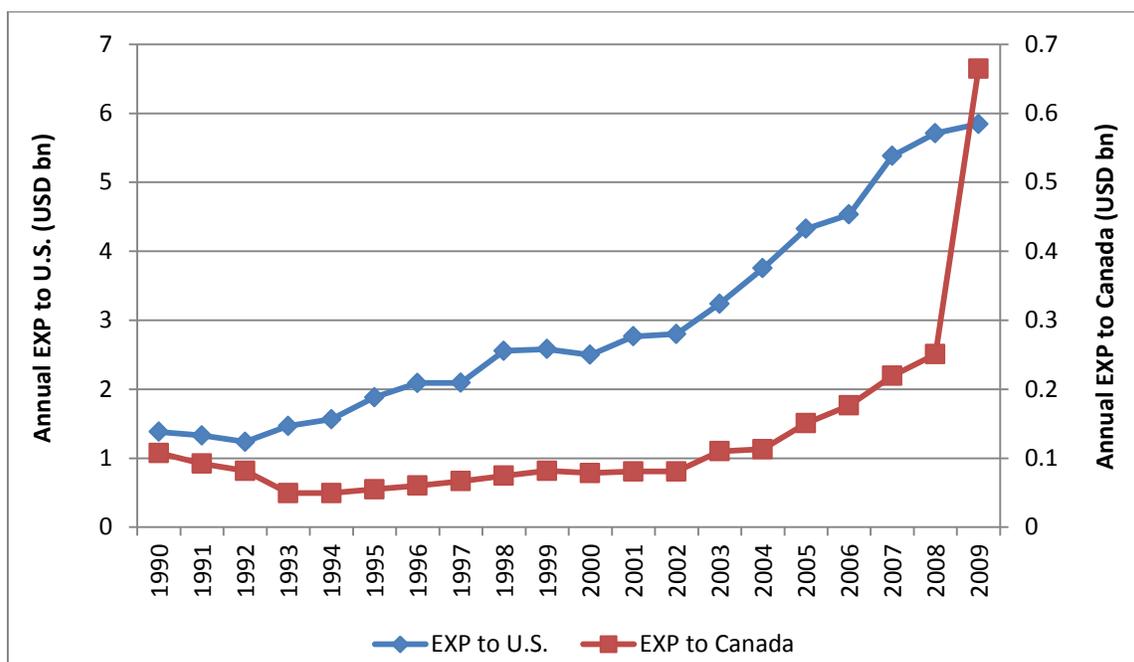
Source: Foreign Agricultural Service, U.S. Department of Agriculture
 Note: EXP means exports, bn means billion

Figure 1.2: Canadian Fresh Fruit & Vegetable Exports to the U.S. and Mexico, 1990-2009



Source: Foreign Agricultural Service, U.S. Department of Agriculture
 Note: EXP means exports, bn means billion

Figure 1.3: Mexican Fresh Fruit & Vegetable Exports to the U.S. and Canada, 1990-2009

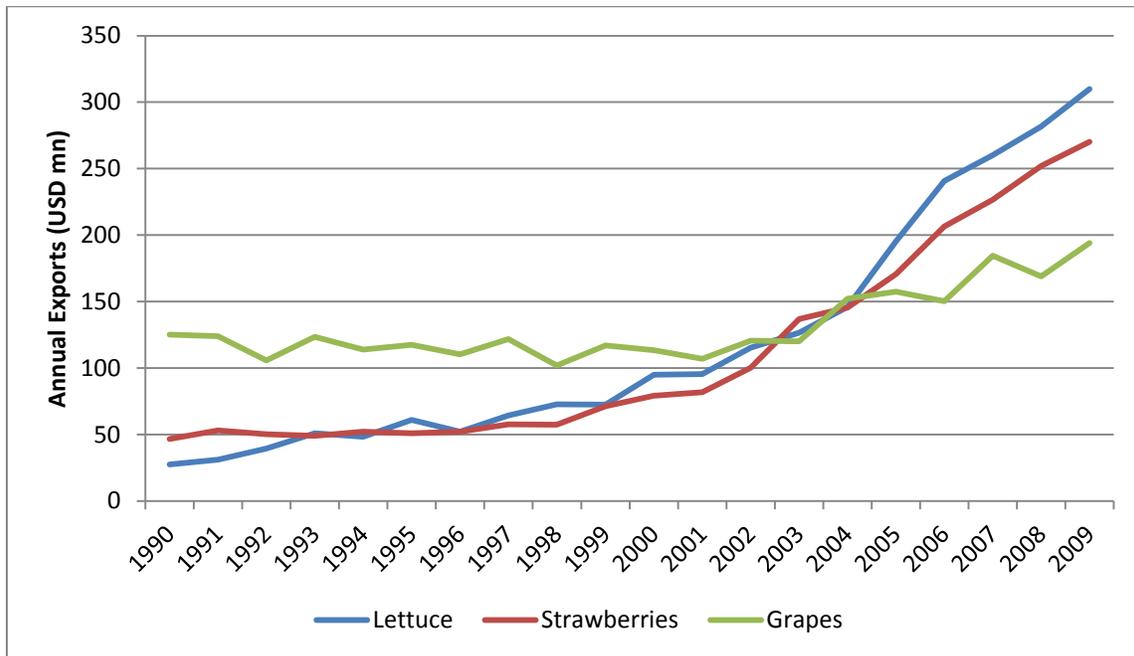


Source: Foreign Agricultural Service, U.S. Department of Agriculture

Note: EXP means exports, bn means billion

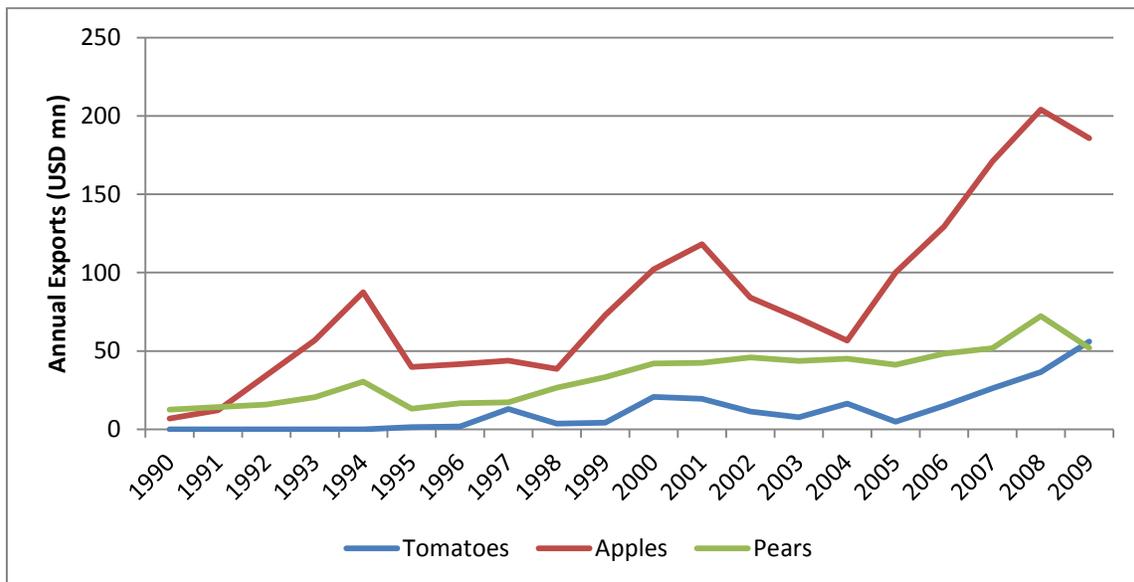
In 2009, U.S.’ top F&V exports to Canada consisted of strawberries, grapes, apples, lettuce, onions, and carrots. According to the exported value in 2009, strawberries, grapes, and lettuce ranked as the top three commodities (USDA 2010). While growth in the exports of lettuce and strawberries over 1990-2009 has been rapid (increasing by almost six times), grapes’ exports have increased at a relatively slower pace (see Figure 1.4). On the other hand, tomatoes, potatoes, onions, apples, pears, and grapes are the leading F&V commodities exported from the U.S. to Mexico (USDA 2010). In 2009, apples, pears, and tomatoes constituted the leading export commodities. In particular, U.S. apple exports to Mexico grew from a meager USD 10 million to USD 170 million over 1990 to 2009 (see Figure 1.5). Not only has the value of these exports risen substantially, the quantity exported has also registered appreciable growth over the last twenty years (USDA 2010).

Figure 1.4: Top U.S. Fresh Produce Exports to Canada (1990-2009)



Source: Foreign Agricultural Service, U.S. Department of Agriculture 2010

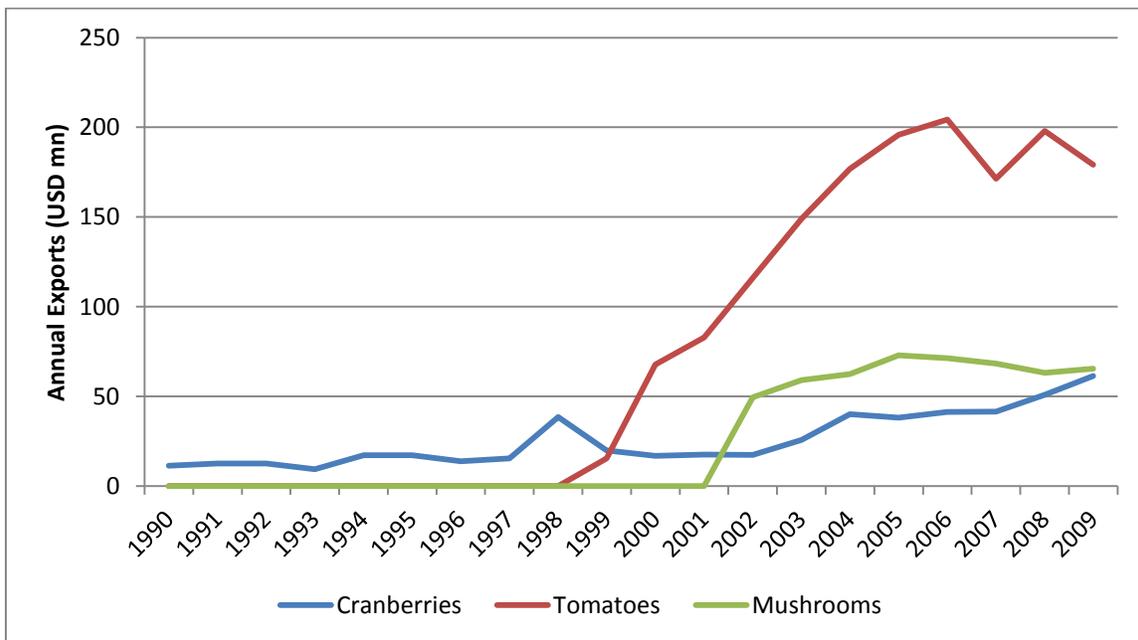
Figure 1.5: Top U.S. Fresh Produce Exports to Mexico (1990-2009)



Source: Foreign Agricultural Service, U.S. Department of Agriculture 2010

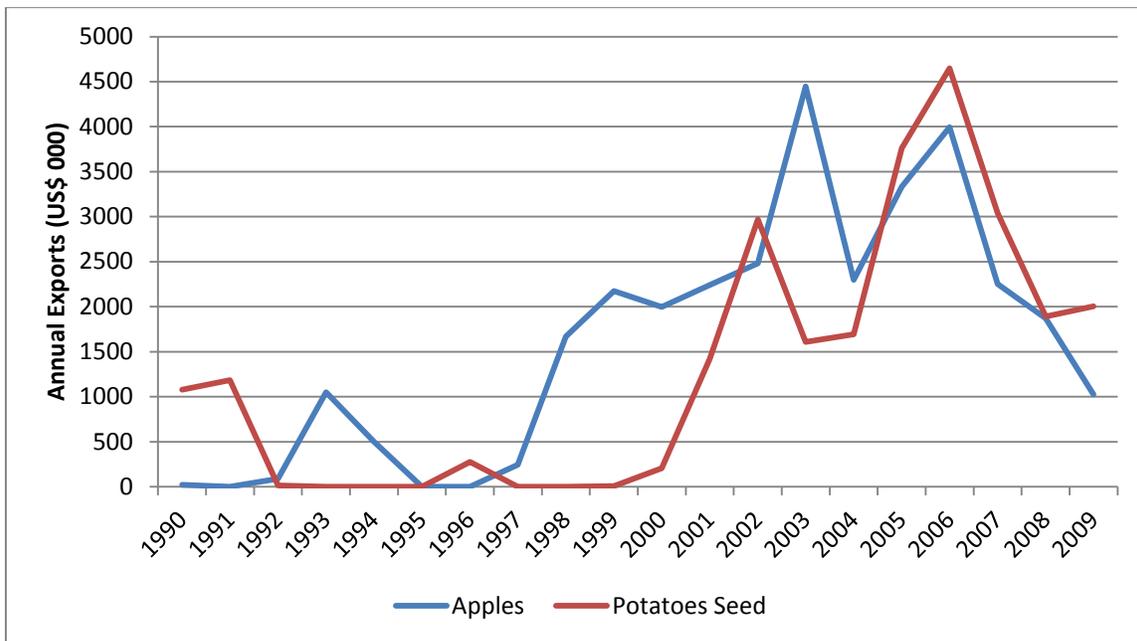
At present, cranberries, apples, cherries, and blueberries make up the leading Canadian fresh fruit exports to the U.S., whereas greenhouse tomatoes, bell peppers, and mushrooms rank among Canada’s top fresh vegetable exports to the U.S. (USDA 2010). In 2009, cranberries, mushrooms, and tomatoes formed Canada’s top F&V exports to the U.S (see Figure 1.6). The same year, Canada’s leading F&V exports to Mexico consisted of apples and seed potatoes (see Figure 1.7) (Statistics Canada 2010).

Figure 1.6: Top Canadian Fresh Produce Exports to the U.S. (1990-2009)



Source: Foreign Agricultural Service, U.S. Department of Agriculture 2010

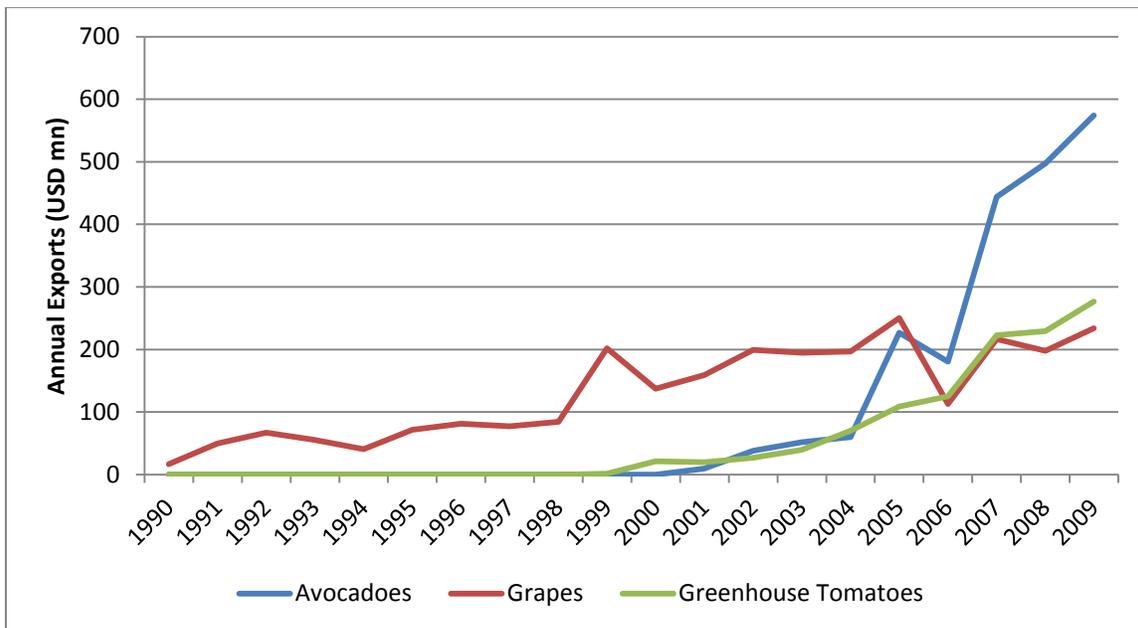
Figure 1.7: Top Canadian Fresh Produce Exports to Mexico (1990-2009)



Source: Canadian International Merchandise Trade Database, Statistics Canada 2010

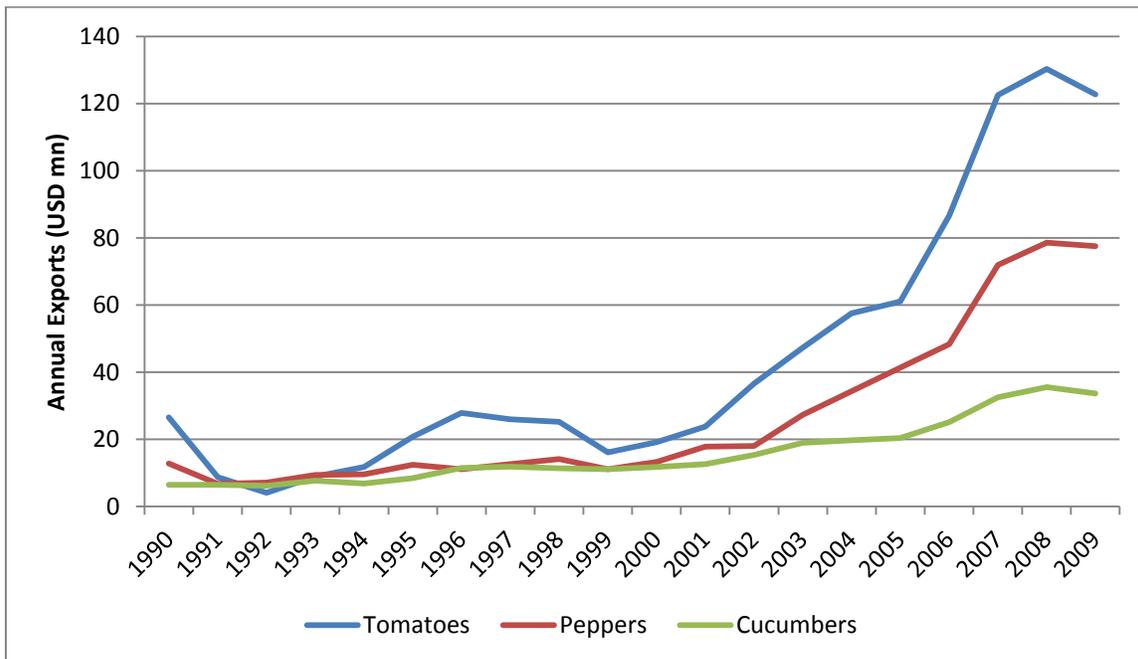
Mexico's top F&V exports to the U.S. consist of greenhouse tomatoes, chili pepper, Roma tomatoes, avocados, grapes, and strawberries (USDA 2010); and its top exports to Canada include tomatoes, peppers, and cucumbers (Statistics Canada 2010). In 2009, avocados, grapes, and greenhouse tomatoes ranked as the top three Mexican export commodities to the U.S. Over the 1990 to 2009 period, annual exports of these commodities to the U.S. have exhibited considerable variation; a general upward trend with occasional dips (see Figure 1.8). On the other hand, the value of the leading Mexican export commodities to Canada has been consistently rising, barring the minor decline in 2007-08 (see Figure 1.9).

Figure 1.8: Top Mexican Fresh Produce Exports to the U.S. (1990-2009)



Source: Foreign Agricultural Service, U.S. Department of Agriculture 2010

Figure 1.9: Top Mexican Fresh Produce Exports to Canada (1990-2009)



Source: Canadian International Merchandise Trade Database, Statistics Canada 2010

III. Mechanisms for Dispute Resolution Prior to the DRC

At the time the NAFTA treaty entered into force in January 1994, separate dispute resolution systems for F&V trade existed in the U.S. and Canada. In the U.S., the Perishable Agricultural Commodities Act (PACA) of 1930 had established an effective mechanism for ensuring that buyers and sellers of fresh and frozen F&V respect the terms of their contracts and abide by the PACA trading practices (Koller 2011). In instances where a PACA licensee failed to observe the PACA trading practices or did not act in accordance with the contract, the resulting dispute could be resolved using the informal or formal procedures for the resolution of private commercial disputes offered by PACA (Whalen 2011). Operating under a similar mandate, the Canadian Licensing and Arbitration Program regulated fresh F&V trade in Canada (Zohar-Picciano 2011). With licensing being key to the effective operation of both these systems, federal law in the U.S. stipulated that all agents trading F&V products in interstate or foreign commerce require a PACA license (Koller 2011). Likewise, all dealers and brokers marketing fresh F&V in Canada, both inter-provincially and internationally, were required to be federally licensed (Zohar-Picciano 2011). A failure to abide by the terms of a contract could potentially result in the revocation of a license, thus establishing a strong incentive for buyers and sellers to follow good trading practices. These systems served to promote orderly marketing of products and encouraged trade by providing a predictable and cost effective alternative to civil courts as a means of settling disputes over product quality considerations. Mexico, on the other hand, practically lacked a well-functioning and fully-established system for resolving international trade disputes, creating uncertainty regarding timely payments and contract enforcement that dissuaded producers in Canada and the U.S. from freely engaging in fresh produce trade with their southern neighbor (Paredes 2010).

