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## Commercial Alternative Dispute Resolution in Cascadia\*

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In this interdisciplinary research<sup>1</sup> I will study the convergence of two phenomena intricately linked and highly topical of the late 20<sup>th</sup> and early 21<sup>st</sup> centuries: Regional Market Integration (RMI) and Alternative Dispute Resolution (ADR). Both in the literature and in the real world, RMI, which is premised on theories and policies of free trade, is perceived as the “better” economic arrangement. But what are the contours of the “benefit” of RMI? Can access to justice be construed as a non-tariff barrier to RMI trade (NTB)?

I limit the scope of inquiry to the study of companies as the beneficiaries of RMI, focusing on the dichotomy of big versus small and medium size companies. I further limit the focus to address the process of justice (not substance) as it arises in the event of disputes among firms.<sup>2</sup> Cascadia, which is a trans-border region within the North American Free Trade Agreement (NAFTA 1992) is thus a natural candidate for such research.

ADR, mainly arbitration and mediation, but also other alternatives to court

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1. International political economy and law.
2. I use the terms firm, corporation, company, and business interchangeably.

adjudication, have become increasingly popular at four levels of application:

- ▶ Legal and para-legal practitioners praise ADR as a just, efficient, and effective means to settle civil and international disputes;
- ▶ The courts throughout Canada have incorporated mandatory as well as voluntary ADR as a pre-trial procedure;
- ▶ The British Columbia (B.C.) Attorney General maintains a Dispute Resolution Office to administer this area of law; and
- ▶ The NAFTA provides for, and continues to develop, procedures and rules of ADR.

Many in the legal profession, judiciary, and executive in Canada and the U.S., as well as in the North American free trade forum, have subscribed to ADR. However, the attitude of the private sector remains unknown.

Consequently, three general questions arise:

- ▶ In the corporate and commercial area, does business perceive lack of access to justice as NTB?
- ▶ Is business aware of the ADR option? and
- ▶ Does business share the above mentioned enthusiasm for ADR?

To this date, there is no literature, statistical or otherwise systematic research on small regions cross-border commercial ADR available.<sup>3</sup>

Ultimately, the objective of my research is to study the awareness of the ADR option of private small and medium size companies engaged in cross-border trade in Cascadia. I am specifically interested in assessing the reasons for, and the extent of, inclusion of provisions for ADR in commercial agreements.

I apply a mixed methodology using primary and secondary sources on regionalism, Cascadia, the NAFTA, and ADR. To this I add over 55 interviews (mostly over the phone) I conducted in the business sector, the legal community, ADR non-legal practitioners, government, and regional organisations and associations. This quantitative part of the research, which is exploratory in nature should be considered as a pilot study. I chose the interviewees from across the business sector so as to capture as broadly as possible the commercial diversity in Cascadia. The responses reflect, on the one hand, the degree of willingness to acknowledge the existence of disputes and, on the other hand, the reluctance to disclose the fact of resorting to a resolution process as well as to share information about the process and its outcome. The upshot of the interviews in the remainder sectors largely conveys the appreciation, or the lack thereof, of both

3. For example, in borderland regions, e.g. along the French-German, Swiss-French-German and French-Italian borders, as distinguished from international regions e.g. EU, NAFTA. Since this is an interdisciplinary study, and to assist the uni-disciplinary reader, I will elaborate on fundamentals regarding both integration theory and reality, and ADR. I use the terms borderland, cross-border, and trans-border interchangeably.

scope of trade disputes and ADR in Cascadia.

The objective of the research represents a formidable challenge. Given especially the confidential nature of ADR, many of the hurdles present at the outset of the research have not been crossed in this paper. In this regard, I am quoting from a trend leading article by Carruth:

"[...] [T]he study of harmonisation and convergence of previously divergent social values and frameworks for regulation, market governance, and the protection of the collective good in North America and Europe will require comparative and empirical research methodologies. Although traditional models of stakeholder analysis are useful for exploratory and descriptive purposes, *new and empirically verifiable theories and conceptual frameworks* that address the regional interactions of corporations and their governments are needed for the advancement of the study of business, government, and society. [...]"

Therefore, the examination of enduring structural, institutional, and cultural differences that serve as the basis for regional market integration and for diverse models of business, government, and society provides new and intellectually challenging opportunities for the scholarly community in the 21<sup>st</sup> century" (Carruth 1999: 412, my emphasis).

I begin by setting out the general framework of RMI, which is the context of operation of ADR, and then move on to discuss Cascadia (section I). The next section provides a general panorama of ADR. Then, I present a survey and analysis of the specific use of ADR in Cascadia according to a sectoral classification. I continue in the following section with a study of new ADR initiatives both in Cascadia and the NAFTA. This is followed by a brief summary and conclusion.