Deficiencies of the Existing Systems

From 1934 to 1974, the Canadian Board of Arbitration (BOA) administered the licensing program for shippers and receivers of fresh F&V (Zohar-Picciano 2011). However, in 1974, the BOA's statutory authority to provide rulings over disputes was challenged in court and proven illegitimate, relegating the BOA to rule on disputes pertaining to grading standards only, and offer arbitration on a voluntary basis (Addy 1974). Even though the Canada Agricultural Products Standards (CAPS) Act was amended to partially reinstate the authority of the BOA and strengthen licensing requirements in 1983, the BOA still remained unable to rule on contract law and disputes pertaining to non-payment of invoices and intra-provincial trade, which made up a significant part of produce trade within Canada (McKenzie 2010).

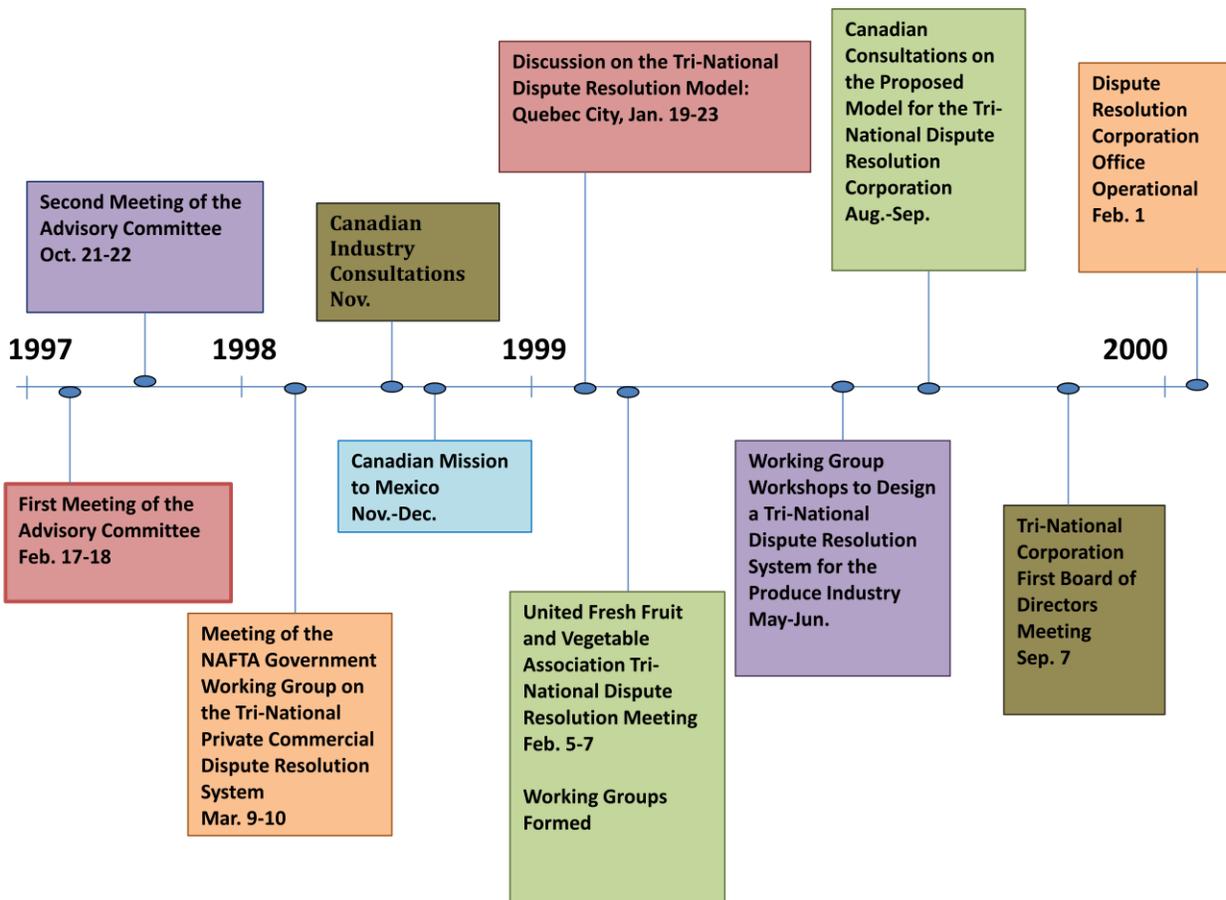
Under the Canadian constitutional arrangements, such authority could only be granted to a federal board either through a change in the Canadian constitution or the establishment of cumbersome federal-provincial agreements, both of which were practically unachievable (Whitney 2011). The Canadian BOA thus fell short of vital industry needs and expectations in several critical areas, leading to rampant incidence of non-payment and increased frustration among trading firms (Addy 1974). U.S. and Canadian shippers also encountered relatively high commercial risks and substantial transaction costs when exporting to Mexico owing to the complete absence of an international dispute settlement mechanism (McInerney 2010). The U.S. and Canadian industries were thus extremely interested in a transition from ineffective and incomplete government regulatory systems in Canada and Mexico to the creation of a mutually-beneficial, industry-driven dispute resolution system that would resolve trade-related disputes in

an effective and timely manner, and establish harmonized regional trading standards (Carberry, 2010; Chancey, 2010; Keeney 2010).

IV. Origins of the F&V Dispute Resolution Corporation: 1996-2000

The DRC was the result of the confluence of private and public objectives to develop a common and effective trade dispute resolution mechanism in North America. An unprecedented level of communication took place between private and public organizations in the three countries and multiple formal and informal meetings were undertaken to identify an ideal dispute resolution system. This section chronologically describes the key events and important milestones in the process leading to the creation of the DRC (see Figure 2).

Figure 2: Milestones in the Process Leading to the Creation of the DRC



IV.1 The Advisory Committee on Private Commercial Disputes regarding Agricultural Goods

At a meeting of the NAFTA Committee on Agricultural Trade, held on May 1, 1996 in Washington D.C., NAFTA representatives agreed to establish an Advisory Committee (AC) on Private Commercial Disputes regarding Agricultural Goods as stipulated by Article 707 under NAFTA. This AC, also known as the tri-national task force/NAFTA 707 Committee, was charged with the task of providing recommendations for the development of systems to achieve prompt and effective resolution of private commercial disputes in agricultural trade, given the perishable nature of certain agricultural commodities. The recommendations of the AC could either build on existing systems or devise alternative dispute resolution methods, with initial efforts focusing on fresh F&V only. This task force was also encouraged to explore the possibility of harmonizing trading rules and standards among the NAFTA partners. In addition, the AC was expected to identify agricultural sectors that would benefit from the use of alternative dispute resolution (ADR). Expanding private sector awareness of the need for ADR, creating opportunities for broader cooperation between institutions, and tackling issues related to the enforcement of arbitration agreements and awards were also among the AC's primary responsibilities (NAFTA Committee on Agricultural Trade 1996).

The AC was comprised of both industry and government representatives from the three countries with expertise in the resolution of private disputes in agricultural trade. The committee's work was divided into two critical stages; the initial phase comprised of identifying industry requirements and objectives, and the subsequent stage involved the development of recommendations for consideration by governments. In order to effectively accomplish the assigned tasks, the committee was required to meet at least once every year, with committee

meetings to be successively hosted by each country (NAFTA Committee on Agricultural Trade 1996).

IV.2 Trilateral Meeting in Washington D.C., April 30, 1996

In April 1996, representatives from AMS' PACA Branch and Agriculture and Agri-Food Canada's (AAFC) Licensing and Arbitration Division presented detailed information on the U.S. and Canadian arbitration mechanisms to Mexican representatives at a trilateral meeting held in Washington D.C. At this meeting, all representatives expressed interest in establishing a common dispute resolution mechanism, agreed to the mandate and terms of reference for the AC, and pointed out the need for developing a scope paper to guide the AC's tasks (NAFTA Committee on Agricultural Trade 1996). Accordingly, a scope paper was prepared by the Canadian produce industry. This scope paper was reviewed and approved with certain amendments at a working group meeting of the NAFTA Section 2022 Advisory Committee held on June 18, 1996. This document described the background, mandate, composition, and goals for the AC. At this meeting, country representatives reported on their preliminary efforts to identify private sector and government representatives for the AC. Following this meeting, detailed planning ensued on the agenda and procedural details for the first official meeting of the AC to be held in the fall of 1996. In preparation of the AC's first formal meeting, U.S. industry representatives began work on an initial draft for an appropriate tri-national model for dispute resolution (NAFTA Section 1996).

IV.3 First Meeting of the Advisory Committee: February 17-18, 1997 (Mazatlan, Mexico)

The first formal meeting of the AC was held in Mazatlan (Mexico) on February 17-18, 1997.

Although the AC emphasized F&V trade as the main focus of its discussions, it recognized that the scope of future meetings might be broadened to include other agricultural commodities. The primary objectives of the Mazatlan Meeting were to achieve a better understanding of each country's existing dispute resolution systems, to identify contentious issues pertaining to the effective resolution of commercial disputes in the region, and to propose viable alternatives for addressing them (Advisory Committee 1996). After meticulous deliberation, delegation members put forth a list of criteria which was to guide the future development of a preferred dispute resolution option:

- There was unanimous agreement that the mechanism should have a uniform set of trade standards and be reciprocal, ensuring equal treatment to all involved parties;
- The enforcement mechanism should have mandatory outcomes including the use of sanctions, be able to deal with non-payment issues, be self-funded, flexible and simple;
- Instead of relying heavily on the legal system, the dispute resolution process should be based on active industry participation, and also have provision for the creation of a multinational panel recognized by each country;
- The dispute mechanism must ensure fulfillment of the contract, allow for a judgment to be taken to an existing arbitration or justice system in the respective country, and use a "Confirmation of Sale-like" document to be presented as evidence in arbitration;
- To safeguard the seller and buyer against a breach of contract, it was recognized that the dispute settlement mechanism must be supported by an inspection system and certificate at the final destination point;

- Having an informal dispute resolution component in association with a credible formal component was also deemed desirable;
- Other favorable attributes included a system of good commercial practices and licensing, including the ability to accommodate a broader range of agricultural products (Advisory Committee 1996).

Delegates at the meeting identified options that could serve as transitory mechanisms towards a more preferred option. Three of these options included establishing a private business entity whose rules were based on the PACA/USDA model; establishing a private business that would utilize third party inspection and dispute resolution services combining elements of the Canadian and U.S. systems (i.e. certification by a private agency while government acts as an arbitrator); or simply complementing existing country models with an international system applying PACA standards in all three countries (Advisory Committee 1996).

The key outcomes from the deliberations at Mazatlan highlighted the urgent need for a dispute resolution solution to ensure fair and harmonious settlement of disputes, to enhance produce trade in the region. The options identified during the proceedings on the meeting were deemed complementary and transitional in moving towards the ideal. A detailed report of the outcomes from the Mazatlan Meeting was provided to the NAFTA Committee on Agricultural Trade which subsequently established a work plan for the Advisory Committee with associated milestones. Representatives from each country were granted time to consider the next steps in the process, coordinate domestic system changes with international developments, investigate the elements of the PACA model, and consider ways in which those elements might be achieved in other jurisdictions (Advisory Committee 1996).

IV.4 Second Meeting of the Advisory Committee: October 1997, Anaheim, California

At its second meeting, held in Anaheim (California) on October 21-22, 1997, the AC recommended more specific components of the regional mechanism based on the outcomes from the Mazatlan meeting (Advisory Committee 1997). Industry representatives identified the following components and characteristics for such a mechanism:

- A voluntary, tri-national organization, supported by the governments of the three countries, offering membership to all firms in Canada, Mexico, and the U.S. dealing with fresh produce trade;
- Agreement by organization members to abide by mutually recognized trade standards as incorporated in membership by-laws and contracts;
- Alternative dispute resolution through tri-national and/or existing dispute settlement mechanisms (e.g. PACA, the Canadian Board of Arbitration, Compromex);
- Firms refusing to comply with alternative dispute resolution results would be de-listed. De-listing would be widely advertised in trade journals, credit reporting services, member governments, and other appropriate means;
- Mechanisms should be sought in each country to facilitate the enforcement of alternative dispute resolution decisions through the countries' respective legal systems;
- The tri-national mechanism should be administered in an effective, efficient and affordable manner (Advisory Committee 1997).

The Anaheim Meeting was absolutely critical in the process leading up to the creation of the DRC as industry representatives and government officials unanimously signed off and agreed to the major components of a tri-national dispute resolution organization. This marked the establishment of an international agreement between the NAFTA partners (Whitney 2011).

Participants of the Anaheim Meeting recognized the need for establishing a trilateral agreement that would cover issues pertaining to non-payment, international trade contracts and quality standards, and adopting the PACA standards for non-payment. Following the Anaheim Meeting, members of the AC started developing a comprehensive set of standards and guiding principles, using PACA as a template. Various options for funding such a system through an annual membership fee, either flat or differentiated, were also contemplated. Participants at the meeting further concurred that the existing systems needed to be investigated in detail and an international board of directors for the dispute resolution body needed to be instituted (Advisory Committee 1997).

IV.5 Seventh Meeting of the NAFTA Committee on Agricultural Trade: November 20-21, 1997, Washington D.C.

At its seventh meeting, held in Washington D.C. in November 1997, the NAFTA Committee on Agricultural Trade recognized the success of the AC in completing its task of developing consensus recommendations on establishing an industry-driven mechanism for F&V dispute resolution. The strong support of the private sector was also acknowledged and appreciated. At the meeting, the NAFTA Committee requested a time frame to have a mechanism prepared by the end of the first quarter of 1998, with the goal of presenting a final structure to industry representatives by mid-1998. Preliminary discussions on the possible extension of the mechanism to other commodities were also undertaken, but it was agreed that the main focus should remain on fresh F&V. At the end of the meeting, the AC's recommendations from Anaheim were fully approved (NAFTA Committee on Agricultural Trade 1997).

IV.6 Meeting of the NAFTA Government Working Group on the Tri-National Private Commercial Dispute Resolution System: March 9-10, 1998 (Washington D.C.)

At this meeting, representatives of the NAFTA Government Working Group agreed that the U.S. model for dispute resolution could serve as an appropriate basis for a tri-national commercial dispute resolution body in the NAFTA region. They also agreed that an accurate inspection service for assurance of quality and condition was required at destination⁵, which could be provided either by already-existing government inspection service providers or private inspection service providers accredited by the tri-national body (NAFTA Government Working Group 1998).

The need for effective enforcement provisions and sanctions to ensure rapid dispute settlement and the establishment of membership criteria were prioritized as the next tasks. Representatives further agreed that the tri-national organization would retain the authority to de-list and subsequently advertise the name of a member company (in trade journals, credit reporting services, member governments and other appropriate means) that failed to comply with any arbitral decision given by the DRC. In addition, failure to comply with an arbitration decision could adversely impact the party's licensing status within existing government systems. It was also recommended that a business plan be devised to facilitate the development of organizational and administrative options for an industry-run alternative dispute settlement mechanism. Legal counsels ensuring that all aspects of the dispute resolution system could function as intended in each of the NAFTA countries were also to be instituted. It was also agreed that widespread industry consultations should be undertaken in each of the three countries

⁵ Historically, most commodities in Canada and the U.S. were inspected at shipping points. Overtime, regulatory agencies, particularly in Canada, have moved away from providing inspection services at shipping points. This is because shipping point inspection has become less relevant for dispute resolution. The destination inspection certificate is the single most crucial document furnishing evidence to settle a dispute as most disputes pertain to condition defects rather than permanent defects.

to discuss and finalize a proposed model for effective dispute resolution in the region (Report of the Meeting of NAFTA Government Working Group, 1998). To facilitate industry-government consultations in the respective countries, white papers were developed in the following critical areas:

- Trade Standards (led by Jorge von Bertrab, Mexico)
- Mediation/Arbitration (led by Jim Frazier, U.S.)
- Inspection Services (led by Helen Zohar-Picciano, Canada)
- Enforcement (led by Robert Lazariuk, Canada), and
- Business Plan (led by Robert Carberry, Canada)

The timeline required white papers to be completed and discussed with NAFTA produce industries by the end of May, 1998.

IV.7 Canadian Produce Industry Consultations: November 1998

The NAFTA Committee on Agricultural Trade mandated government officials from the three countries to draft a consultation document, elucidating the components that needed further consideration by the respective industry sectors in finalizing a detailed working model and business plan for the establishment of a tri-national dispute resolution body. This consultation document was completed in April 1998 and individual countries were subsequently asked to scrutinize, discuss, and develop the proposed model, paying greater attention to key issues, including trade standards, mediation and arbitration services, inspection services, enforcement provisions, and a basis in international law that entailed deeper analysis. Successful accomplishment of this task required a structured consultative process, with adequate industry

and government representation from the three NAFTA countries (Agriculture and Agri-Food Canada 1998).

The Canadian Produce Marketing Association (CPMA) and the Canadian Horticultural Council (CHC), together with Agriculture and Agri-Food Canada and the Canadian Food Inspection Agency, led this consultative process. In addition, a steering committee was created in May 1998 to provide overall direction for the project and bolster Canadian involvement.⁶ Funded by Agriculture and Agri-Food Canada (with the provision of CAN\$800,000 from Minister Vanclief), the Canadian produce industry initiated a series of industry consultations across Canada to raise awareness among key stakeholders, to present the tri-national mechanism options to the latter, and to elicit their feedback (Agriculture and Agri-Food Canada 1998).⁷

These consultations confirmed the general support of the Canadian produce industry for pursuing this industry-led, government-supported initiative and recognition for the proposed PACA-like model. Industry participants, consisting of growers, packers, shippers, wholesalers, brokers, food service distributors and retailers, from various regions across Canada were generally very satisfied with the proceedings of the consultations and with the process of seeking their input, and requested future updates on the project. The next logical step for the Canadian industry was to engage in a series of similar discussions with their Mexican counterparts to create awareness within the Mexican industry regarding the tri-national dispute resolution mechanism (Agriculture and Agri-Food Canada 1998).

⁶ Members of the steering committee included Danny Dempster, Stephen Whitney, David Hendrick, Robert Carberry, Greg Borotsik, Helen Zohar-Picciano, Glyn Chancey and Fiona Lundie.

⁷ Tri-national Dispute Settlement Workshops were conducted during November 10-19, 1998 in Winnipeg, Manitoba; Saskatoon, Saskatchewan; Burnaby, British Columbia; Calgary, Alberta; Moncton, New Brunswick; Toronto, Ontario; and Montreal, Quebec.

IV.8 Canadian Mission to Mexico: Canada-Mexico Industry-to-Industry Consultations

November 27-December 02, 1998

The principal objectives of the Canadian Mission to Mexico were to develop key contacts with the Mexican produce industry and government, strengthen cooperation between Canadian and Mexican produce industries, share the results of the Canadian domestic consultations, and learn about Mexican interests and expectations with respect to a tri-national dispute resolution model (Canadian Produce Marketing Association 1998).

The Canadian Mission identified interest among Mexican growers and exporters in participating in a tri-national dispute settlement system. While the tri-national dispute resolution model was an improvement over the status quo in Canada, the model offered a new mechanism for dispute settlement in Mexico. At the time, it was clear that the major challenge was to adapt the Canadian and Mexican models to the existing PACA system in the U.S. The Canadian-Mexican industry consultations resulted in the development of a migration strategy which is reflected in Table 1 (Canadian Produce Marketing Association 1998). While dispute resolution mechanisms and government-provided inspection services existed in the U.S., under the USDA's Agricultural Marketing Service (PACA USDA Inspection), and to some extent in Canada, under the Canadian Food Inspection Agency, the Board of Arbitration, and the Fresh Fruit and Vegetable Inspection Service, such mechanisms were almost non-existent in Mexico (Whitney 2011). On the other hand, Mexico lacked a system that offered inspection services in the event of a dispute which represented an important barrier for transition to the regional system (Paredes 2010). The key elements of this migration strategy were thus the establishment of harmonized trading practices and standards, the assurance of timely provision of inspection services, and the provision of an effective and efficient dispute-resolution/arbitration mechanism. The Mexican

produce industry further agreed that inspection services could either be provided by the government or by a private agency accredited by the tri-national organization depending on their cost-effectiveness (Paredes 2010).

Table 1: Tri-national Migration Strategy

	Canada	U.S.	Mexico
Today (1998)	Government Inspection Licensing & Arbitration Regulations Board of Arbitration	USDA/AMS Fresh Products Branch Inspection Service (PACA) Trust Laws	Limited private inspection services
Tomorrow	Conform to tri-national standards Canadian inspectors; public or private; accredited by tri-national corporation Tri-National arbitration New York Convention	Conform to PACA equivalent tri-national standards US inspectors; public or private; accredited by tri-national corporation Tri-National arbitration Trust Laws New York Convention	Conform to tri-national standards Mexican inspectors; public or private; accredited by tri-national corporation Tri-National arbitration New York Convention
How to Get There	Build on a tri-national system Seek government support for strengthening enforcement Build retail sector support	Work with Canadian & Mexican industry to develop policies and standards reflective of PACA	Work closely with the US & Canadian team to build understanding of requirements Develop an inspection capacity

Source: Canadian Produce Marketing Association, Report on the Canadian Mission to Mexico (1998)

Since each country had different initial conditions, the migration strategy proposed for each was also different. The Canadian industry promoted the tri-national system in Mexico by building retail sector support and creating widespread awareness about its benefits across

industry participants. The U.S. industry, in turn, led the coordination process with their Canadian and Mexican counterparts to frame trading policies and standards that mirrored those provided under the PACA. Requiring the greatest amount of effort, energy, and resources, the Mexican industry and administration were encouraged to propagate the idea of a tri-national dispute resolution body among Mexican firms, harmonize trading standards, and develop a full-scale inspection capacity with the support of the U.S. and Canadian governments (Canadian Produce Marketing Association 1998).

IV.9 Discussion on the Tri-National Dispute Resolution Model: Canada, Mexico & the U.S., January 19-23, 1999 (Quebec City, Canada)

Following the Canadian and Mexican industry consultations, the CPMA/CHC documented the feedback received during the consultations in the form of a first draft discussion paper. The CPMA/CHC also arranged subsequent meetings, funded by the AAFC's Canadian Adaptation and Rural Development (CARD) Fund, from January 19-23, 1999, in conjunction with CPMA's annual convention in Quebec City (Agriculture and Agri-Food Canada 1999).

The Quebec City meetings offered Canadian and U.S. industry representatives the opportunity to discuss the dispute resolution system in more detail, including its delivery strategy, membership criteria, selection of arbitrators, legal basis for arbitral awards, enforcement mechanisms and trust protection, and budget and corporate governance. The meeting ended with agreement on several fundamental questions related to membership criteria, fees, service delivery pertaining to inspection and arbitration, enforcement mechanisms, and certain aspects of governance. Few issues, such as the approach to selecting the officers and

Board of Directors of the organization, however remained outstanding and required further analysis and deliberation (Agriculture and Agri-Food Canada 1999).

The participants at these meetings were strongly committed to moving the dispute resolution project forward en route to industry agreement on a model, and to obtaining government support for implementation. It was decided that a revised discussion paper which would set out directions more clearly would be drafted and circulated among the attendees. Representatives from the U.S. industry agreed to prepare a model contract for the tri-national corporation, incorporating the issues discussed during the Quebec City meetings for review at a subsequent meeting in San Diego (Hendrick and Whitney 1999).

*IV.10 United Fresh Fruit and Vegetable Association Tri-National Dispute Resolution Meeting
February 5-7, 1999 (San Diego, California)*

Industry representatives from across the three countries next convened in San Diego in February 1999 to shape the action plan in terms of the NAFTA 707 Committee, review further developments following the Quebec City Meeting, and address such issues as the corporation's board size, governance structure, trade standards and model contract. A public workshop titled "Dispute Resolution across Two Borders: A Private Sector Initiative under NAFTA" was held as part of the San Diego Meeting to inform industry of project-related activities and progress on critical issues, and to solicit the industry's perspectives and involvement (USDA 1999).

Following the San Diego Meeting, industry efforts focused on preparing a final draft document for review in each country en route to a meeting in Mexico in April/May 1999 where an industry-wide agreement on a detailed model would be reached, and each of the three countries would begin devising their implementation strategies to identify domestic schemes that would provide the enabling support required. With continued support of the Canadian industry,

Mexican delegates were to outline a dissemination strategy and a buy-in campaign to raise awareness among domestic producers and shippers about the emerging dispute resolution model and convince the industry of the benefits of the model over the next 6-months. At the San Diego Convention, it was decided that five Working Groups would be created to develop the key elements of the corporation, with each Working Group having a lead person and adequate representation from each country. For each Working Group, the goal was to outline a proposal or set of options that were superior in terms of the associated cost, timeliness, and complexity than the existing systems, and conformed to the principles laid out in the dispute resolution model (USDA 1999). The five Working Groups formed at the San Diego Convention were as follows:

- i) **By-laws:** to draft a set of by-laws covering all aspects of membership, and the structure of governance and organization (with the exception of fees);
- ii) **Standards for Trade based on PACA and Inspection Protocol:** to outline a defined set of trade standards which should incorporate definitions of terms such as F.O.B, determine appropriate grade standards to be applied in a given trade scenario (within-country and between-countries), ascertain the link to regulatory requirements of each country for mandatory grade standards, and set out basic rules which would clarify and simplify policy;
- iii) **Mediation, Arbitration, Enforcement Protocols, and Delivery Mechanisms:** to define a PACA-like process and standards of operation, develop options for delivery in each country, determine the suitability of different service providers, research and document current practices and arbitration resources in each country, and thoroughly review the PACA Business Process to improve and streamline the mediation/arbitration process for the tri-national entity. The enforcement provision would specifically address the ability to

get an award paid and revoke a license, and issues pertaining to insolvency, and de-listing and publicity.

- iv) **Model Contract for Purchase and Sale:** to develop a standard contract which in the absence of transaction-specific written contracts would represent the default contract to provide the basis for resolution of the dispute and strengthen the means of enforcement; and
- v) **Business Plan:** to devise a financial plan to address the start-up and on-going revenues and expenses requirements, to finalize the organization's corporate status and relationship to members, to propose an appropriate fee structure, and to clarify the business case at the level of the individual member in terms of the associated costs, benefits and services, relative to the trade practice of the company (USDA 1999).

Each Working Group was given sixty days to complete the task by mid-April 1999. It was decided that all Working Group outcomes, except those for the Business Plan, were to be distributed by end-April 1999 for review by each country (USDA 1999).

The San Diego Convention was a critical step towards the creation of the DRC as at this meeting Canadian industry representatives were able to convince the U.S. industry to collaborate with them in finalizing the proposed tri-national dispute resolution process and moving towards the implementation phase of the project. Canadian representatives were also successful in convincing their U.S. counterparts that the implementation of the tri-national dispute resolution organization will not affect the PACA in the U.S. in any major way. Having this surety, the U.S. industry extended full support towards quickly moving the process forward (Whitney 2011).

IV.11 Working Group Workshops to Design a Tri-National Dispute Resolution System for the Produce Industry: May-June 1999

The Working Groups participated in two events: a two-day session in Mexico City on May 12-13, 1999 to design their respective part of the dispute resolution model; and a one-day session on June 22, 1999 to prepare a final document on the design and implementation schedule of the new corporation. These meetings were conducted with the assistance of Collaborative Decision Resources (CDR) Associates, a consultant firm with recognized expertise in dispute resolution. Prior to these Working Group meetings, preparatory workshops were held in Mexico City (Mexico) from April 21-22, 1999, to update all industry representatives on the latest developments on the project and to finalize Mexican nominees for the working groups (Canadian Produce Marketing Association 1999). These workshops also offered leaders of the Standards and Inspection Working Group an opportunity to develop their work plan and chart out the future course of action. These Working Group meetings primarily focused on:

- The kinds of disputes that the new corporation would address and resolve;
- The major causes of trans-boundary disputes over produce imports and exports;
- The general types of dispute resolution mechanisms that should be put in place to address, handle, and resolve contested issues;
- An assessment of existing dispute resolution mechanisms in the produce industry and identification of useful components that could be incorporated into the new system;
- The changes in attitudes, approaches, procedures or structures that could be implemented to prevent the emergence of commercial complaints or disputes;
- The design for a dispute resolution system that would combine prevention and intervention components and would clearly indicate the sequence of activities; and

- Implementation issues including the location, staffing, procedures, administration, internal and external service providers, training staff, quality control, and marketing of the new system (Collaborative Decision Resources Associates 1999).

The Working Group leaders reviewed, compared, integrated, and refined the various pieces from the five Working Groups, which were subsequently presented to the full project team for approval of a final draft of the elements of the new system.

IV.12 Canadian Consultations on the Proposed Model for the Tri-National Dispute Resolution Corporation: September 1999

During August 1999, the Tri-National Dispute Resolution Project Team met with industry representatives in seven locations across Canada to present and elicit feedback on the final draft of the policy and operating framework of the proposed Dispute Resolution Corporation. In addition, attendees were also asked for their input on the timing of the repeal of the CFIA licensing and arbitration legislation and membership promotion during fall 1999 (Agriculture and Agri-Food Canada, Summary Report 1999). The highlights of the consultation discussion outcomes are listed below:

- *Governance*: The need for continuity of the Board of Directors and adequate protection for the Board and the Corporation in terms of liability was emphasized.
- *Fee Structure*: A fee structure that was fair, affordable, and would not create disincentives to membership, was devised. It was also suggested that further work be undertaken to define a retail fee structure consistent with the PACA and CFIA.

- *Re-entry after De-listing*: It was agreed that stricter conditions, in the form of bonding as well as disclosure of companies or individuals connected to the de-listed company, should apply to re-entry after de-listing.
- *Scope of Eligible Members*: The inclusion of transportation companies and allowance for “associate members”, such as regional produce marketing associations and regional grower organizations, was considered.
- *Standards & Inspection*: The issue of specific grade standards being applicable to a given commodity in a given transaction and of recognition of inspection authorities or other recognized parties was addressed.
- *Mediation & Arbitration*: Consensus was reached regarding publishing the names of companies which use the mediation/arbitration process and including trained industry personnel as mediators/arbitrators. A clear outline of the mediation/arbitration steps involved and the time required for each step, and the scope of mediation/arbitration and the informal services offered by the Corporation was laid out.
- *Financing in Year One*: It was agreed that efforts to seek a capital base by requesting contributions from the three governments and from industry associations must be undertaken.
- *Promotion and Marketing*: Regional seminars to educate and build membership and marketing brochures for use in each country were proposed as integral components of the initial marketing and promotion campaign. In addition, soliciting endorsement of state and provincial associations, creating a corporation web-page to provide information on the corporation’s services and allow on-line registration, circulating a final report to all

parties in three countries, and coordinating a North American media blitz were also identified as being critical to promoting the new corporation.

- CFIA proposed an amendment to the Canadian Agricultural Products Act, which would modify its Licensing and Arbitration regulations, to make membership in the DRC more attractive within the Canadian industry (Agriculture and Agri-Food Canada, Summary Report 1999).

The produce industry in all the three countries, led by their associations, committed to expediting the establishment of a working tri-national model, through the intensification of consultation, research and development efforts, both domestically and tri-nationally. At this time, the industry was convinced that the regional model was critical to ameliorating the commercial environment for fruit and vegetable trade in the region. Likewise, at a meeting of the NAFTA Committee on Agricultural Trade held in Canada in March 1999, government officials pledged to continue to extend full support to this initiative and to participate in the working groups formed in February 1999. There was consensus regarding the need for additional consultative and development work in Mexico, given inadequate inspection infrastructure in this country. Consequently, the Canadian private and public sector (with approximately CAN\$1 million of financial support from the AAFC) continued to assume an important leadership role in promoting the tri-national model among Mexican industry groups. The World Bank and the USDA also pledged funds to assist Mexico in developing the necessary infrastructure and expertise (Canadian Horticultural Council 1999).

After the five technical Working Groups completed their work in June 1999, industry representatives advanced a comprehensive corporate model for further consideration in July and August, 1999. The NAFTA 707 Committee examined the model and provided input emphasizing

legal aspects in the context of the free trade agreement. Following these internal country consultations, the first Board of Directors Meeting of the Tri-National Dispute Resolution Corporation was held on September 7, 1999 in Washington D.C. With the opening of the Tri-National Corporation Office planned for February 1, 2000, the proposed model was finalized and an implementation plan was developed and presented to the NAFTA Steering Committee for ratification at this meeting (Canadian Horticultural Council 1999). In addition, this first meeting focused on appointment decisions, proposal of names for the tri-national organization, discussion of issues pertaining to start-up funds, corporate structure, marketing and promotion, the inspection program in Mexico and the Canadian regulatory situation; creation of two critical committees to deal with the corporation's financial and membership affairs, approval of corporation's policies and standards, determination of corporation's goals and measureable results, particularly with respect to the quality of service provided, accountability measures for the Board of Directors and CEO, update on each country's consultation process on the final draft document for the tri-national corporation, and drafting a work plan through to summer 2000 (Fruit and Vegetable Dispute Resolution Corporation 1999). An interim Board of Directors was selected to supervise and ensure the timely establishment of the corporation. Under the leadership of the Corporation's first President and Chief Executive Officer, Mr. Stephen Whitney (former Executive Vice-President of the CPMA and former Assistant Executive Vice-President for the CHC), the Board engaged in an aggressive membership recruitment drive in the three countries (Canadian Horticultural Council 1999).

Seeking Legal Opinions on Recognition & Enforceability of the Dispute Resolution Mechanism

It was absolutely necessary that the arbitration agreements and awards issued by the tri-national dispute resolution mechanism be enforceable in all three countries. Without legal enforcement, the legitimacy of the dispute resolution body could be challenged. To ensure the recognition and enforcement of these awards across the three NAFTA countries, the DRC requested detailed legal opinions from leading legal firms in Canada, Mexico, and the U.S. shortly after its creation. These legal opinions were based on the premise that all DRC members would agree in writing to binding arbitration either through a membership contract in which members agree to arbitrate disputes with other members as a condition of membership, or through a written sale contract with a firm that a member engages in business with, or in an agreement to arbitrate in the event that a dispute arises (Whitney 2011). In general, these legal opinions confirmed that the arbitral awards decided by the DRC were legally enforceable in the courts across the three countries. The exact details whereby which these awards were to be enforced however differed to a certain extent in the three countries.

Following the enactment of a federal law, the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also commonly known as the New York Convention, were enforced in the U.S. in 1970. The New York Convention provided that each state recognized and enforced agreements to arbitrate and arbitral awards. Similarly, federal courts were also required to recognize and enforce such agreements and awards. On account of the New York Convention, any parties that entered into a membership contract in which they agreed to arbitrate generally with other members in the instance of a dispute would be required to arbitrate by a U.S. court, and any resulting award would be confirmed by the court. Likewise, if prior to the occurrence of a dispute the parties entered into a written contract which contained a clause requiring the parties to arbitrate disputes in accord with the rules of the DRC, such

agreements would be enforced, as would any award issued. Finally, if the parties entered into an agreement to arbitrate after a dispute arose, then again both the agreement to arbitrate and any award issued would be enforced in the U.S. courts. Domestic awards would be enforced under different provisions than those governing foreign arbitrations. For within-state arbitration agreements, awards would be enforced according to each state's arbitration award enforcement statutes (McCarron 1999).

The legal opinions confirmed that in Canada arbitral awards issued by the tri-national corporation would be more easily enforceable and subject to considerably less judicial review than would decisions of courts or other administrative authorities that would otherwise have jurisdiction to preside over the relevant disputes. The legal opinions further stated that this would be especially true for foreign or international awards as they are governed by a legal regime particularly favorable to the enforcement of arbitral agreements and awards. In most jurisdictions, the recognition and enforcement of foreign and international awards in Canada is governed by specific legislation which adopts and implements two important international instruments dealing with international commercial arbitration; the New York Convention and the United Nations Commission on International Trade Laws Model Law on International Commercial Arbitration (the UNCITRAL Model Law). Both the New York Convention and the Model Law firmly support the enforcement of arbitration agreements and awards in Canada. They also provide a summary procedure for the recognition and enforcement of awards which restricts and defines the bases for resisting enforcement of awards and, in most cases, reverses the legal burden by requiring the party resisting enforcement to prove that one of the limited grounds for refusal exists (Alvarez 1999).

On account of certain constitutional complexities, the procedure for enforcement of domestic arbitral awards in Canada is not as straightforward as for foreign and international awards. In most jurisdictions, other than the federal jurisdiction and Quebec, legislation governing domestic arbitration within Canada allows greater control of the process by the courts and does not establish very clear procedures for enforcement of awards both inter- and intra-provincially. Moreover, there exist marked differences in legislation between jurisdictions, resulting in a more complicated framework for enforcement of awards. Nevertheless, arbitral awards are enforceable between provinces and are typically subject to less judicial scrutiny than judgments (Alvarez 1999).

Legal experts from Canada also acknowledged that the tri-national dispute resolution system would be very effective as it evaded the constitutional problems hampering the development of a legislative or regulatory regime to address the disputes in question. The use of voluntary membership in the tri-national corporation and a mandatory dispute resolution system based on the corporation's standards and regulations established an efficient channel to deal with issues resulting from the Canadian constitutional division of powers (Alvarez 1999).

Legal opinions from Mexico also corroborated that awards made by the tri-national corporation would be subject to the general arbitration regime in Mexico which supports the enforcement of foreign and international awards according to the Mexican legal framework. The Mexican legal framework for commercial arbitration and enforceability of arbitral awards is comprised of the New York Convention, the Inter-American Convention on International Commercial Arbitration of 1975 (the Panama Convention of 1975), the Code of Civil

Procedure⁸, and the provisions of the Title Fourth of the Commercial Code⁹. Commercial matters in Mexico are thus subject to the Federal Constitution and the Code. According to the provisions of the Code, unless otherwise agreed to, parties are free to resolve their disputes in whichever way they deem appropriate. This includes arbitration by a third-party, including an arbitral institution such as the tri-national corporation. Furthermore, unless otherwise provided, there is no need for judicial intervention. If, however, judicial intervention is requested, the federal district court or the local court at the place of arbitration is competent to intervene. The Mexican Code recognizes the arbitrations undertaken by the corporation and allows for the possibility of seeking assistance of the relevant federal or local court in arbitral matters (Marquez 1999).

Figure 3: Critical Stages in the Creation of the DRC



Summing up, the process leading to the creation of the DRC can be described as consisting of five crucial stages (see Figure 3). The initial stage (prior to 1997) consisted of meetings among government representatives from the three countries resulting in the creation of the advisory committee on the resolution of private commercial disputes in agricultural trade. In 1997, the advisory committee met twice and developed a basic model for the tri-national dispute resolution mechanism. Through mid and late 1998, industry representatives from Canada and Mexico engaged in a series of consultations to improve and revise the model for the tri-national

⁸ The provisions of the Fourth Book of the Federal Civil Procedure Code on International Cooperation, effective from 1988

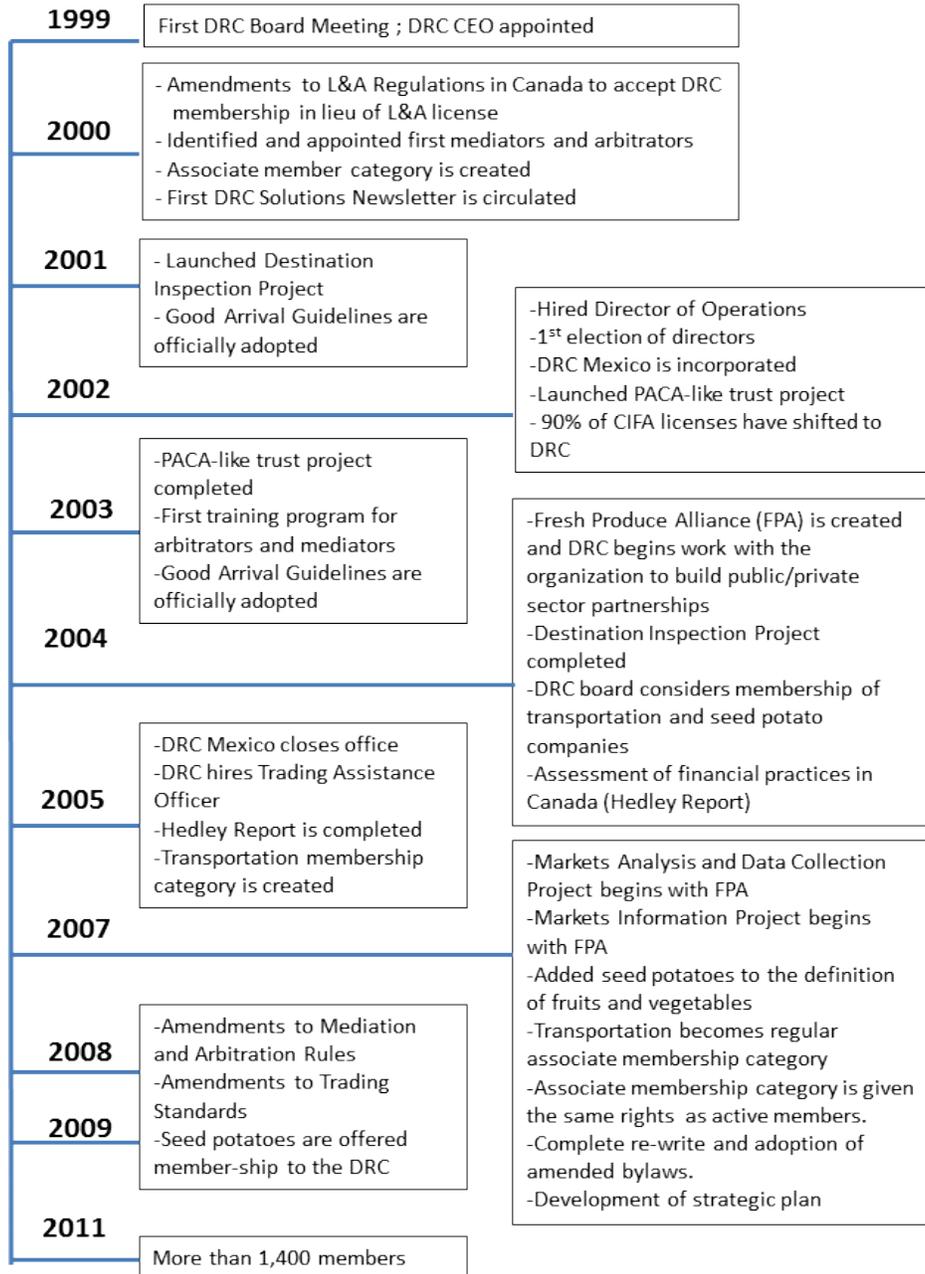
⁹ Effective from July 1993, the Commercial Code follows the Model Law.

corporation developed by the advisory committee. This process was expedited with the formation of the technical Working Groups in the spring of 1999 which were charged with finalizing the details of the key elements of the tri-national corporation. As the Working Groups completed their tasks, industry representatives collaborated throughout the fall of 1999 to launch the tri-national corporation by early 2000.