## Regional Market Integration (RMI)

It is precisely in the era of accelerated globalisation that regionalism has been resurfacing. The new regionalism, i.e. of the late 1980s as distinguished from its predecessor of the 1950s and 1960s, has propelled trade theorists to pose several questions, conspicuously concerning the relationship between the formation of regional trade blocs and the status of welfare (Ethier 1998: 1149). In this context, I argue that there is an intricate and indissoluble link between economic efficiency, social welfare, and the management of legal justice.<sup>4</sup>

4. Carruth refers to a similar link, albeit in the more general context of change, since she mentions that RMI "in the transatlantic area can be conceptualized as simultaneous processes of economic, institutional, and sociological change in North America, the Western Hemisphere, and Europe" (1999: 403).



In globalisation and regionalism studies, *welfare* has largely been used in two main respects. In the North-South dichotomy as well as in the Capitalist/Democratic-post-Communist context, welfare loosely denotes a standard measurement of prosperity. Seen from a phenomenological perspective, welfare relates to collective interests, the public good, and the notion of civil society. The latter approach has largely, but not solely, focused on labour standards and interests, and the environmentalists' struggle for sustainable growth. The trade (international and political economy) literature however, unlike, for instance, the legal literature, pays little if any attention to justice as a condition of welfare. It ignores the gap regarding access to justice between big and small corporations, despite the fact that the small company is an important economic actor in the trade system along with the state and multinational enterprises. Questions of justice and their impact on RMI, free trade, and the economy at large have been ignored, e.g. the proposition that inadequate justice processes and procedures may well be considered an NTB.

It has been argued that trade liberalisation is achieved primarily by *small* countries linking up with a large country in an RMI, the former compelled to make significant unilateral reforms effectively rendering the trade agreement one-sided: "The liberalisation in NAFTA is due much more to 'concessions' by Mexico and Canada than by the United States" (Ethier 1998: 1151). Such liberalisation occurs mainly among *neighbouring* countries (Ethier 1998: 1152).<sup>5</sup> From a global trade liberalisation perspective, RMI represents constellations used by small states as bridges to enter the global and multilateral trading system. Pasquero maintains that "RMI is the concerted effort by governments sharing the same geographical area to harmonize their trading rules and create more competitive markets. [...] RMI is an intermediate phenomenon between the globalization of trade rules under GATT and WTO, and domestic trade liberalization within member countries" (2000: 7) Moving down the echelon to the next level of analysis, I suggest the application of a similar logic to the smaller actors within the trading system. Thus, small and medium size companies in a larger RMI system (e.g. the NAFTA) could be expected to consider the local borderland arena as their playing field (and perhaps their bridge to the entire RMI) if they wish to survive in the larger RMI.

Other arguments developed in the context of international, transgovernmental, and transnational relations draw the attention to *proximity*, *transportation*, and *social cohesion* among the trading partners regarding labour standards as crucial factors in trade agreements (Hefeker 1998).<sup>6</sup> It is in the interest of

5 "[...] [R]egional integration now usually involves reform-minded small countries 'purchasing', with moderate trade concessions, links with a large, neighbouring country that involve 'deep' integration but that confer relatively minor trade advantages" (Ethier 1998: 1152).

6. See the typology of provincial/state internationalism in Cohn and Smith (1996: 26-29). Introduced by Keohane and Nye, "transgovernmental" stands for direct and relatively autonomous interactions between governmental sub-units of different governments, whereas "transnational" implies cross-border interactions comprising of at least one non-governmental

neighbouring states to trade freely as

"[b]y moving towards free trade, [...] governments lose an important instrument for gaining political support from import-competing industries. Therefore it is obvious that the viability of a free trade agreement might be increased if other instruments can substitute for tariffs to protect negatively affected industries.

One such instrument can be social integration. [...] An obvious example is the social chapter and the protocol of social policy (annexed to the Maastricht treaty) of the EU. In this regulation an approximation of social regulation across all member countries of the EU is required. This has not happened to protect workers in countries with lower standards, but in fact aimed to 'level the playing field' for international trade (see Vaubel 1995)" (Hefeker 1998: 383-384).

The argument for social justice can be taken one step further. Yoffie (1993) maintains that in the real world, it is the comparative advantage of companies that affects international trade and production, and not the comparative advantage of states. If this is valid, then social justice may be relevant not only to the employee worker; then social cohesion must encompass also the business sector, those active in the marketplace either as self-employed or employers. By extension, social justice embraces also small and medium size firms.