V. The Evolution of the DRC: Responding to a Dynamic Industry

The previous chapter outlined the players and processes that led to the creation of the DRC. This chapter describes the evolution of the DRC for the period 2000-2011. It focuses on the central business of the DRC- dispute resolution and mitigation- and the efforts undertaken to make this mechanism relevant and valuable to the produce industry in the U.S., Canada, and Mexico. The primary milestones discussed in this chapter are presented in chronological order in Figure 4. The chapter begins with a brief description of how the DRC's dispute resolution process works, the various stages involved, and the role of DRC staff throughout. Next, it discusses the membership development and marketing efforts undertaken by the DRC in Canada, the United States and Mexico. Third, it describes efforts to expand the scope of membership, including the creation of new membership categories, the extension of membership to additional sub-sectors of the produce industry, and the exploration of association-sponsored membership modalities to make DRC services available to smaller firms. Following this, the chapter then outlines special projects and initiatives undertaken by the DRC to address structural and policy shortcomings that contribute to regional trade disputes.

Figure 4: Chronology of milestones, 1999-2011



Source: Created by Authors based on DRC Records

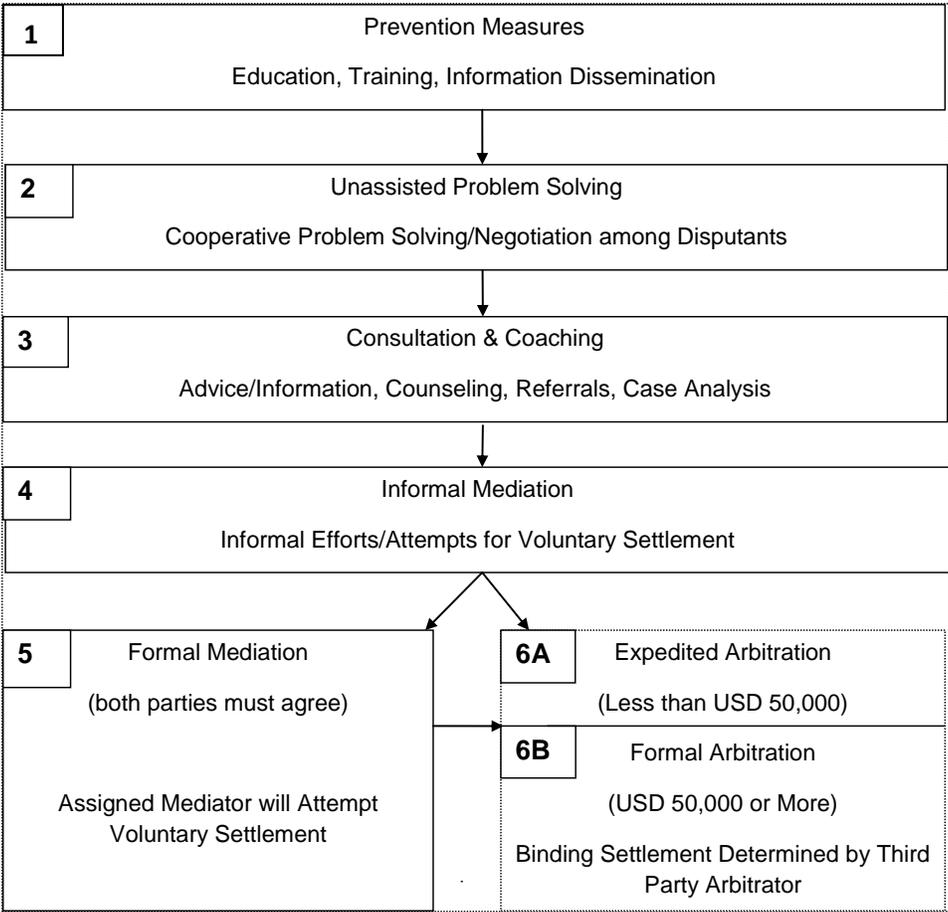
V.1 Core Business of the DRC

Firms that join the DRC adhere to a common set of trading practices and mediation and arbitration procedures. Decisions of the DRC can be registered with and are enforceable in the

courts of the three countries. The primary incentives for participation are the commercial benefit to suppliers, customers and transportation service providers that result from greater assurance of reputable business behavior, and the clarity and efficiency of the resolution mechanisms in the event that disputes arise between buyer and seller.

Dispute resolution includes an array of activities including providing advice, coaching and consulting, as well as the provision of both informal and formal mediation services. When necessary, it also includes the process of final arbitration. In addition to offering a structured process for dispute resolution, the DRC focuses on mitigating disputes through a variety of educational activities such as seminars, newsletters and workshops, among others (Figure 5).

Figure 5: DRC Dispute Resolution Process



V.1.2 Stages in the Dispute Resolution Process

The model is an all-encompassing six stage dispute resolution process, as shown in Figure 5.

The process provides both assistance and intervention as needed by members. Services are supplied through DRC staff and contracted third parties like PACA (US Perishable Agriculture Commodities Act).

Prevention Measures - At stage one of the model, members are provided with information about their DRC rights and obligations. Information will be general in nature. However, a number of important issues will be covered, such as the statute of limitations for filing a claim, options for dispute avoidance and/or resolution and the best way to protect oneself. Prevention measures also include a variety of educational opportunities for the membership. Through workshops and trainings, webinars, newsletters, and public seminars, the DRC works to promote better industry education about issues which are involved in the buying and trading fruits and vegetables. This includes helping companies think about the options available when product is received in poor condition, how to interpret inspection certificates, good arrival guidelines, and avenues for dispute settlement, among others (DRC 2011).

Unassisted Problem Solving - At stage two of the model, the parties engage in unassisted negotiations and problem solving between buyer and seller. The focus of unassisted problem solving is to provide general information so that the parties may discuss and resolve the potential dispute themselves. Members will be given advice on how to effectively approach their trading partner. Here, DRC staff will refrain from taking positions or giving too much technical advice. The DRC wishes to encourage and promote bargaining in good faith between the parties, not technical trading.

Coaching and Consultation - At stage three, a physical file will be started and all correspondence and documents shared between the parties will be held in that file. DRC staff will take a more active role in dealing with the parties. Specifics of the case will be discussed at this point; and opinions and settlement offers exchanged between parties. When consulting or coaching, the DRC may advise members on the strengths and weaknesses of the case, and often suggests ways of approaching the relevant trading partner for resolution. During this phase the DRC staff also reminds parties of the Statute of Limitations for the DRC dispute resolution procedure, as well as any pertinent, additional requirements outlined by CFIA or the USDA (DRC 2011). It is important to emphasize the relevance of stages 1-3: according to the leadership, over 85 percent of disputes managed by the DRC are resolved informally through unassisted problem solving, consultation and coaching, and informal mediation (DRC 2011). This highlights the role of the DRC in promoting improved relationships among produce supply chain members in North America.

Informal Mediation - Stage four of the model begins when the voluntary stages have not succeeded in providing a resolution. Informal Mediation is the beginning of specific DRC procedures. It imposes certain filing requirements as well as a twenty-one day timeframe within which a voluntary settlement must be reached. Informal Mediation requires all parties to forward supporting documentation to the DRC. Upon receipt of this documentation, DRC staff helps parties exchange information required to reach resolution of the dispute. When this exchange of information is complete, DRC staff works with both parties to achieve a voluntary settlement. If the parties cannot agree to settle their dispute, a formal mediation or an arbitration option is elected. This stage initiates a formal flow of processes and documents, which is

described in detail in Appendix B. Figure B-1 in the appendix describes these processes in the context of the informal mediation stage.

Formal Mediation - The fifth stage is an option that can be used regardless of the dollar value of the claim. Both parties must agree to use this option and the mediation is carried out by an independent third party mediator who can be selected from a roster maintained by the DRC. If the parties do not agree to use formal mediation or if mediation does not succeed in generating a settlement acceptable to both parties, then either party may proceed with arbitration. Since the inception of the DRC, formal mediation has rarely been used. Rather, Claimants prefer to save money by using informal mediation (which is included in DRC membership fees) or take the claim directly to arbitration, the sixth and final stage of the dispute resolution process. Appendix B describes details of processes, documentation and responsibilities of parties in dispute in the formal mediation stage (Figure B-1).

Arbitration - In circumstances where the dollar value of a claim is less than \$50,000 U.S., an *expedited arbitration* takes place where the DRC provides the parties with an accelerated process. While this process places strict time limits on the exchange of information, it is both fair and equitable when compared to the amount in dispute (less than \$50,000). In circumstances where the dollar value of the claim is equal to or greater than \$50,000, the parties are required to use the formal arbitration process as defined under the Corporation's Formal Arbitration Rules (i.e., *formal arbitration*). However, when both parties and the administrator agree, the expedited arbitration process can still be used for claims greater than \$50,000. Once a binding decision has been rendered by the arbitrator, the DRC staff will monitor compliance with the binding decision. In circumstances where there is failure to comply with a decision, the DRC will proceed with de-listing the party failing to pay and will help to facilitate the registering of the

decision with the court. The formal arbitration (expedited and formal) processes and flows are described in detail in Appendix B (Figure B-2).

Whether the process involves formal or expedited arbitration, the DRC members will be able to draw from a roster of knowledgeable mediators/arbitrators that has been established by the DRC. The recruitment, training, and maintenance of trustworthy and knowledgeable arbitrators are of paramount importance to the DRC. It is noteworthy that with funding from Agriculture & Agri-Food Canada, the DRC conducted an extensive arbitrator/mediator training program with CDR and Associates (a mediation and conflict resolution company) in 2004. The majority of current mediators/arbitrators attended the 2004 training session.

V.1.2 Dispute Resolution Stages and the Evolution of the DRC

While the DRC provides dispute resolution services in an effort to assist the produce industry, the organization exists, at a deeper level, to help support and maintain important business relationships between members and within the larger produce industry. This often means helping parties compromise and work together— especially when clear responsibility or blame for a product quality issue is not obvious in produce trading. Especially for product quality disagreements, uncovering the exact reasons and responsibility for diminished quality can be difficult, if not impossible. The fresh produce industry is constantly fighting a battle against natural product deterioration in produce supply chains, which typically involve multiple handlers. As a result, it is often unclear as to the time, place, or the ownership point at which quality diminishes as a result of what may or may not be partner negligence or ineptitude. This lack of clarity in determining responsibility is a key reason why the DRC constantly promotes

amicable, mutual resolution, as reflected in the fact that about 85 percent of the disputes are resolved in stages 2-4 of the process (DRC 2011).

V.2 Membership Development and Marketing Efforts – A Tale of Three Countries

While the DRC core business objectives have remained constant, the composition and needs of the industry have not. Operating within a dynamic, growing industry means constant internal efforts to remain tuned in to both member needs and industry shifts in policy or practice. A marketing orientation is critical to the DRC because the revenue stream which sustains DRC operations derives almost entirely from the membership dues it receives from the produce buyers and sellers who voluntarily elect to affiliate with it. Efforts towards coalition building with produce and industry associations, new methods of marketing and outreach, and the creation of new membership categories have each been internal efforts to improve value and provide better provision of core business services to DRC members. This section discusses the successes, failures, and challenges in membership development in Canada, the US, and Mexico.

Beginning in 1999 from a base of zero members, by 2011 the DRC membership has risen to include 1,421 member companies. However, as shown in Table 2, the growth rate has varied substantially across countries (Table 2). Given that the three NAFTA countries began deliberations on equal footing to create the DRC, how did it come to pass that the smallest of the three countries (Canada) would represent over two-thirds of total membership, with the far-larger produce industry of the United States accounting for only a quarter? More importantly, why in Mexico – also a country far larger than Canada both in terms of population and the produce sector– is membership barely nosing out non-NAFTA Chile for third place with only 2 percent of total membership? To address these questions, this section examines the pre-existing produce

dispute resolution systems in each country, the regulatory requirements for licensing, the different approaches adopted by each national government in support of the DRC’s development, and the relative capacity to provide the evidentiary materials on which the DRC’s dispute resolution process is based. Further, this section discusses the membership development efforts undertaken by the DRC in each of the three countries.

Table 2: DRC Membership by Country, December 2011

COUNTRY	MEMBER COMPANIES	% OF TOTAL MEMBERSHIP
CANADA	1,005	71%
USA	358	25%
MEXICO	22	2%
CHILE	18	1%
OTHER	18	1%
TOTAL	1,421	100%

Source: DRC Annual Reports

V.2.1 Canada

At the time that the DRC entered into operation in 1999, buyers and sellers of fresh produce in Canada had three general alternatives on which to rely for dispute resolution: direct negotiation between disputants; civil complaint in a court of law; or the Licensing & Arbitration system of the Canadian Food Inspection Agency (CFIA).

Each of these three alternatives suffered from limitations which impeded its effectiveness. In the case of direct negotiation, leverage lay in the hands of the buyer, or receiver; the seller, or shipper, had in most cases already incurred the costs of procuring and transporting the product to the market specified by the buyer, while the buyer had virtually no economic exposure at the time the product reached his place of business. As a result, resolution through direct negotiation routinely occurred on terms dictated by the buyer, and provided the seller with little, if any, satisfaction. In the case of legal action, the resolution process was invariably

lengthy and expensive. Moreover, given the technical nature of the issues involved in such disputes, and the near-total reliance on verbal contracts in fresh produce transactions, jurists often struggled to understand the concepts involved in attempting to adjudicate such disputes, and frequently arrived at incorrect decisions and resolutions. The Licensing and Arbitration (L&A) system, specifically put in place to resolve disputes between buyers and sellers of fresh produce in Canada, was generally more even-handed than direct negotiation, and far more knowledgeable than the courts. Unfortunately, the L&A system was only able to address disputes involving grade and condition, lacking jurisdiction to address disputes relating to payment issues (e.g., late payment, partial payment or outright non-payment). In addition, the timelines of the L&A system were such that years could elapse before a dispute might be finally ruled upon.

Given the weaknesses of the three pre-existing dispute resolution systems in Canada, there was a generally favorable predisposition among produce firms in favor of a new system - resembling more closely the PACA system in the United States - which could offer fair and objective outcomes on a timely and cost-effective basis. Once the DRC model was rolled out and explained to produce firms, it immediately captured the attention of the Canadian produce industry. Prior to the creation of the DRC, virtually all buyers and sellers of fresh produce in Canada were required to obtain operating licenses from the L&A system of the Canadian Food Inspection Agency. To support and encourage the development of the DRC, the Canadian government announced to the produce industry in 1999 that membership in the DRC would meet the licensing requirement for legal operation within the industry, on an equal footing with a CFIA operating license. This official sanction from the Canadian government, together with the fact that the DRC promised timely and fair dispute resolution, and charged a membership fee that

was considerably less than the CFIA license fee, triggered a wholesale migration from CFIA licenses in favor of DRC membership. This transition is illustrated in Table 3.

Table 3: Canadian Membership Evolution

Year	In	Out	Net	Growth Rate	Recruitment Rate	Retention Rate	Total Canadian Members
2000							591
2001	174	57	117	20 %	29 %	90 %	708
2002	125	73	52	7 %	18 %	90 %	760
2003	99	75	24	3 %	13 %	90 %	784
2004	97	67	30	4 %	12 %	91 %	814
2005	91	73	18	2 %	11 %	91 %	832
2006	68	82	(14) ^a	(2 %)	8 %	90 %	818
2007	104	54	50	6%	13%	93%	868
2008	106	98	8	1%	12%	89%	876
2009	96	81	15	2%	7%	91%	891
2010	140	99	41	5%	16%	89%	932
2011*	142	75	67	7%	15%	92%	999

Source: DRC Membership Records

^a Numbers in parenthesis represent negative changes

Building and maintaining close relations with national produce associations, such as the Canadian Produce Marketing Association and the Canadian Horticultural Council, as well as with provincial produce marketing associations and grower organizations across Canada, has played a critical role in the DRC's membership development activities within Canada. The DRC is a regular participant at national and provincial trade shows, and has been frequently invited to join panel discussions on risk mitigation and dispute resolution at educational forums organized by these national and regional associations. The DRC also works closely with regional commodity associations, such as the Prince Edward Island Potato Growers and the Ontario Greenhouse Vegetable Growers, to provide the membership of these groups with information relevant to the successful management of their credit activities, and to put together customized seminars addressing issues of particular concern to any of these regional or commodity groupings.

The DRC has extended marketing communication strategies beyond Canadian fruit and vegetable growers. The DRC has also cultivated close working relations with Canada's major food retailers, both to inform them of the DRC mission, and to garner their support for its membership development activities. Historically, Canadian retailers had felt themselves to be operating at a disadvantage in attempting to work more closely with fruit and vegetable producers, both in Canada and in the United States, as a result of shipper concerns regarding claims and payment practices on the Canadian wholesale markets from which these retailers procured their product. These retailers recognized the discipline which the DRC would be able to enforce in terms of bringing these claims and payment practices into compliance with shipper expectations, and believed that improvements in this area would enhance their credibility as reliable customers. As a result, Canadian retailers generally supported the DRC mission not only by becoming members themselves, but also by encouraging – – and, in some cases, requiring – – their wholesalers and other vendors to become members of the DRC.

The earlier chapters of this report have explored the extent of Canadian government support, particularly from Agriculture and Agri-Food Canada, throughout the formative, pre-operational phase of the Dispute Resolution Corporation. This support has continued throughout the course of the DRC's evolution since 1999, both in the form of direct funding, and in its efforts to bring all of the active participants within the Canadian produce value chain into its regulatory regime. In terms of funding, the government provided the DRC with an initial amount of \$170,000 to facilitate the DRC's startup in late 1999. In an effort to increase the DRC's reach into Mexico, and thereby increase the DRC's ability to protect Canadian shippers operating within the Mexican market, the government provided \$130,000 to support system upgrades and membership development in Mexico from 1999 through 2003 (this initiative is discussed in more

detail in the evolution of Mexican membership below). In addition the Canadian government provided funding to support a series of studies and activities within Canada designed to enhance the regulatory environment within which the DRC operated, including studies to improve Canada's destination inspection service, a feasibility study for the establishment of a PACA- like trust within Canada, and a formal training program for the DRC's roster of arbitrators and mediators. These initiatives are discussed in detail later in the chapter. Beyond its direct funding support, the Canadian government also enacted several changes to its licensing regulations, in an effort to eliminate loopholes and to improve the universality of compliance with good trading practices throughout Canada. Foremost among these changes were the elimination of the small buyer exemption, which had permitted a significant number of wholesale buyers/resellers to circumvent the need for licenses, and the establishment of a requirement for importers to declare their license details as part of the standard import documentation process. This import documentation requirement, put in place in January of 2011, revealed that many importers had been operating without benefit of licenses, and led to some 60 new member affiliations for the DRC within the first half of 2011.

The DRC support from government and industry in Canada appears to have contributed to solve a domestic problem, improving the resolution of commercial disputes between Canadian produce firms. Table 4 indicates that during the period 2007-2010 about 90 of the disputes filed with the DRC in Canada consisted on complaints brought by Canadian firms against other Canadian firms. Of this 90 percent, about half of them dealt with disputes between members in different provinces and the other half dealt with disputes between members within the same province (Table 4).

Table 4: Type of disputes resolved by the DRC in Canada, 2007-2010

Year	2010	2009	2008	2007
Inter-provincial	208	187	144	55
Intra-provincial	165	145	111	37
Canada vs. USA	37	36	20	8
Canada vs. Mexico	0	0	0	0
Canada vs. Other	4	4	3	0
Total	414	372	278	100

Source: DRC Official Statistics (2010)

Over the past 10 years the corporation had to overcome specific law suits which put at risk the existence of the DRC. These law suits were brought by firms that were required to make payment to a trading partner as a result of DRC arbitration decisions in 2004 and in 2007. The process that ensued was similar in both cases so the focus here is on what happened with the 2004 law suit. The firm did not accept DRC's arbitration decision and consequently filed a law suit in the British Columbia court arguing that the DRC did not have the right to suspend their membership and seeking compensatory damages . The DRC prevailed in this law suit, but the firm went ahead a filed another law suit in the Ontario court to overturn the arbitration award. This second law suit created a serious financial problem for the DRC. While the DRC carried insurance cover against the exposure resulting from the first law suit, no Canadian insurer provided services to provide cover against law suits involving interference in a business, which was at the heart of the second law suit (i.e. removal from DRC membership). The DRC prevailed in both law suits, but spent about \$250,000 in legal fees in the process. These legal expenses imposed a huge financial burden on the DRC to the point of exposing the corporation to bankruptcy.

This negative experience provides an important lesson, underscoring a critical feature of private, voluntary organizations such as the DRC. While a private organization operating under an international trade agreement is more flexible and can adapt to meet member firm

expectations, it does not have the “deep pockets” that government agencies have in order to face legal challenges. As a direct result of these experiences, the DRC hired legal counsel to review its bylaws and rules with a view of making modifications that would reduce the risk of similar law suits in the future. They also worked with their insurance broker to find insurance coverage for these types of lawsuits and were the first organization in North America to obtain the required coverage. In spite of this negative experience, one advantage of a private organization over a government agency is that it has more flexibility to change its bylaws and avoid similar situations in the future. This poses an important policy question: Is there a role for government to provide a certain level of “insurance coverage” for private institutions who have essentially taken on the role of delivering trade dispute resolution services?

V.2.2 United States

As explained earlier, the US produce industry has relied on the Perishable Agricultural Commodities Act (PACA) Branch of the US Department of Agriculture to resolve disputes between buyers and sellers, and to ensure general compliance with regulated trading practices, since the PACA branch was first created some 80 years ago. Virtually all US-based buyers and sellers of fresh produce are required to hold PACA licenses in order to operate legally within the produce business. Failure to operate according to regulated trading practices, or to honor PACA reparation orders issued in the course of a dispute resolution, can lead to suspension or termination of a company’s PACA license. Licensees are required to pay an annual license fee of \$995.00.

PACA licensees have generally been well satisfied with the role played by PACA as enforcer of the "rules of the road" within their sector, and have sought comparable protection for

their sales into Canada and Mexico. Indeed, this desire to duplicate services across the NAFTA region, which were already provided to them by PACA on sales within the United States, was the primary motivation for US participation in the process which led to the formation of the DRC. PACA coverage for all transactions involving buyers in the United States -- regardless whether the sellers are US licensees or unlicensed firms from overseas -- leaves little room for DRC involvement in dispute resolution for disputes arising within the United States. This explains why the number of US firms that are DRC members is less than half the number of Canadian members, even though the produce industry in the United States is substantially larger than in Canada (Table 5). While the number of member US companies is relative low, their high retention rates attest to the value provided by the DRC to US fruit and vegetable supply chains exporting to Canada.

Table 5: Evolution of US Membership, 2000-2011

Year	In	Out	Net	Growth Rate	Recruitment Rate	Retention Rate	Total US Members
2000				-	-	-	166
2001	58	20	38	23%	35%	88%	204
2002	65	20	45	22%	32%	90%	249
2003	50	15	35	14%	20%	94%	285
2004	37	34	3	1%	13%	88%	287
2005	40	29	11	4%	14%	90%	300
2006	42	27	15	5%	14%	91%	317
2007	28	25	3	1%	9%	92%	321
2008	44	32	12	4%	14%	90%	333
2009	37	30	7	2%	11%	91%	340
2010	27	34	(7) ^a	(2%)	8%	90%	333
2011*	37	18	19	6%	11%	95%	352

Source: DRC Membership Records

^a Numbers in parenthesis represent negative changes

The DRC has proven itself to be quite effective in protecting the interests of US sellers on their transactions with Canadian buyers. This is reflected in the fact that the vast majority of the claims filed by US produce firms involve buyers in Canada (Table 6).

Table 6: Type of disputes resolved by the DRC in the United States, 2007-2010

Year	2010	2009	2008	2007
Interstate	19	17	8	1
Intrastate	8	7	3	1
United States vs. Canada	768	726	591	98
United States vs. Mexico	2	2	1	0
United States vs. Other	5	5	1	0
Total	802	757	604	100

Source: DRC Official Statistics (2010)

It is this effectiveness in Canada which has proven to be the DRC's most compelling sales point in developing memberships within the United States (and in overseas points of origin as well).

Membership development activities in the United States have, from the very outset, relied heavily on DRC's two major partners within the United States: national and regional produce associations and the PACA Branch of the US Department of Agriculture. Just as the national and regional produce associations served as active participants during the origination phase of the DRC, so have they served as active boosters and supporters since the DRC went operational. The United Fresh Produce Association, the Produce Marketing Association, the Western Growers Association, the Florida Fruit and Vegetable Association, the Texas Produce Association, the Georgia Fruit and Vegetable Growers Association and the Fresh Produce Association of the Americas have been particularly active in support of the DRC's recruitment efforts within the US produce industry. Further, many other smaller grower-shipper and commodity organizations across the United States have also contributed their time and effort to this end. Initially, all members of these organizations received direct communications outlining the benefits which would accrue to DRC members, and emphasizing the fact that these benefits would only be available to DRC members. These associations also made room at their annual conventions and/or trade shows for the DRC to present its case, and organized stand-alone seminars for more comprehensive coverage of the DRC's risk mitigation model and procedures.

In spite of these communication efforts, convincing the US produce industry about the rationale to buy a membership met with several hurdles. At the time of the DRC's inception, many actors in the US produce industry continued to believe that the PACA Branch could provide them with dispute resolution services on their sales into Canada and even into Mexico, despite the fact that PACA lacked standing to resolve disputes in either of those two countries. Given that the cost of DRC membership came on top of the cost of a PACA license, it was important to communicate that membership in the DRC provided exclusive benefits to its membership, benefits which were complementary to those provided by PACA. In conveying this message to the US produce trade, the cooperation and support of the PACA Branch was of critical importance. By appearing on the same podium with PACA officials, and making joint presentations regarding the benefits and jurisdictional limitations of each of the two organizations, the newly-formed and relatively unknown DRC was able to benefit from the 80 years of credibility and trust which the PACA branch had established with its license holders. By making it clear that the two organizations were operating in coordination with one another, and not in competition, the challenge of explaining what the DRC intended to do, and where it intended to do it, was made significantly easier.

The support of Canadian retailers and foodservice operators was as valuable for development of US membership as for Canadian memberships. Several key companies (The Produce People, Metro, Loblaw's and Sysco, among others) agreed to share their vendor lists, and to encourage any non-members to affiliate, with the DRC. In many instances, US-based vendors found this gentle encouragement from their key Canadian customers to be irresistible.

Assistance from the US Department of Agriculture to the DRC during the initial years of its operations also contributed to the success of the DRC's membership development activities in

the United States. The USDA's Foreign Agricultural Service contributed almost \$600,000 of Targeted Export Assistance (TEA) funds to US membership development activities, reasoning that membership in the DRC would lead to increased trade flows to Canada and Mexico on the part of US grower/shippers. The DRC applied these funds to its in-field education and communications activities within the United States, as described earlier in this section. The USDA also provided some \$130,000 toward the training and development of a destination inspection service within Mexico, based once again on the argument that the existence of such a service, coupled with the dispute resolution system which would use this inspection service in the course of its arbitration and mediation procedures, would further enhance produce trade flows from the United States to Mexico. Unfortunately, the returns to these marketing and education investments made in Mexico by the US Department of Agriculture did not produce the expected outcomes. DRC role in resolving disputes involving sales to buyers in Mexico has never achieved the scope which was originally conceived during its formative stages, as explained in detail below. USDA funding for DRC membership development in the United States ended in late 2007. Since then all membership development activities in the United States have been financed by funds generated internally by the DRC.

V.2.3 Mexico

Unlike the situations described above in Canada and in the United States, the Mexican produce industry in 1999 had no officially-sanctioned inspection service and no tradition of alternative dispute resolution within the sector. Historically, the principal tool for avoiding disputes between produce buyers and sellers in Mexico lay in selling to, or buying from, individuals or companies with whom one had many years, if not generations, of direct personal experience. In the same

vein, disputes – when they did arise – were settled through personal negotiation, without recourse to the legal system or any other form of third-party adjudication. Although Mexican produce exporters occasionally relied on PACA or CFIA assistance in settling disputes involving sales to customers in the United States or in Canada, there was no comparable mechanism for resolving disputes between buyers and sellers on the domestic Mexican market, nor any apparent inclination within the sector toward establishing such a mechanism.

Unlike the Canadian and American delegations which participated in the development of the DRC model, the leadership of the Mexican delegation was drawn not from the Ministry of Agriculture, but rather from the Ministry of Commerce and Investment. At the time, the Mexican Ministry of Agriculture and Mexican produce professionals were not enthusiastic about the potential of a formal mechanism for dispute resolution in the fruit and vegetable sector. Thus Mexican government officials and produce industry association executives faced a far more difficult challenge in the area of membership development once the DRC was formally inaugurated.

In Mexico, promoters of the DRC first needed to explain the advantages of mediation and arbitration as dispute resolution tools. They then needed to convince potential members that the DRC system would operate more equitably and efficiently than the time-honored person-to-person system currently in vogue. They next needed to assure potential members that a third-party inspection system, which had already existed for many years in both Canada and the United States, and which constituted a fundamental element in determining the merits of each dispute, could be credibly implemented in Mexico. Finally, promoters needed to explain why this system should be paid for by private membership contributions rather than by government subsidies. Thus, to promote the DRC in Mexico, government and industry had to overcome more

difficult hurdles than they Canadian and US counterparts. In fact, successfully addressing these four challenges has, over the past 10 years, proven to be beyond the grasp of DRC promoters – – both from the government and from the private sector – – within Mexico.

The single most important promotional push from the Mexican Ministry of Agriculture consisted of providing produce companies with free memberships in the DRC in 2003 and 2004. While this provided a temporary boost in membership over this period (see table 7), the inability to address the issues cited above led to an immediate decline in membership once the subsidy for payment of membership dues was removed late in 2004. From a peak of 211 Mexican members in 2004, active membership declined dramatically over the next two years, finally settling into a range of 20 –25 active members, which remains the level of Mexican affiliation today.

Table 7: Evolution of Mexican Membership, 2000-2011

Year	In	Out	Net	Growth Rate	Recruitment Rate	Retention Rate	Total Mexican Members
2000	7	0	7				7
2001	6	2	4	57 %	86 %	71 %	11
2002	24	4	20	182 %	118 %	64 %	31
2003	152	1	151	487 %	390 %	97 %	182
2004	72	43	29	16 %	40 %	76 %	211
2005	17	170	(153) ^a	(72%)	8 %	19 %	58
2006	18	31	(13)	(22 %)	31 %	47 %	45
2007	9	16	(7)	(16 %)	20 %	64 %	38
2008	1	15	(14)	(37 %)	3 %	60 %	24
2009	0	1	(1)	(4 %)	-	96 %	23
2010	7	5	2	9 %	30 %	78 %	25
2011*	4	6	(2)	(8 %)	16 %	76 %	23

Source: Various DRC Marketing Plans (2003-2011)

^a Numbers in parenthesis represent negative changes

The governments and the produce industries of United States and Canada launched several initiatives to grow the DRC in Mexico, motivated by the need to protect the firms from these countries selling produce to Mexican buyers. When the DRC headquarters was established in Ottawa in 1999, the decision was made to hire one full-time employee to represent the DRC in

Mexico. Since there were no Mexican members - and thus no Mexican income - at that point, the Canadian government undertook to provide startup capital until such time as Mexican membership could be developed to the point where membership dues there would be sufficient to provide funding for the Mexican representation office. This arrangement remained in effect until late 2001, at which time the Mexican Ministry of Agriculture decided to accelerate the process by providing direct subsidies to several major produce associations which their association members could then use to take out memberships in the DRC in Mexico. In order for these subsidies to be distributed to the associations, Mexican law required the establishment of a freestanding corporate structure for the DRC within Mexico with its own management and Board of Directors, independent of the Ottawa headquarters. Over the four year period from 2001 to 2005, the Mexican government dispersed a total of \$1,700,000 to fund the office and staff of the DRC-Mexico operation, as well as the membership subsidy program.

However well-intentioned this subsidy program may have been, and however positive its immediate effect in boosting the Mexican membership roster, its long-term effects proved to be negative on several fronts. First of all, it removed the need for the DRC to explain and justify its value proposition to the Mexican industry. Second, it made it unnecessary for Mexican companies to give any serious consideration to the advantages they might derive from membership in such an organization. Third, it relieved the Mexican government of any immediate obligation to address the numerous obstacles (many of them structural) which prevented the DRC system from serving as a worthwhile tool for the Mexican produce industry. Included among these obstacles were lack of a timely and credible inspection service, lack of grade and quality standards for produce commodities, absence of any national system to encourage compliance with good commercial practices and standards within the sector, and

absence of any provision for the enforcement of such practices and standards. Finally, once Mexican produce companies realized that the government was providing them with DRC membership free of cost they came to expect that the government would continue to fund membership indefinitely.

Several efforts attempted to overcome these structural deficiencies in the Mexican system over the past 10 years. For instance, in an effort to address the absence of a destination inspection service within Mexico, the Mexican Ministry of Agriculture (SAGARPA), with funding assistance of more than \$100,000 from the US Department of Agriculture, embarked on a training program for seven government produce inspectors during the period 2002-2004. Once these inspectors had participated in a rigorous program at the USDA training center in Maryland, the plan called for them to return to Mexico to train a larger group of inspectors who would then be deployed to the principal produce terminal markets across Mexico. While the initial cadre of inspectors successfully completed its training in the United States, SAGARPA funding for the second round of inspector training in Mexico was canceled. The original group of trainees was then reassigned to other responsibilities within the Ministry, or hired for quality control positions by private sector companies. This effort in developing human capital for inspection services was therefore unable to achieve its goal.

Once the Mexican government decided, in late 2004, that the time had come to shift the cost of membership in the DRC from SAGARPA to the private sector associations and individual companies within the produce industry, none of the aforementioned obstacles to sustained membership had been adequately addressed, much less resolved. Without a reliable inspection system in place, without a clear understanding of the benefits which arbitration and mediation could bring to dispute resolution on transactions both within Mexico and across the

NAFTA region, the great majority of Mexican members chose to ignore their renewal notices, and simply discontinued their membership in the DRC. Ultimately, this left DRC membership in Mexico by 2008 at barely 10% of the peak level it had established in 2004. Most of the Mexican DRC members today are firms that export produce to the Canadian market, given that those exporting to the United States already receive protection from the PACA (Table 8). Neither SAGARPA nor the DRC has been able to re-invigorate the Mexican membership since then.

Table 8: Type of disputes resolved by the DRC in the Mexico, 2007-2010

Year	2010	2009	2008	2007
Interstate	1	1	1	5
Intrastate	0	0	0	0
Mexico vs. Canada	30	27	18	76
Mexico vs. USA	11	11	7	14
Mexico vs. Other	1	1	1	5
Total	43	40	27	100

Source: DRC Official Statistics (2010)

V.3. Expanding the Scope of Membership

The DRC has sought ways to increase its relevance to the ever-changing North American produce industry over the past 10 years. It has engaged in a variety of initiatives in collaboration with a wide array of industry associations in the fruit and vegetable supply chain. These initiatives have led to the creation of new membership categories, the extension of membership to additional sub-sectors of the produce industry and the exploration of association-sponsored membership modalities to make DRC services available to smaller firms. This section discusses the achievements and challenges that the DRC has faced in the development of such initiatives.

V.3.1 Creating the Associate Membership Category

At the inception of the DRC, membership in the corporation was reserved for buyers, sellers, growers, packers, shippers, produce brokers, wholesalers, fresh processors, food service

distributors, retailers, and commission merchants of fresh fruits and vegetables whose place of business was in Canada, the United States or Mexico. In response to growing and important trading relationships with firms that were outside the NAFTA region, an Associate Member category was created by the DRC in 2000. This extended DRC membership to parties located outside North America who traded with North American firms within US, Canadian, or Mexican markets.

The primary reason for the creation of this category was to ensure that DRC members in North America had coverage when dealing with firms from outside the region. Once the DRC began operations it became apparent that not covering these transactions was a material problem especially for Canadian buyers, given that this country imported produce from many countries. After creating the Associate member category, the DRC had to make substantial efforts to show the value of membership for those Canadian companies trading with firms outside of North America. A substantial number of these firms preferred maintaining a CFIA license over joining the DRC. The reasons for favoring a CFIA license were that many companies 1) did not believe a DRC membership gave them the right to import produce from outside of North America and 2) generally understood that the CFIA could help them on disputes with firms from outside of North America while the DRC membership could not.

The services provided to Associate members have evolved over time. Many of the Associate members would prefer to use the DRC when solving disputes with non-DRC members in North America, because of the DRC's expertise in handling produce disputes, instead of alternative arbitration mechanisms such as the PACA branch. However, under DRC by-laws, Associate members (unlike Regular members) could only bring disputes before the DRC when dealing with Regular members. When Associate members were added, they were specifically

excluded from bringing disputes with other Associate members or non-DRC members before the DRC. In 2006, a Notice of Motion was approved to give Associate members the right to use the DRC in disputes with other Associate members and with non-DRC members for any transactions related to produce grown or shipped into North America. The rationale of this change was that providing Associate members with these additional rights may help build membership in the DRC. This decision had minimal or modest impacts on membership as most Canadian buyers are already DRC members and most US receivers are governed by PACA and less likely to be DRC members. Further, Associate members are being counseled to put arbitration clauses in all of their contracts with clients in North America who are not DRC members. This change was expected to provide an incentive for Mexican receivers to join the DRC rather than sign such agreements, but the impact has been modest. Today, the 36 non NAFTA DRC members are all in the Associate category.

V.3.2 Extending Membership to Transportation Service Providers

Over 95 percent of all fresh fruits and vegetable shipments across North America are transported by truck. While there had always been seasonal problems when it was difficult to find enough trucks to move the volumes of fresh produce available, the industry grew increasingly concerned in 2004 that this shortage of truck availability was developing into a chronic problem for the industry. In part this was due to a decline in the number of new drivers entering the trucking industry, as a result of low wages, long hours, increases in restrictions on schedules, and good job opportunities for unskilled labor elsewhere. While these disincentives were weighing on the overall availability of trucks, irrespective of cargo class, the produce industry found itself at the bottom of the pecking order, due to the need for additional investment in specialized refrigerated

equipment, liability issues stemming from the perishable nature of the cargo, tight windows for pick-ups and deliveries, frequent and lengthy delays in getting loaded, and generally bad treatment at the hands of shippers and receivers.

At that time, many produce associations, including PMA, CPMA and UFPA, set out to develop ways of making produce loads more “carrier-friendly”. The DRC felt this might represent an opportunity to expand its membership base by developing a comprehensive set of dispute resolution guidelines and arbitration practices to resolve disputes between carriers and their clients – both shippers and receivers. In so doing, the DRC would be filling a void left by PACA and CFIA, which lacked both rules and interest for addressing transportation disputes within the produce industry.

The DRC conducted a survey of 100 companies that provided transportation services to the produce industry in North America, and there was an overwhelmingly positive response to the concept of providing binding dispute resolution services based on mutually agreed rules and standards. The DRC then spent considerable resources developing transportation standards and dispute resolution rules specifically designed to resolve transportation disputes. These guidelines were intended to allow inspectors to accurately ascertain the extent of damage caused to produce cargo due to a failure to observe standardized transportation regulations. Standardizing and popularizing these regulations would support the DRC’s core business of dispute resolution by enabling a data collection process that would identify culpability more clearly.

Once the DRC’s transportation services were ready for implementation, the DRC worked to establish contacts with a wide range of transportation groups including the American Trucking Association (ATA), the Transportation Intermediaries’ Association (TIA), and the Owner-Operator-Independent Drivers’ Association (OOIDA). Despite favorable initial responses to the

DRC's survey and from these organizations, however, the number of companies that actually paid to become members of the DRC has been relatively small. As of the end of 2011, there were only some 34 DRC transportation members worldwide.

V.3.3 Extending Membership to Seed Potato Growers

Seed potato production is an important sector in North America. In 2008, the DRC changed its rules to include this sector after realizing that seed potato companies, particularly in Canada, did not have access to DRC-like systems for dispute resolution. An analysis conducted by the DRC late in 2007 documented that the DRC was not handling seed potatoes in the same fashion as the PACA did. The reason is that the DRC defined fresh fruits and vegetables to include all fresh and chilled fruits and vegetables, fresh cuts, edible fungi and herbs, but excluded any fresh fruit and vegetable which is frozen or sold for seed. Thus no services were available from the DRC for any transactions involving seed potatoes.