Focusing on "corporate social management", Pasquero (2000) explores the various multipartite and multilevel negotiations taking place at the instance of government economic decision making.<sup>7</sup> These have resulted, in part, from a process of power consolidation by the MNEs. Focusing on Canada and the U.S., and cognisant of the different goals pursued in entering the NAFTA, the agreement seems to have economically fulfilled both these partners' expectations. However, socio-political critics contend that the logic of integration has been largely commercial, ignoring the undesirable consequences of integration (Pasquero 2000). This statement merits further elaboration for it draws the attention to the multidimensional nature of free trade. As Pasquero himself observes, intrafirm trade in the NAFTA -- which is a characteristic of big business -- "is 20%-40% of total trade, depending on the country, government, and growing" (*ibid*: 11) and "[a] *democratic deficit*, to use the term first applied to the construction of the European Union, also marks RMI in North America. To date, the process has largely been one of 'executive democracy', that is, decision making among governments, in association with powerful business groups" (*ibid*: 13). Furthermore, even economists admit that the determinants of trade policy are inherently political (Rodrik 1994: 44), and that the importance of intrafirm trade

actor (1976: 4).

7. See this excellent paper for a review of four major theoretical streams in the study of regional market arrangements.



calls for a fundamental revision of previously held assumptions about free trade (Yoffie 1993: xi).

Consequently, the answer to the crucial question -- "integration for the benefit of whom?" (Pasquero 2000: 15) -- must be revisited. Rather than search for it in theoretical models, a survey of NTBs will prove an eye-opener. Adding to the long list of such barriers also the cost (economic and other) of dispute settlement will explain why local RMI has proceeded only reluctantly in North America. Empowering small and medium size companies by opening avenues to equalise access to justice among business will prove a catalyst to RMI. Multi-party organisations and multilevel communication could facilitate this.

### Cascadia

Cascadia is the generic term representing the binational (Canadian and American) Pacific Northwest region. Among the numerous variations, three main different boundaries as well as three different foci arise. The "Narrow Corridor" or "Main Street Cascadia" refer to British Columbia, Washington, and Oregon, focusing largely on facilitating efficient and effective transit and communication to enhance competitiveness in the larger RMI and globally.<sup>8</sup> The "Economic Nation" or the "Pacific Northwest Economic Region" ranges from Alaska to Yukon, British Columbia, Alberta, Idaho, Montana, Washington, and Oregon. It is intended to intensify the NAFTA by forging closer local-regional economic ties and further liberalising and coordinating free trade in the region. "Bio-region Cascadia" represents an area in a range similar to the larger region however focusing on environmental issues and sustainable development.

As integration activities crosscut between the two regional spheres, the main part of this paper refers to the larger "Economic Nation", although some of the data collected (the interviews with business and the legal profession, though not the cross-border organisations) are at this time confined to the "Narrow Corridor" boundaries.

The NAFTA has spawned an almost NAFTA-independent transgovernmental dynamic involving state, provincial, municipal, and other local governments. The NAFTA involves internally, directly or indirectly, the interests of about 85,000 types of governments, including 91 states or provinces, and 40,000 cities, many of which are more powerful than states and keen to expand their autonomy (Pasquero 2000). In addition, a multitude of businesses and other lobby groups have joined in the RMI transnational process. Lateral, vertical, and diagonal relationships represent inter-central government negotiations, central-subnational government contacts encompassing also cross-border state and provincial associations, and relations between non-executive bodies, e.g. the continental association

8. For a systematic review see, Cohn and Smith (1996).

of 164 subnational state legislatures (Pasquero 2000). Furthermore, at the supra-NAFTA level, the North American free trade arrangement has generated also inter- and transnational energies. One such, for example, is the Transatlantic Business Dialogue (TABD), that lobbies and negotiates mutual recognition agreements (MRAs) in view of promoting regulatory harmonisation, and the Transatlantic Consumer Dialogue (TACD) seeking to mobilise inter-regional public interest and policy groups.<sup>9</sup>

Since 1986 (with some interruptions), this trend has been actively endorsed by B.C. Premiers intent on developing closer relations with the Western states as a strategy to consolidate the province's economic power locally as well as globally (Cohn and Smith 1996). In Cascadia, this RMI movement manifested itself in the emergence of several bodies.<sup>10</sup> While still needing to gather steam, they have already effected some reverberations across the Canadian-American border and in the region at large. Among the chief actors are two organisations, tailed by a third. The Pacific Northwest Economic Region (PNWER) is a 1991 statutory-created partnership of the public and private sectors in the five states of Alaska, Washington, Oregon, Idaho, and Montana, and the Canadian provinces of Alberta, British Columbia, and the Yukon territory. Its membership consists of legislators and executives (Governors and Premiers) and various public sector bodies (e.g., counties) and private members (e.g., industry associations).<sup>11</sup> PNWER's goal reflects the "bridging" concept mentioned earlier, whereby local cross-border initiatives enhance their competitive edge by taking advantage of the larger RMI -- here the NAFTA -- as a spring board to both this arena as well as the global one.<sup>12</sup>