The PACA, for its part, provided certain types coverage for seed potato transactions. The PACA defines fresh fruits and fresh vegetables to include all produce in fresh form generally considered as perishable fruits and vegetables and makes no reference to the exclusion of seed potatoes. Therefore sellers of seed potatoes (or any type of seed that is in a fresh form) in the United States can use PACA's complaint resolution in specific cases, including seed potatoes sold to a grower or anyone else who is licensed by or subject to PACA essentially up to the point where they are planted. The DRC changed its definitions so that it could provide the same services as those offered by the PACA in the United States. This adaptation further harmonized DRC's coverage with that of the PACA, without exposing the DRC to any risks associated with subsequent problems that may arise following seed potato planting.

V.3.4 Pilot Programs to Extend Membership to Collective Organizations

The degree to which the DRC can be successful depends to a very large degree on its ability to increase the number of members and maintain high retention rates. As a membership based organization, the DRC must provide value in order to attract and keep members. The value proposition is different for the different players in the industry and the DRC has recognized that a “one size fits all” membership fee structure is not conducive to building membership within certain groups, particularly smaller dealers and the grower community. Consequently, since 2007 the DRC has been exploring strategies to offer its services to regional grower associations typically formed by smaller growers for whom individual membership fees may be otherwise too onerous. As a result, the DRC explored an association-sponsored membership approach. The DRC has used this approach to develop pilot programs with the Prince Edward Island Potato Board (PEIPB), the Ontario Greenhouse Vegetable Growers (OGVG) and the Toronto Wholesale Produce Association (TWPA).

In the case of the PEIPB and the OGVG these organizations used authorities they have under provincial legislation to require parties who they license as “dealers” to market potatoes or greenhouse crops to become DRC members. In the case of PEIPB a tiered fee was established for the dealers based volumes marketed. This ensured that anyone licensed to market products regulated by these organizations had access to an effective dispute resolution mechanism. Then through a combination of their rules and those of the DRC memberships were provided at a discounted fee to growers who market their crops through these dealers. To ensure fairness to all members the DRC introduced a “Gate Fee” to initiate a dispute involving any member who had not paid a full membership fee. The gate fees apply for services that are normally provided at no

additional cost to a full paying member. Again to ensure equity the combination of the tiered fee and the gate fees will never exceed a full membership fee. This approach provided full coverage for the producers and dealers of the subject goods. Dealers were covered for all of their sales to receivers in Canada, most of whom are DRC members and growers were covered for any sales to these licensed dealers.

The TWPA is an association of 21 wholesalers who are tenants on the Toronto Food Terminal, charged with invoicing and collecting invoices between the members and its clients. While the association has the authority to “cut off” any client from doing business on the market that has not paid its current invoices, it does not have the power to resolve disputes between members and clients. The establishment of the DRC removed the need for the TWPA to get involved in a dispute between any of its members and its clients where both parties were DRC members. However, it left unresolved the issue of disputes between its members and their clients who were not nor ever likely to become DRC members (e.g. jobbers, small and local retailers, etc.). In 2008, it was clear to the TWPA Board that the association should not be involved in disputes and therefore was seeking an affordable and expedited dispute resolution model to resolve disputes. This presented the DRC with a different opportunity to pilot test an association-sponsored membership with a group that differs from the PEIPB and the OGVG. Consequently, the DRC developed a program with the TWPA which is structured along the following lines. Members of the TWPA are required to be DRC members, which most already were. The TWPA then amended its contracts with all clients (especially targeted to those that were not DRC members) stipulating use of the DRC and its rules to settle any and all disputes. In this case membership fees were not discounted for the wholesaler members or for any of the “clients” as it was unlikely any of them would join. Again a fee schedule was developed for

services and a specific process was designed for handling complaints with the TWPA office playing a central role.

These pilot programs have been well received by participant firms and have encouraged the DRC to look for other opportunities. The association-sponsored membership may be an effective strategy to increase membership and to improve the value of DRC activities to the industry at large. However, the DRC needs to address concerns regarding the fairness of this membership modality relative to its regular membership.

V.4 Addressing Structural and Policy Shortcomings that Contribute to Disputes

The basic policy and structures for dispute resolution in the United States has been modified over the years both by PACA and by the produce industry in order to make them better suited to deal with trade irritants and disputes. Despite several initiatives by the DRC to create comparable structures and policies in Mexico, they have all been ultimately unsuccessful. In Canada, however, the story is quite different and far more positive, as shown in this section.

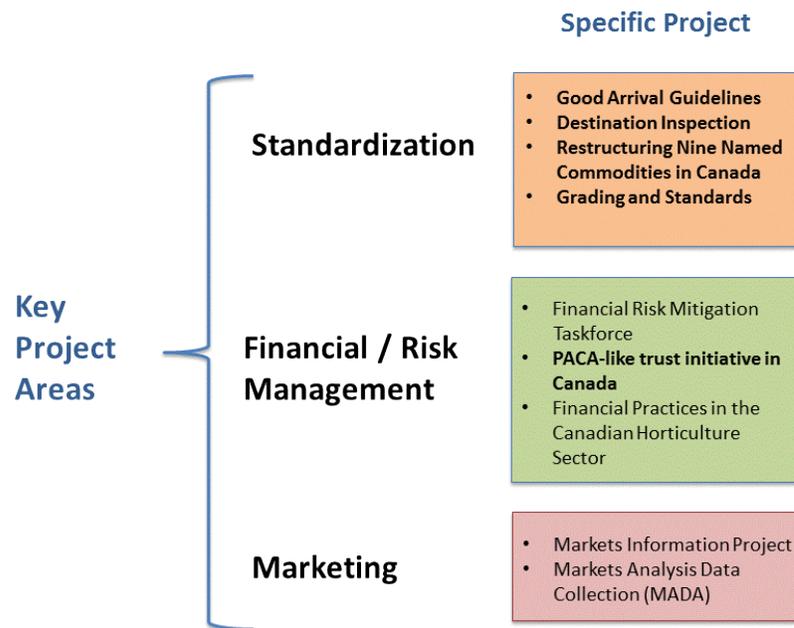
In furtherance of its core business of providing trading assistance and dispute resolution services to members, the DRC has been actively involved in working primarily with the Canadian government and industry associations to identify and resolve structural issues that contribute to trade irritants and disputes. The challenges facing both industry and government include:

- a policy framework which supports fair and ethical business practices
- promoting the economic viability of legitimate Canadian businesses and industry self-reliance
- mitigating business and market risks
- promoting Canada's reputation nationally and internationally
- meeting Canada's international trading obligations

- maintaining reciprocity with USDA PACA
- strengthening industry/government partnerships
- maintaining grades, trading standards, and a strong regulatory framework for enforcement purposes
- strengthening licensing provisions, dispute settlement mechanisms and inspection services
- managing operational costs and fees for government services

To this end, the DRC engaged in a portfolio of projects primarily in Canada with partner organizations and government support (Figure 6).

Figure 6: DRC’s Key Project Areas and Initiatives in Canada



Bolded texts designates a project where the DRC took on a leadership role.

Source: Authors, 2011

These initiatives can be grouped into three main categories: standardization, financial / risk management and marketing. In the figure, projects in bold represent those that were led by the DRC, while other listed projects represent collaborative endeavors led by the Fresh Produce

Alliance (FPA).¹⁰ The FPA was established to identify and consolidate multi-stakeholder issues which are cross-sector in nature, validate potential solutions and facilitate the necessary action to generate change. As such, it brings together the Canadian Produce Marketing Association, the Canadian Horticultural Council and the DRC in collaboration to fabricate an improved business climate for the fresh produce industry.

V.4.1 Standardization Initiatives

a. Good Arrival Guidelines and Good Inspection Guideline - These were the first initiatives to address structural shortcomings in the North American fruit and vegetable supply chain. With regard to grade and condition of product, the trading partners typically agree to specific standards prior to shipment, on the condition that such standards are in compliance with an applicable minimum grade and condition standard established by the importing or exporting country. In the absence of an agreement on grades, the calculation of conformance to contract will default to a set of ‘industry accepted’ guidelines. Prior to the establishment of the DRC, the industry used one set of Good Delivery Guidelines developed by PACA for sales made in the US, and a separate set of approximately the same number of guidelines developed by the Board of Arbitration for sales made in Canada. Mexico, for its part, did not have (nor does it now have) such guidelines.

Lack of consensus and misaligned expectations on good arrival quality constitute a fundamental reason for trade disputes. When the DRC was established, one of its first tasks was the creation of its own Good Arrival Guidelines in 2001 to serve as the default standards when

¹⁰ The Fresh Produce Alliance (FPA) is an alliance between the Canadian Produce Marketing Association, the Canadian Horticulture Council, and the DRC to identify and consolidate multi-stakeholder issues and improve the business climate in Canada and within the North American marketplace www.freshproducealliance.com

either an independent contract did not exist or when guidance on generally accepted industry standards was needed. It did so by building on the existing mechanisms and eliminating duplication and conflicting guidelines between the Canadian and the US practices. These guidelines have become a standard for trade across North America.

Another early task for the DRC was the establishment of its Good Inspection Guidelines in 1999. These Guidelines prescribed policies, standards and elements for the provision of destination inspection services, and were based on the Destination Inspection Services provided by USDA and CFIA. The DRC dispute resolution model is evidence-based, with about 70 percent of all disputes being related to product quality the availability of a credible destination inspection service is of paramount importance. These two initiatives have proved of value to the industry and have substantially contributed to the fact that about 85 percent of the disputes that are filed with the DRC are resolved amicably in stages 1-3 of the dispute resolution process.

b. Destination Inspection - A well-functioning, timely and affordable destination inspection service is critical for effective dispute resolution. Historically, inspection services have been offered by the Fresh Products Branch of USDA/AMS in the U.S., and the CFIA in Canada. Prior to 2004, approximately 350,000 loads of highly perishable fresh produce arrived from foreign and domestic markets in Canada each year. About 15,500 destination inspections were performed by the CFIA on an annual basis. During the late 1990s, CFIA began directing more resources to food safety and plant and animal health issues, indicating a strong desire to move this service provision to the private sector and completely exit the inspection business (Zohar-Picciano 2011). In cooperation with the U.S. and Canadian governments, the DRC undertook a project to develop and implement a regional destination inspection program built upon the lessons learned and achievements of the CFIA system. Along with input and advice

from the PACA destination inspection system, the DRC helped support the Canadian government to initiate a standalone, industry-sponsored inspection program that could offer inspection services at destination points across the U.S. and Canada (Whitney 2011). The following is a recounting of the stages and processes that were undertaken by the DRC to launch such a program.

After an initial stage of assessing needs and industry and country requirements, the DRC began charting out a business model and program implementation plan. Initially, the DRC extended alternative delivery options for destination inspection services and generated a detailed business model that outlined the parameters for success as well as potential pitfalls¹¹. This model consolidated and modified the existing services in the U.S and Canada by focusing on streamlining the management framework, strengthening training and oversight, and providing a more transparent cost structure. During July 2004, a working group involving industry and government agencies was established to develop a detailed business plan and create an implementation strategy by the end of the year. The objective of the new program attempted to ensure:

- Credibility of service,
- Recognition by the USDA for PACA equivalency purposes,
- Cost-competitive and financially viable,
- Acceptable across the North American produce industry, and
- A standardized system of destination inspection standards and practices (FPA 2005).

After the modeling and planning process was completed, the final step was to roll out the program and to begin Canada-wide implementation (McInerney 2011; Whitney 2011). The

¹¹ The business model for the Destination Inspection Services project was approved on October 27, 2004 (McKenzie 2011).

program was phased in over a three-year period. Fees incurred throughout this period and full cost recovery after the initial roll out phase would ensure that the organization could evolve over time in response to growing industry demand (FPA 2005).

c. The Nine-named Commodities - There are 30 commodities for which Canadian Grade Standards have been established under the Fresh Fruit and Vegetable Regulations pursuant to the Canada Agriculture Products Act (CAP Act). The grade standards for these 30 commodities are mandatory and they establish the minimum requirements for import and inter-provincial trade¹². Within these 30 commodities, there were nine (apples, beets, cabbage, carrots, onions, parsnips, pears, potatoes and rutabagas) for which Statutory Destination Tolerances were established (both permanent and condition defects apply against the grade at destination). Condition defects do not apply against the grade for the remaining twenty-one commodities. If any of the nine named commodities failed to meet the minimum condition tolerances upon inspection at destination they were put under detention by the federal inspectors.

The “Nine-Named Commodities” were intended to promote the marketing of quality produce within the Canadian marketplace. However, over time, the Nine Named requirements proved to have a negative effect, because some Canadian buyers were increasingly using this regulation as a tool to manipulate their shippers. Unscrupulous receivers in Canada could take advantage of these provisions by threatening to call federal inspections on shipments with the implied threat of detention. The net result was lower quality products in the market, lower returns to shippers, and price distortion. Further, the increasing use of non-CFIA inspection services made inspection credibility an issue. The DRC recognized the need to amend this regulation and worked with the Canadian industry through the Canadian Horticultural Council and the Canadian Produce Marketing Association to raise awareness about the evident

¹² The grade standard for strawberries is voluntary.

limitations of these regulations and to obtain the necessary support to implement the necessary regulatory changes in 2003. This regulatory modification was welcomed by key industry stakeholders including receivers, shippers and transportation firms, each of whom were now more confident in the Canadian trading climate. The revision did not change any other requirements, such as permanent grade defects, labeling, and packaging requirements. Standards can be effective at leveling the playing field, ensuring quality, and normalizing expectations, but not when they can easily be manipulated. To this end, the DRC has been working to help support harmonizing standards when necessary, and eliminating regulations when they negatively impact trade (DRC 2002).

d. Grades and Standards - In 2004 a project was launched by the Fresh Produce Alliance (FPA) to harmonize Canadian and US grade standards and inspection procedures for 31 commodities where both countries had developed different grades. The rationale for this initiative was to provide a common, and simpler trading language; facilitate dispute resolution; minimize potential disputes due to confusion about language; facilitate and improve the training of inspectors; and strengthen the reciprocal understandings between Canada and the United States. At the end of this project, which spanned four years of analysis and stakeholder consultations, the industry was presented with the following five options for each commodity:

- Maintain a compulsory Canadian grade standard in Fresh Fruit & Vegetable regulations (and their corresponding inspection procedures) amended to harmonize with the US standard as closely as possible;
- Maintain a Canadian grade standard in Fresh Fruit & Vegetable regulations (and their corresponding inspection procedures) changed to replicate the US standard;

- Maintain a Canadian grade standard in Fresh Fruit & Vegetable regulations but remove the mandatory requirements in the regulations and have it revert to a voluntary grade standard, i.e. a given grade standard may or may not be used for interprovincial or international trade. However, if used on packaging, the product must meet the grade declared; if the product does not meet the standard, the grade name must be removed from the packaging in order for the product to be marketed.
- De-regulate to remove grade from Fresh Fruit & Vegetable regulations and rely completely on existent US standard for trade purposes.
- De-regulate to remove grade from Fresh Fruit & Vegetable regulations but maintain a national grade standard for trade purposes but “housed” elsewhere (e.g., DRC, CFIA, or Canadian General Standards Board).

At the conclusion of the project in 2008, the FPA presented the CFIA with a request to make approximately 750 amendments to existing Canadian grade standards. The recommendations included such aspects as dropping a number of Canadian standards in favor of the US standards (e.g. for cranberries and rhubarb); harmonizing a number of grade standards with those of the US and making them voluntary; harmonizing a number of grade standards with those of the US but keeping them compulsory; and investigating the potential of setting the standards up in referenced document versus maintaining them in regulation.

Given the magnitude of the recommendations and the related impact on resources it was agreed by the FPA and CFIA that dumping these into the normal regulatory amendment process would overload the system. The task of finding a solution to this dilemma was assigned to an industry-government policy committee which to date has not devised a strategy to implement these trade policy recommendations.

V.4.2 Marketing Initiatives

a. Horticulture Market Information Project - A sizeable number of disputes occur due to inaccurate, ill-timed, or absent information. In general, good market information system assists buyers and sellers in ascertaining a fair price for a predetermined grade of produce and facilitates agreement on a contract. Accurate and timely market information is also critical in dispute resolution after a disagreement has occurred. Consider the instance of a product shipment rejection by a receiver. If a shipment is rejected by a receiver upon arrival due to disagreement over grade or quality, the shipper often has the option of requesting that the receiver (or often, a third party) tries to sell that load in the local market for the best available price. Often, the shipper may not feel that the final price fetched for that shipment is fair. The shipper may choose to file a dispute whereby the DRC determines whether or not the load was, in fact, sold at a fair market price value. In this circumstance, up-to-date and unbiased information on prices, supply, quality, and market conditions enables the DRC to make such an assessment.

While the USDA regularly collects and organizes data on wholesale and retail prices for fresh produce in terminal markets in the U.S, (i.e., USDA's Market News¹³), such data has not been readily available for the Canadian industry. Although the CFIA had been collecting wholesale price information in the past, it stopped gathering such data when the department shifted focus towards food safety and animal and plant health. In 2007, the DRC (as part of the Fresh Produce Alliance), received funds from Agriculture and Agri-food Canada (AAFC) to begin a project to collect data on average prices for principle fresh produce commodities in major Canadian markets, including terminal and wholesale markets in Toronto, Montreal, Vancouver, and Calgary. A partnership consisting of the DRC, the FPA, and the Canadian

¹³ See the USDA's market news site at: www.ams.usda.gov/AMSv1.0/marketnews

Produce Marketing Association worked to aggregate regional data and information for NAFTA trading with the following objectives:

- to address immediate gaps and challenges in the horticultural markets information system;
- to test the longer term viability of an industry data collection system through pilot projects;
- to identify and build consensus around the design of an enhanced horticultural markets information system;
- to provide education and training on markets information collection methods to project partners; and
- to build awareness of markets information as a competitive market decision-making tool across the value chain.

Described as *The Markets Information Project*, the DRC and many industry partners believed this work carried great potential for facilitating the dispute resolution process in Canada.

However, the project was suspended in 2009 due to a lack of funding (McKenzie 2011).

b. Market Analysis Data Collection (MADC) Project - As mentioned, inadequate statistical information about the Canadian marketplace rendered it difficult for industry and government to develop long-term, strategic responses to the various challenges faced by the Canadian fresh produce sector. A new project called the *Market Analysis Data Collection (MADC)* project, attempted to develop a comprehensive data management system for the Canadian fresh produce sector. Through this project, the FPA aimed to create a robust national data collection and analysis system that would enable firms to make strategic decisions, identify new trends and opportunities, and plan for future growth. Such a system would also allow the

industry to accurately measure and evaluate instances of unethical business practices and fraudulent activity. Members of the produce industry value chain, including producers, marketers, wholesalers, importers, processors, retailers, and food service providers, as well as the Canadian federal and provincial government agencies were all identified as primary beneficiaries of the MADC project. Unfortunately the recommendations emanating from this project were never acted on due to a lack of funding.

V.4.3 Financial / Risk Management Activities

a. Financial Practices of the Canadian Horticultural Sector - In 2005, an assessment of the financial practices in the Canadian horticulture sector was undertaken by the FPA in an effort to bolster the credibility and feasibility of successfully implementing the NAFTA trade agreement. The integration of the Canadian fresh produce industry with the U.S. and Mexican markets had placed new and different pressures on local producers and handlers of fresh fruits and vegetables. An increase in the numbers and complexity of growers and dealers in Canada made it difficult for individuals and businesses to obtain commercial contracts and access necessary finance. Failure to perform proper credit checks and a lack of government support in encouraging lending and credit access, together with a climate of high business and financial risk, resulted in frequent bankruptcies and monetary losses throughout the Canadian horticulture sector (Hedley 2005).

Under the supervision of Dr. Douglas Hedley, the FPA conducted a detailed financial analysis of the Canadian fresh produce industry with the prime objective of understanding the frequency and severity of fraudulent businesses practices as well as instances of corporate insolvency and bankruptcy. As one of the outcomes of the Hedley Report, the project generated

recommendations to eliminate unethical business practices and minimize associated losses. This assessment was based on a comprehensive industry scan which included interviews with key government officials and industry stakeholders. In addition, the team reviewed and evaluated current regulations and held meetings with enforcement agencies and monitoring organizations to further understand instances of bankruptcy and fraud. A survey of Canadian produce firms was also undertaken to gather information regarding companies' financial and business practices (Hedley 2005).

Based on the findings of this analysis, the Hedley Report compiled a list of recommendations, which included conducting a Market Analysis Data Collection (MADA) project and the development of mechanisms to offset financial losses such as PACA-like trust provisions, as will be explained below. These recommendations focused on ways to reinforce ethical business practices among industry participants through increased regulation and monitoring by federal and provincial governments. The report also gave detailed suggestions for licensing and establishing clear codes of conduct. The Hedley Report also suggested possible ways to ensure transparency between buyers and sellers by integrating mechanisms and procedures that could better define product ownership and responsibility. Finally, the report advocated for a greater awareness within the industry about the consequences of elevated business risk, and possible opportunities for risk mitigation. This included performing better due diligence at the outset of a transaction and exploring possible options for insurance against partial or non-payment (Hedley 2005).

b. PACA-like Trust Provisions - In the United States, the Perishable Agricultural Commodities Act (PACA) licenses buyers of produce to ensure that those who sell produce receive payment for their products. At the same time it has established legislation establishing

specific trust provision which protects a produce seller when a buyer fails to pay. Under the PACA trust, the seller is granted preferential access to all funds (e.g. inventory, cash and receivables) of buyers who declare bankruptcy. That is, produce debt is settled first in case of bankruptcy. This is very important to produce sellers, because companies declared in bankruptcy often have liabilities to multiple entities other than the produce seller. The PACA Trust was established in 1984 and had worked quite well over the years. This type of protection has not been available to Canadian produce firms. This is an important shortcoming in the legislation because such provisions contribute to reducing the amount of unethical practice in the produce sector.

At the time the DRC started operations, it applied for funding from Agriculture and Agri-Food Canada to contract for a study examining and documenting the legal feasibility of creating a PACA-Like Trust in Canada. The study started late in 2002 and was completed in early 2003. It was conducted by Edward Belobaba, and the final report essentially stated that from a legal perspective a PACA-like trust could be implemented in at least two manners. Regardless of the implementation strategy, the trust provisions would make it illegal for a buyer to claim the product load as an asset of the firm until the seller had been fully paid for the shipment. In the case of a buyer bankruptcy, the seller could claim itself as a creditor and enforce payment through the court system. The DRC welcomed the study because it was (and currently is) interested in finding a tool to mitigate the risks associated with bankruptcy and insolvency, which the DRC could not address (McInerney; Whitney 2011). The DRC objective again was to develop integrated tools for an integrated market, based on the premise that it has worked very well in the United States.

The report was presented to industry and government in the spring of 2003 and did not get the necessary support from government because it was proposing major changes to legislation at both the federal and provincial levels. However, the study was instrumental in that government commissioned a series of additional studies (e.g., the Buckingham study) which interestingly confirmed the benefits of the Belobaba examination. In short, the various technical studies concluded the legality of creating a PACA-like trust in Canada; however, its implementation presented major political and policy challenges that stalled the creation of the trust at that time.

c. Financial Risk Mitigation Taskforce and Advancing the PACA-like Provisions - The next chapter on the PACA-like trust came in 2006 when Douglas Hedley completed the Financial Practices Study for the Fresh Produce Alliance and identified the need for a risk mitigation tool to address bankruptcy and insolvency losses. He found that the fresh fruit and vegetable sector at the wholesale level in Canada had four times as many bankruptcies as did the same sector across all of agriculture and 10 times as many bankruptcies as those sectors of agriculture that were very highly structured and regulated (e.g. poultry, eggs, milk, western grains). He recommended looking at a number of options like the PACA Trust and insurance regimes.

The FPA presented Hedley's report to the Federal, Provincial, and Territorial (FPT) Policy Assistant Deputy Ministers Committee in the spring of 2006. They committed to the establishment of a federal, provincial, territorial task force to review all of the recommendations in the report, including the trust. The task force was established and it undertook its own assessment of the financial practices within the sector and the recommendations that had been presented. It solicited input from industry as well as from a number of other federal departments

and made its report to the Committee in the spring of 2008. While the FPT task force agreed with many of the Hedley Report recommendations, it did not agree that there were notable losses from bankruptcies and insolvencies. This was based on its own analysis of bankruptcy and insolvency data (a simple calculation of total losses compared to the value of the sector) and a survey of Canadian firms involved the fresh produce sector.

The Fresh Produce Alliance task force took issue with this analysis and continued to push for a more comprehensive and collaborative effort to document the problem and to find a solution. The FPT Assistant Deputy Ministers Committee finally agreed and in the spring of 2010 another FPT task force was created to handle the matter. Unlike the first task force, the new one had representation from industry as well as from the federal and provincial governments. It has met on several occasions and is currently undertaking another study to look at options to mitigate risks associated with bankruptcy and other non-payment situations in the produce industry. The options include insurance and bonding regimes as well as the specific features that exist within the PACA Trust model in the United States. Interestingly, the whole subject of the need for a risk mitigation tool for the fresh fruit and vegetable market in Canada is now one of the items that have been agreed to under the Canada-United States Regulatory Cooperation Council that was launched by President Obama and Prime Minister Harper in 2011. The US produce industry and their government had made it very clear they want to see Canada provide similar coverage to their exporters to Canada as they provide to Canadian exporters to the United States.

VI. Key Lessons from the Origins and Evolution of the DRC

The DRC experience reveals important lessons regarding the role, advantages and limitations of privately-run trade dispute resolution mechanisms for perishable products in the context of free

trade agreements. Such lessons can be drawn from both the tri-national process that led to its creation (1996-2000) and over the course of its evolution (2000-2011).

VI.1 Lessons from the Origins Phase (1996-2000)

The tri-national process leading to the creation of the DRC was led by the regional produce industry and facilitated by the NAFTA countries' governments. This tri-national process was based on extensive consultations and deliberations that resulted in an agreement over a model for the tri-national dispute resolution mechanism. The process that led to the DRC thus sheds light on some important lessons regarding the establishment of regional mechanisms for dispute resolution in the context of free trade agreements, particularly in the case of trade in perishable products.

The tri-lateral, consultative process focused on a problem that was affecting businesses interested in expanding regional produce trade. The primary reason for creating the DRC was to ensure that the participants in fresh produce trade in the NAFTA region would abide by fair and ethical trading practices, submit to mediation or arbitration of disputes in accord with standard rules and procedures, and demonstrate a strong commitment towards a fair and efficient mechanism of dispute resolution. The establishment of the DRC was therefore deemed instrumental in facilitating produce transactions among the three NAFTA countries as it offered a level playing field to all stakeholders engaged in fresh produce trade (Whitney 2011). The creation of the DRC was also expected to improve the trading environment in Canada by overcoming the deficiencies of the Canadian Licensing and Arbitration Program (Carberry 2010). This tri-national initiative also generated expectations for the development of an institutional infrastructure for fresh produce inspection in Mexico, and for improved

collaboration between the Mexican industry and its U.S. and Canadian counterparts in harmonizing quality standards and training Mexico's inspection staff (Paredes 2010). The consensus established across the three countries regarding a common set of trading rules was also crucial in boosting the confidence of US traders and allowing them to freely engage in regional trade through access to a dispute resolution mechanism in Canada and Mexico that was very similar to the PACA (McInerney 2010).

The commitment and support from governments of the three countries was a critical element in the process that led to the creation of the DRC. With substantial financial, personnel, and technical assistance from Agriculture and Agri-Food Canada, the Canadian industry facilitated the formation of the DRC by bringing together industry representatives from across the NAFTA countries, and allowing them to participate in a lengthy series of dialogues and discussions to develop a suitable working model for the tri-national dispute resolution organization. Although the creation of the DRC was an industry-led process, the support, cooperation, and commitment of the Canadian and the U.S. governments, in the form of funding and technical expertise, was indispensable. Government sponsorship was also crucial in legitimizing the outcomes of a process involving intensive industry collaboration (McInerney 2010; McKenzie 2010).

The process leading to the creation of the DRC reveals that meaningful dialogue and discussion encompassing groups that represent all key industry stakeholders facilitates the identification of mutually-beneficial, cost-efficient, and sustainable solutions to long-standing trade barriers. This case shows that once an industry-wide consensus is achieved through extensive consultation and deliberation among market participants, a solution can be identified and implemented with the financial support and the technical assistance of the government. In

the case of the DRC, the common interest of the regional produce industry was recognized early in the process; and subsequently, industry and government representatives embraced the task of charting out an effective framework for a dispute resolution organization for fresh produce within North America (Chancey 2010).

Another element that contributed to the success of this process was that the governments of the three countries trusted in the ability of the produce industry to identify appropriate solutions to solve a critical problem. While the U.S. and Canadian governments consistently backed the process of dialogue and interaction between major stakeholders, representatives from the industry set aside their differences and worked closely and diligently for the common good of the industry. Based largely on mutual trust and goodwill, the process resulting in the establishment of the DRC brought industry participants together, and allowed them to recognize their ability to collectively resolve their issues in a cordial and efficient manner.

VI.1 Lessons from the Evolution Phase (2000-2011)

The evolution of the DRC in the past ten years reveals accomplishments and some disappointments regarding its impact on alleviating trade irritants and solving trade disputes in the NAFTA region. The evolution also illustrates the hurdles that a privately-run dispute resolution mechanism may encounter in delivering its services and maintaining its relevance to members.

Perhaps the most salient success of the DRC has been its contribution to a better produce trade environment in Canada, both for domestic transactions as well as international transactions involving a Canadian importing firm. This is the reason why the majority of Canadian firms prefer to hold a DRC membership over a CFIA license. There is no doubt that the DRC success

in Canada is associated with the weaknesses of the pre-DRC dispute resolution systems in place. Further, Canadian firms embraced the DRC because it resembled the PACA system, which had proven successful in the United States for many years. However, these two features of the DRC were necessary but not sufficient to the success of the DRC in Canada. There were at least three other features discussed in this study that contributed to having a strong and stable Canadian DRC membership:

- The DRC has worked closely with all members of the supply chain, including food retailers and the so-often ignored small growers, to garner their support and expand the membership. For example, retailers were instrumental in educating their suppliers about the value of a DRC membership.
- The Canadian government has been a strong supporter of the DRC throughout the past decade in two fundamental ways: 1) by providing resources to investigate deficiencies in the Canadian system and 2) by enacting changes in the regulatory framework to improve the compliance with good trading practices based on DRC recommendations.
- Because DRC membership is voluntary, the DRC has continuously sought ways to increase its value to the produce industry and to increase the scope of the membership. As a result, the DRC has modified its bylaws to create new membership categories, to extend membership to important sectors such as transportation service providers and seed potato growers, and to experiment with association-sponsored memberships to service smaller firms and growers. A governmental agency may lack the flexibility to adapt its rules to the changing needs of the industry.

The DRC experience in Canada also highlights certain unexpected financial risks arising from public-private partnerships in which a private organization takes responsibility for tasks

traditionally conducted by governmental agencies. This is the case of the law suits that put at risk the very existence of the DRC as discussed earlier. The Canadian government was unable to cover the legal costs of a private organization such as the DRC, even when the organization was engaged in providing services typically delivered by the public sector.. Had the DRC declared bankruptcy during this process, the government would have had to step in and administer the dispute-resolution mechanism. The lesson is that careful thought should be given to liability issues when government designates private entities to deliver programs traditionally delivered by the public system, such as the dispute resolution system in Canada.

Unlike DRC's accomplishments in Canada, the outcomes of multiple privately- and publicly-led initiatives to create a better produce trading environment and to develop DRC membership in Mexico have been largely disappointing. Only a very small number of Mexican firms, mostly exporting to Canada, are DRC members today. Mexican firms exporting to the U.S. are already protected by the PACA and do not have incentives to hold a DRC membership. In perspective, it is possible that public and private DRC promoters in the United States and Canada underestimated how difficult it would be to develop the necessary infrastructure for a reliable dispute resolution system in Mexico. Prior to the DRC, the produce industry in that country had no inspection service, lacked unified grades and standards for a number of products, and had no functioning trade dispute system. Moreover, the promoters may have not fully considered the business culture in Mexico. That culture has traditionally favored informal approaches to solve disputes for many years.

The approach of the Mexican Ministry of Agriculture to promote the DRC – subsidizing the membership for Mexican produce firms – proved to be inappropriate. This approach did not address the root of the problem in that country: the lack of human and physical infrastructure to

operate a formal, effective dispute resolution system. Garnering support from the Mexican Government to develop a reliable inspection system and convincing the domestic produce industry of the benefits from belonging to an effective formal trade dispute system remains one of the primary challenges to have a truly tri-national, unified dispute resolution systems in the NAFTA region.

In the United States, for its part, DRC is relevant only to produce firms that seek PACA-like dispute resolution services when exporting to Canada. The DRC's effectiveness in Canada has been responsible for the steady increase in U.S. membership over the past 10 years, driven primarily by increased produce exports to Canada. However, efforts to increase the scope of DRC membership among U.S. firms have had only modest impacts. The industry has been highly satisfied with the protection services provided by the PACA, on the one hand. On the other hand, U.S. produce firms exporting to Mexico may be wary about the failures of multiple membership expansion initiatives conducted in that country. The DRC has never intended to substitute, but rather complement, the protection provided by the PACA to U.S. firms. This focus has yielded beneficial collaborations between the DRC and PACA in solving trade disputes, particularly those involving Canadian and U.S. firms.

This study shows that the DRC has made substantial positive impact to eliminate trade irritants and to effectively solve trade disputes in the NAFTA region. It has proven to be a flexible organization able to adapt to the changing dynamics of the produce industry, guided by a relentless focus on providing value to its membership. Today, the DRC has more than 1,400 members and it has successfully resolved over 1,300 disputes over 2000-2010, for an approximate value of \$33 million. These accomplishments attest for the substantial positive effects of the DRC on produce trade in the NAFTA regions. Yet, the DRC is still far from

becoming a truly tri-national organization and achieving a harmonized dispute resolution framework throughout the region. Achieving this goal requires renewed private-public partnerships involving all three countries, with particular initiative from the Mexican public and private sector representatives.

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APPENDICES

**APPENDIX A: PARTICIPANTS IN MEETINGS LEADING TO THE CREATION OF
THE F&V DISPUTE RESOLUTION CORPORATION**

Table A-1: Participants of the First Meeting of the Advisory Committee (Mazatlan, Mexico), February 17-18, 1997

Names	Organization
US Attendees	
Alan R. Middaugh	National Potato Council
Daniel J. Coogan	Soto, Martin & Koogan, P.C.
Donald H. Arhens	Twin Garden Farms
Gary Ball	Gary Ball Inc.
Jerold W. Ahrens	Agricultural Investment Associates, Inc.
Joseph G. Procacci	Procacci Brothers Sales Corporation
Kenneth C. Clayton	USDA, AMS/F&V Programs PACA Branch
L. Patrick Hanemann	Majestic Valley Produce
Lee Riley Powell	USDA, AMS
Leonard F. Timm	The Red Book/Vance Publishing
Matthew M. McInerney	Western Growers Association
Michael J. Machado	17th District of California
Reginald L. Brown	Florida Fruit & Vegetable Association
Richard J. Kinney	Florida Citrus Packers
Richard N. Matoian	California Grape & Tree Fruit League
Robert C. Keeney	USDA, AMS/F&V Prog. PAC Br.
Robert L. Meyer	Meyer Tomatoes
Scottie J. Butler	Florida Farm Bureau Federation
Thomas A. Leming	USDA, AMS/F&V Prog. PAC Br.
Canadian Attendees	
Robert Carberry	Canadian Food Inspection Agency
Danny Dempster	CPMA/CHC
David Byer	Agriculture & Agri-Food Canada
Glenn Baty	Serca Food Service
Glyn Chancey	Agriculture & Agri-Food Canada
Greg Gowryluk	M.J. Gowryluk & Sons, Ltd.
Helen Zohar-Picciano	Agriculture & Agri-Food Canada
Stephen Whitney	CPMA/CHC
Terry Norman	Agriculture & Agri-Food Canada
Mexican Attendees	
Humberto Jasso Torres	SECOFI

Source: Advisory Committee on Private Commercial Disputes Regarding Agricultural Goods (1997)

Table A-2: Participants of the Second Meeting of the Advisory Committee (Anaheim, California), October 21-22, 1997

Names	Organization
US Attendees	
Alan R. Middaugh	National Potato Council
Donald H. Ahrens	Twin Garden Farms
Enrique E. Figueroa	USDA, AMS
Jerold W. Ahrens	Agricultural Investment Associates, Inc.
Kenneth C. Clayton	USDA, AMS/F&V Programs PACA Branch
Daniel J. Coogan	Soto, Martin & Koogan, P.C.
Joseph G. Procacci	Procacci Brothers Sales Corporation
L. Patrick Hanemann	Majestic Valley Produce
Leonard F. Timm	The Red Book/Vance Publishing
Matthew M. McInerney	Western Growers Association
Michael J. Machado	17th District of California
Reginald L. Brown	Florida Fruit & Vegetable Association
Richard J. Kinney	Florida Citrus Packers
Robert C. Keeney	USDA, AMS/F&V Prog. PAC Br.
Robert L. Meyer	Meyer Tomatoes
Scottie J. Butler	Florida Farm Bureau Federation
Thomas A. Leming	USDA, AMS/F&V Prog. PAC Br.
Canadian Attendees	
Leo Baribeau	Star Produce Ltd.
Donald Keenan	N.B. Shippers Association
Douglas Powell	CPMA
Mark McComb	Canadian Food Inspection Agency
Robert Carberry	Canadian Food Inspection Agency
Danny Dempster	CHC/CPMA
David Byer	Agriculture & Agri-Food Canada
Glenn Baty	Serca Food Service
Glyn Chancey	Agriculture & Agri-Food Canada
Greg Gowryluk	M.J. Gowryluk & Sons, Ltd.
Helen Zohar-Picciano	Canadian Food Inspection Agency
Stephen Whitney	CPMA/CHC
Mexican Attendees	
Humberto Jasso Torres	SECOFI
Arnoldo Moreno Camou	Secretary of Agriculture, Livestock & Rural Development
Eduardo Coppel Lemmen	Local Agricultural Producers Associations of Table Grapes of Sonora
Anuro Cobian Lopez	National Forestry Commission (CONAFOR)

Andres Piedra Ibarra	National Confederation of Livestock Mexico (CNOG)
Amadeo Ibarra Hallal	National Association of Manufacturers of Oils and Fats (ANIAM)
Enrique Dominguez Lucero	Mexican Pork Council
Mario Haroldo Robles	Sinaloa Growers of Mexico
Arturo Guajardo Estrada	Commission for the Protection of Foreign Commerce of Mexico (COMPROMEX)
Mario Sosa Uribe	SAGAR
Jorge von Bertrab	SECOFI

Source: NAFTA Committee on Agricultural Trade (1997)

Table A-3: Participants of the Seventh Meeting of the NAFTA Committee on Agricultural Trade, November 20-21, 1997

Names	Organization
US Attendees	
Audrae Erickson	Office of the US Trade Representative
Carol Goodloe	USDA, Foreign Agriculture Service, International Trade Policy
Dan Conable	USDA, Foreign Agriculture Service
Dave Priester	USDA, AMS
David Edwards	Department of State, US Embassy, Mexico City
Enrique E. Figueroa	USDA, AMS
Jeffrey Margolick	Office of the US Trade Representative
John Link	USDA, Economic Research Service
John Melle	Office of the US Trade Representative
Kenneth C. Clayton	USDA, AMS/F&V Programs PACA Branch
Larry Deaton	USDA, Foreign Agriculture Service, International Trade Policy
Mike Koplovsky	Office of the US Trade Representative
Norval Francis	Foreign Agriculture Service, US Embassy, Mexico City
Patricia Sheikh	USDA, Foreign Agriculture Service, International Trade Policy
Renee Schwartz	USDA, Foreign Agriculture Service, International Trade Policy
Robert C. Keeney	USDA, AMS
Scan Darragh	Office of the US Trade Representative
Susan Garro	Department of State
Canadian Attendees	
Robert Carberry	Canadian Food Inspection Agency
Terry Norman	Agriculture Canada
Marvin Hildebrand	Canadian Embassy
William Hewett	Canadian Embassy
Mexican Attendees	
Mario Sosa Uribe	SAGAR
Jorge von Bertrab	SECOFI
Humberto Jasso Torres	SECOFI

Source: NAFTA Committee on Agricultural Trade (1997)

Table A-4: Participants of the Meeting of the NAFTA Government Working Group on Tri-National Private Commercial Dispute Resolution System (Washington D.C.), March 9-10, 1998

Names	Organization
US Attendees	
Jim Frazier	USDA, AMS/F&V Prog. PAC Br.
Kenneth C. Clayton	USDA, AMS/F&V Programs PACA Branch
Leslie Wowk	USDA, AMS/F&V Programs PACA Branch
Robert C. Keeney	USDA, AMS/F&V Programs PACA Branch
Tom Leming	USDA, AMS/F&V Programs PACA Branch
Canadian Attendees	
Fred Gorrell	Canadian Food Inspection Agency
Glyn Chancey	Agriculture & Agri-Food Canada
Helen Zohar-Picciano	Canadian Food Inspection Agency
Robert Carberry	Canadian Food Inspection Agency
Robert Lazariuk	Agriculture & Agri-Food Canada
Mexican Attendees	
Constantino Figueroa	Bancomext (Compromex)
Jorge von Bertrab	SECOFI
Jose Samano	Bancomext (Compromex)
Mario Sosa Uribe	SAGAR

Source: NAFTA Government Working Group (1998)

Table A-5: Participants of the Canadian Mission to Mexico: Canada-Mexico Industry-to-Industry Consultations, November 27-December 02, 1998

Names	Organization
David Hendrick	CPMA/CHC
Richard King	B.C. Fruit Packers
Rick Wallis	David Oppenheimer & Associates
Glenn Baty	Serca Food Service
Judy Chong	Wing Chong Farms
Martin Desrochers	Hydro Serres Mirabel
Brenda Simmons	PEI Potato Board
Fred Gorrell	Canadian Food Inspection Agency
Glyn Chancey	Agriculture & Agri-Food Canada
Monty Doyle	CPMA/CHC

Source: Canadian Produce Marketing Association (1998)

Table A-6: Participants of the Quebec City Meeting (Quebec City, Canada), January 19-23, 1999

Names	Organization
US Attendees	
Jim Carr	Blue Book
John McClung	United Fresh Fruit & Vegetable Association
Kenneth C. Clayton	USDA, AMS/F&V Programs PACA Branch
Lorne Goldman	Lorne Goldman (representing WGA)
Reggie Brown	Florida Fruit & Vegetable Association
Stephen McCarron	McCarron & Associates
Canadian Attendees	
Robert Carberry	Canadian Food Inspection Agency
David Hendrick	CPMA/CHC
Don Rhyno	Atlantic Wholesalers
Fiona Lundie	Agriculture & Agri-Food Canada
Glyn Chancey	Agriculture & Agri-Food Canada
Guy Lafreniere	Agriculture & Agri-Food Canada
Helen Zohar-Picciano	Canadian Food Inspection Agency
Judy Chong	Wing Chong Farms
Leo Baribeau	Star Produce Limited
Martin Desrochers	Hydro-Serre Mirabel
Michael Mazur	Ontario Fruit & Vegetable Association
Monty Doyle	CPMA/CHC
Peter Brackenridge	Canadian Food Inspection Agency
Ricardo del Castillo	Canadian Embassy-Mexico City
Rick Wallis	David Oppenheimer & Associates
Stephen Whitney	CPMA/CHC
Susan Frost	Canadian Food Inspection Agency
Mexican Attendees	
Gerardo Lopez	SAGAR
Jorge von Bertrab	SECOFI
Juan Antonio Villareal	CAN
Victor del Angel	SAGAR

Source: Agriculture and Agri-Food Canada (1999)

Table A-7: Participants of Canadian Consultations on the Proposed Model for the Tri-National Dispute Resolution Corporation (across Canada)

August 1999; Winnipeg Meeting (Winnipeg, Manitoba), August 16, 1999

Name	Organization
Dave Jefferies	Peak of the Market
David Hendrick	CPMA/CHC
Don Kroeker	Peak of the Market
Fred Gorrell	CFIA
John Itzke	CPMA/CHC
John Kuhl	SMPC
Ken Krochenski	Peak of the Market
Larry McIntosh	Peak of the Market
Monty Doyle	CPMA/CHC
R. Ross	STELLA Produce
Ron Hemmersbach	Peak of the Market
Roy Vinke	The Grocery People
Samy Pelerin	CPMA/CHC
Stephen McCarron	McCarron & Associates
Stephen Whitney	CPMA/CHC
Tom Wryha	B.C. Tree Fruits

Toronto Meeting (Mississauga, Ontario), August 17, 1999

Name	Organization
Allan Brown	Morris Brown & Sons
Bruce Nicholas	Ontario Food Terminal Bd.
Chuck Dentelbeck	OPMA
David Hendrick	CPMA/CHC
Fred Gorrell	CFIA
Gary Lloyd	Loblaw Co.
Ian McKenzie	Ontario Apple Comm.
Jim Diodati	Ontario Produce Companies
John A. Goodall	C.H. Robinson Co.
John Brayuannis	B.C. Tree Fruits
Judy Chong	Wing Chong Farm Co.
Lesley Moran	Morris Brown & Sons
Mary Fitzgerald	Chiquita
Michael Mazur	OFVGA
Motny Doyle	CPMA/CHC
Samy Pelerin	CPMA/CHC
Scott Tudor	Sobeys Inc.
Stephen McCarron	McCarron & Associates
Stephen Whitney	CPMA/CHC

Atlantic Meeting (Moncton, New Brunswick), August 26, 1999

Name	Organization
Brenda Simmons	P.E.I. Potato Board
David Hendrick	CPMA/CHC
David Savage	N.B. Shippers Association
Dela Erith	N.S. Fruit Growers' Association
Donald Keenan	N.B. Shippers Association
Ivan Noonan	P.E.I. Potato Board
Marvin MacDonald	O'Leary Farmers Co-op P.E.I.
Patton MacDonald	N.B. Potato Agency
Paul Eyking	Atlantic Fresh Produce Association
Rollin Andrew	AAFC
Ron Turner	Kings Produce N.S.
Stephen McCarron	McCarron & Associates
Stephen Whitney	CPMA/CHC

Vancouver Meeting (Burnaby, British Columbia), August 31, 1999

Name	Organization
Adrian Abbott	B.C. Tree Fruits Limited
Andy Smith	B.C. Hot House Foods Inc.
Art Kurri	E&A International
Bob McKilligan	BCPMA
Christina Hilliard	CFIA
David Hendrick	CPMA/CHC
Ernie Deaust	All Seasons Mushrooms
Greg Gauthier	B.C. Tree Fruits Limited
James Adamson	Mark T. Adamson Co. Ltd.
Jim Alcock	B.C. Blueberry Council
Jim Steel	Thrifty Foods Limited
Jocylene Ho	Van- Whole Produce Ltd.
John Hall	Overwamga Food Group
John Sears	B.C. Tree Fruits
Kevin Doran	B.C. Hot House Foods Inc.
Michael Mockler	Thrifty Foods
Neville Israel	Sun Rich Fresh Foods Inc.
Peter Austin	B.C. Tree Fruits Limited
Richard King	Okanagan Federated Shippers
Rick Austin	B.C. Tree Fruits Limited
Rick Gilmour	Lower Mainland Vegetable Distributors
Rick Wallis	David Oppenheimer & Associates
Stephen McCarron	McCarron & Associates
Stephen Whitney	CPMA/CHC
Tom Wong	BCPMA Advisor

Calgary Meeting (Calgary, Alberta), September 1, 1999

Name	Organization
Alan Stuart	Bassano Growers/Potato Growers of Alberta
Alex Stadig	Serca Foodservice
Anne Wong	Yees Fine Foods
Brent Lloyd	C.H. Robinson Co. (Canada) Ltd.
Brian Hampton	The Produce People Ltd.
Craig MacKenzie	C.H. Robinson Co. (Canada) Ltd.
Curt Pettinger	Western Grocers
Darryl Tamagi	Bridge Brand
David Hendrick	CPMA/CHC
Garry Doraty	Western Grocers
Garry Wagner	Texas Sweet Citrus
Glenn Baty	Serca Food Service
Jim Deines	Money's Mushrooms Co.
Mike Dube	Krown Produce
Paulette Stolar	Food Processing
Stephen McCarron	McCarron & Associates
Stephen Whitney	CPMA/CHC
Stewart Vang	Faye Clack Marketing
Tom Shindruk	Pak-Wel Produce Ltd.

Saskatoon Meeting (Saskatoon, Saskatchewan), September 1, 1999

Name	Organization
David Hendrick	CPMA/CHC
Deric Karolat	Star Produce
Howard Willems	CFIA
Jim Sparks	Star Produce
John Woronuik	CFIA
Laurie Wagner	Marin's Produce
Leo Baribeau	Star Produce Ltd.
Mike Furi	The Grocery People
Paul Slobodzion	LID Co.
Prentice Dent	The Grocery People Ltd.
Stephen McCarron	McCarron & Associates
Stephen Whitney	CPMA/CHC

Source: Agriculture and Agri-Food Canada, Summary Report (1999).

Table A-8: Members of the Working Groups

Working Group I: Model Contract

Names	Organization
US Contacts	
Stephen McCarron*	McCarron & Associates
Chuck Carl	The Packer Publications/Red Book Credit Services
Jim Carr	Blue Book
Robert C. Keeney	USDA, Fruit & Vegetable Programs
Canadian Contacts	
Stephen Whitney	CPMA/CHC
Rick Wallace	David Oppenheimer & Associates
Ian McKenzie	Ontario Produce Marketing Association
Mexican Contacts	
Juan Carlos Villarreal	Confederacion Mexicana de Productores de Café
Carlos Vejar	Subsecretaria de Negociaciones Com.

Note: * represents Working Group Leader

Working Group II: By-Laws

Names	Organization
US Contacts	
Bill Weeks	Texas Produce Association of the Americas
Fred Webber	Produce Reporter Co/The Blue Book
Dave Durkin	Olsson, Frank & Weeda
Canadian Contacts	
Stephen Whitney	CPMA/CHC
Leo Baribeau*	Star Produce Ltd.
Martin Desrochers	Hydro Serre Mirabel Inc.
Helen Zohar-Picciano	Canadian Food Inspection Agency
Michael Mazur	Ontario Fruit & Vegetable Growers
Leo Arsenault	Uniglobe
Mexican Contacts	
Julio Escandon Palomino	EXIMCO
Juan Carlos Villarreal	Confederacion Mexicano de Productores de Café
Alfonso Rodea	ANTAD

Note: * represents Working Group Leader

Working Group III: Standards & Inspection

Names	Organization
US Contacts	
John McClung	United Fresh Fruit & Vegetable Association
Stephen McCarron	McCarron & Associates
Lee Frankel	Fresh Produce Association of the Americas
Canadian Contacts	
Stephen Whitney	CPMA/CHC
Leo Arseneault	Uniglobe
Alain Pare	Metro Richelieu
Ken Bruce	Canadian Food Inspection Agency
Robert Allard	Conseil Quebecois de L'Horticulture
Mexican Contacts	
Jorge von Bertrab	SECOFI
Mario Haroldo Robles	Sinaloa Growers of Mexico
Miguel Angel Garcia Paredes	CNA

Note: * represents Working Group Leader

Working Group IV: Mediation & Arbitration

Names	Organization
US Contacts	
Matt McInerney*	Western Growers Association
Fred Webber	Produce Reporter Co/The Blue Book
Stephen McCarron	McCarron & Associates
Pat Hanneman	Majestic Valley Produce
Kerry Brown	
Canadian Contacts	
Stephen Whitney	CPMA/CHC
Glen Baty	Serca Foodservice
Judy Chong	Wing Chong Farms
Glyn Chancey	Agriculture & Agri-Food Canada
Mexican Contacts	
Carlos Vejar	Subsecretaria de Negociaciones Com.
Enrique Dominguez Lucero	Mexican Pork Council

Note: * represents Working Group Leader

Working Group V: Business Plan

Names	Organization
US Contacts	
Reggie Brown	Florida Fruit & Vegetable Association
Fred Webber	Produce Reporter Co/The Blue Book
Matt McInerney	Western Growers Association
John McClung	United Fresh Fruit & Vegetable Association
Kenneth C. Clayton	USDA, AMS/F&V Programs PACA Branch
Canadian Contacts	
Stephen Whitney	CPMA/CHC
Richard King	Okanagan Federated Shippers
David Hendrick*	CPMA/CHC
Peter Brackenridge	Canadian Food Inspection Agency
Mexican Contacts	
Roman Gomez	Frutas Lorelay SA de CV
Jaime Almonte	SAGAR
Julio Escandon Palomino	EXIMCO

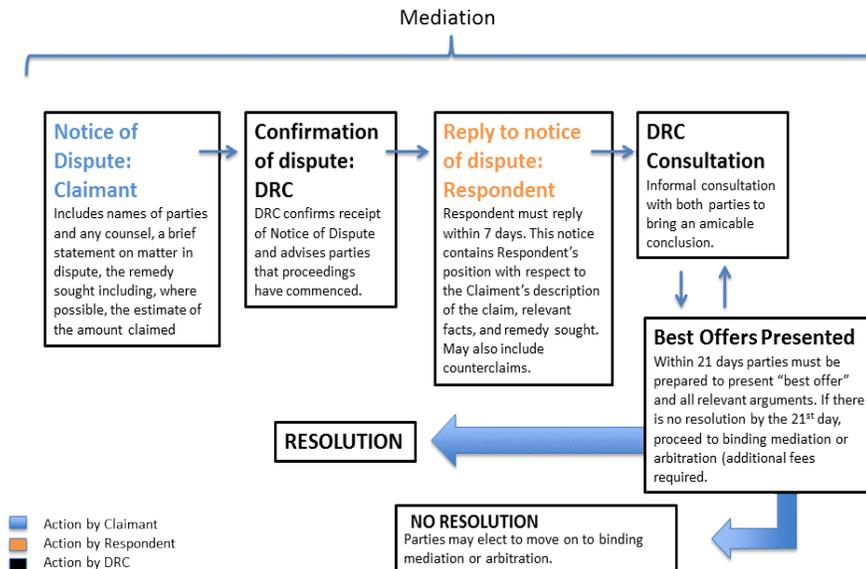
Note: * represents Working Group Leader

Source: U.S. Department of Agriculture (1999)

APPENDIX B: MEDIATION AND ARBITRATION PROCESSES AND FLOWS

A dispute that progresses beyond Stages 1 to 3 of the dispute resolution process moves to the informal/formal mediation stage. A dispute that progresses to this stage requires the filing of a Notice of Dispute (NOD). The filing of a NOD stops the clock on the nine-month statute of limitations and requires that the DRC opens an official file and issue a Confirmation of Receipt of the NOD thereby signifying the commencement of proceedings. The Respondent must provide a Reply to the NOD, within seven days of receiving the Confirmation. The DRC begins by helping parties exchange necessary information, including guidance for voluntary settlement. The DRC also informs parties of their rights and responsibilities, including the need for the Respondent to raise any counterclaims he/she may have. The parties have 21 days from the time of the NOD confirmation to conclude a voluntary settlement. Should they not reach an amicable solution or should the Respondent fail to respond within this timeframe then the Claimant has the right to move the process to the arbitration stage. Figure B-1 describes the mediation process, the paperwork, and subsequent responsibilities of the DRC, the Claimant, and the Respondent.

Figure B-1: DRC Process Flow for Mediation



As shown in Figure B-1, the DRC takes on an active, negotiating role between the two parties. This includes helping share paperwork and eliciting evidence as needed. Evidence may include inspection and quality tracking documents like temperature readings from trucks during

transit, warehouse temperature readings and receiving and loading documentation, among others. After supporting evidence and claims are shared, the DRC assists both sides with formulating a “best offer,” which includes commitments to make or compromise on monetary reparations. Typically, the informal consultation process cannot last longer than 21 days (except when the parties are likely to reach resolution, as mentioned above), and both parties are urged to present their best offer within this three-week period. The process of dispute resolution, until this point, is fully covered by membership fees. To move beyond formal mediation and on to arbitration, one of the parties (normally the Claimant) must file for the advancement (DRC 2009). Once a dispute progresses beyond the informal mediation stage, additional fees such as filing fees and mediator and arbitrator fees apply (DRC 2009).

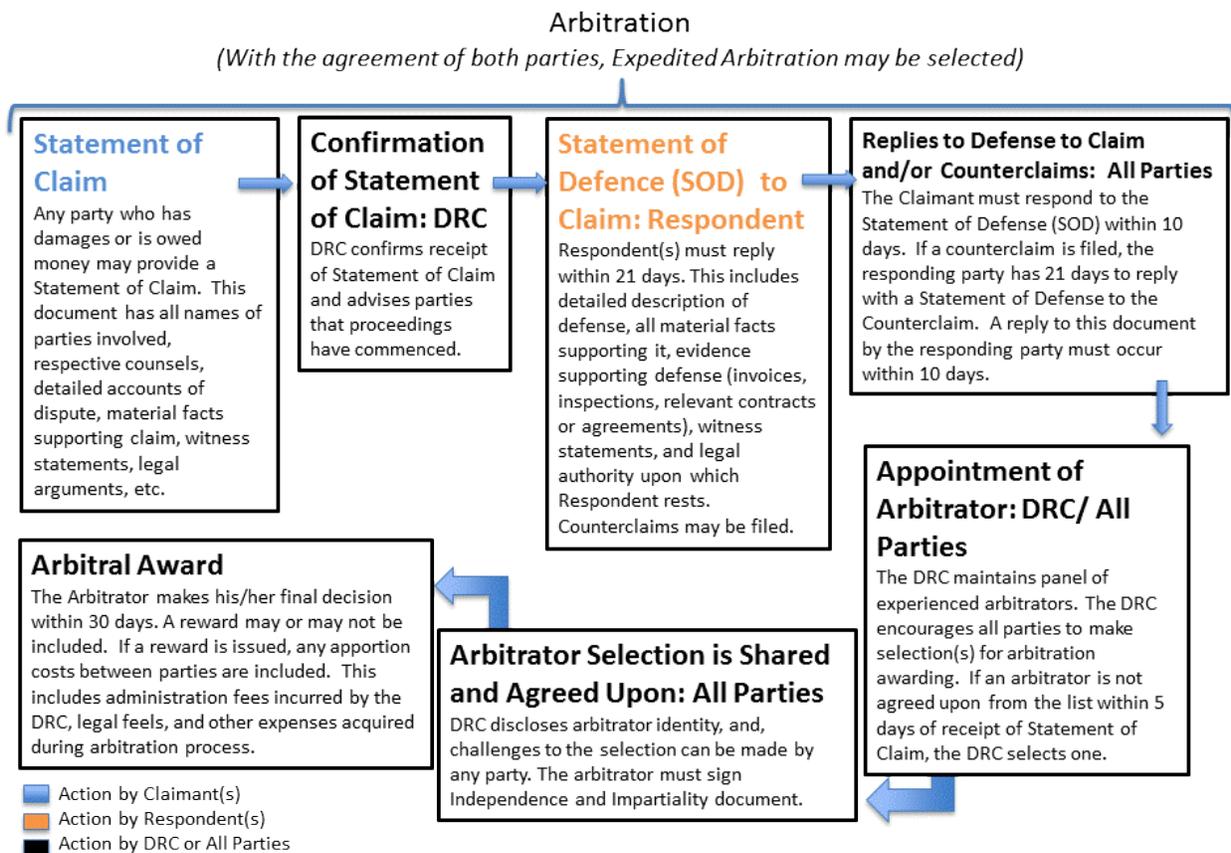
The difference between formal and informal mediation is a defined time process. Since the inception of the DRC, formal mediation has rarely been used. Rather, Claimants prefer to reduce their costs by using informal mediation (which is included in DRC membership fees) or take the claim directly to arbitration. Arbitration represents the minority of cases handled by the DRC due to the extensive coaching, advising, and informal mediation work between parties that occur during Stages 1-3 (DRC, 2011). Arbitration and mediation processes are enumerated within the Corporation’s Mediation Rules.

If the claim is less than \$50,000 then the dispute is eligible for Expedited Arbitration. For claims that are less than \$15,000 a set fee of \$600 is paid by the Claimant to cover the full cost of the arbitration, including arbitrator fees and administrative costs. This fee can be reimbursed to the Claimant if he/she is awarded a settlement and makes the reimbursement request. For claims from \$15,000 to less than \$50,000 a set administrative fee of \$700 applies as well as separate fees charged by the arbitrator (Webber 2011; Whitney 2011). For claims of \$50,000 or more the Parties must use Formal Arbitration Procedures, which include the provision for hearings. Administrative fees are based on a sliding scale and arbitrator fees are negotiated separately because these claims are more complex and warrant more time for an arbitrator to make a decision.

A filing of the Statement of Claim (Expedited) or a Notice of Arbitration (Formal) triggers the Expedited and Formal Arbitration process (See Figure B-2). Here, the names of all the parties are recorded, along with the necessary contact information details, witness statements, legal claims, and any and all applicable, supporting evidence for or against the claim (e.g.,

invoices and inspection reports). The Statement or Notice provides a place for the Claimant to agree that he/she will be bounded by final arbitration and award procedures. Once the DRC confirms receipt of the Statement or the Notice the Respondent is required to provide a written Statement of Defense within 21 (expedited) or 30 days (formal) of receipt of that confirmation. The Respondent may elect to issue a Counterclaim, if he/she raised it during the informal process, which must be responded to by the Claimant. The DRC maintains a Multinational Panel of Arbitrators experienced in resolving produce disputes. At the beginning of an arbitration procedure, the DRC communicates with the parties to the arbitration asking them to make their selection(s). Unless the parties agree to the selection of a particular Arbitrator, the DRC shall, within five days of receipt of the Statement of Claim, appoint an Arbitrator from its Panel of Arbitrators.

Figure B-2: DRC Process Flow for Arbitration



Upon appointment of the Arbitrator, the DRC shall disclose the identity of the arbitrator to the parties and provide the parties with a summary of the Arbitrator's qualifications and biographical data. The DRC releases the arbitrator's qualifications and biographical data to each party, as well as a Statement of Independence and Impartiality signed by the arbitrator. If the arbitration appointment is challenged, the challenging party must provide sufficient evidence to the DRC. If the challenged Arbitrator agrees to withdraw or the other parties to the arbitration agree to the challenge, the challenged Arbitrator shall withdraw from the arbitration. In neither case shall the validity of the grounds for challenge be implied. Where the challenged Arbitrator does not withdraw, the DRC shall decide the challenge.