The Pacific Corridor Enterprise Council (PACE) was established as a cross-border trade council in 1989. Unlike PNWER, which is a private-public partnership, PACE is a non-profit private sector-supported organisation established to promote free trade along the North American west. Over time, and in reaction to the NAFTA, PACE's mandate has expanded to assist in educating business on

9. "Through this regional process of business strategy and societal transformation, the United States, North America, and Europe are rapidly developing a transatlantic value consensus relative to the governance of corporate strategy and competition and the collective good" (Carruth 1999: 407).

10. For one such detailed list of Main Street Cascadia see Consulate General of Canada, Seattle (2000a).

11. The organisational structure comprises of nine working groups representing agriculture, forest products, transportation, environmental technology, government procurement, recycling, tourism, telecommunications, and trade and finance, each sector lead by a legislative, public, and private sector co-chair. Their activities consist of initiating legislation, sponsoring teleconferences, industry fora, and research papers in view of benefiting the member jurisdictions. In addition, PNWER has a Private Sector Council the legal initiative of which will be discussed later.

12. Hoping to become one of the top 12 economies in the world" (www.pnwer.org), the combined GDP of the region is over US \$350 billion annually, the combined population about 18 million, in an area totalling 1,885,346 square miles. Chosen as headquarter to eighteen "Fortune 500" companies (in 1996) and in 1995, the total volume of bilateral merchandise trade (excluding services) between Washington, Oregon, Idaho and Alaska and Canada was Can. \$ 14,526, 622,000 (Consulate General of Canada, Seattle 2000b).



international commerce and engaging in dialogue with business councils and governments throughout the Pacific Corridor (PACE membership form).<sup>13</sup>

The Cascadia initiative is yet another forum promoting cross-border integration. It was started by the Seattle-based Discovery Institute in 1993, in view of developing a network of local leaders working with state, federal, and provincial officials so as to improve Amtrak, border crossing, and international freight mobility. In 1994, the Canadian Cascadia Institute in British Columbia ensuing in the Cascadia Project supplemented the U.S. initiative. Unlike PACE and PNWER, the Cascadia Project focuses largely on transportation issues ([www.discovery.org/cascadia](http://www.discovery.org/cascadia), and [www.seattletimes.com/news/editorial/html98](http://www.seattletimes.com/news/editorial/html98)). Only recently has it addressed the attention also to marine conservation and support of cross-border vacation.

Other Pacific Northwest trans-border initiatives are less relevant to commercial cross-border activity.<sup>14</sup> An example for a government initiative is the Seattle Canadian Consulate General's match-maker project entitled Strategic Alliances (reminiscent of similar popular initiatives in Europe, Asia, and North America) encouraging "a formal and mutually agreed-upon commercial collaboration between companies ([www.canada-seattle.org/SAC/ALL.HTM](http://www.canada-seattle.org/SAC/ALL.HTM)).<sup>15</sup> This endeavour perhaps exemplifies Pasquero's (2000) observation that government has been gradually shifting its role from that of social and economic regulator to promoter of national competitiveness.

The foregoing description paints a picture of disjunctive initiatives, largely sectoral even if supported by government. Although extremely important as public policy factors in promoting the Pacific Northwest RMI, these endeavours are not well grounded in the larger society as two important societal factors -- labour and education -- are not yet involved. (Alper 1999) While the latter are critical in creating an integration-friendly atmosphere, more direct pre-requisites for success are still missing. One such factor most closely linked to business and trade on the one hand, and "welfare" (as discussed earlier) on the other hand, is the *legal connection*.

Business and trade require effective, affordable, and speedy justice systems. The notion of welfare is founded on guarantees of equal opportunities and results. Equitable access to justice -- the elimination of discrimination generated by "non-legal barriers to justice" such as burden of costs, duration of process, type of procedure, etc. -- has long been a paramount concern in the contexts of domestic and international trade. In the latter, they have been compounded by conflict of law and choice of law issues (e.g. the enforcement of foreign judgments, differences in legal procedure, to name only a few) combining to stack costly obstacles

13. Initially, it has focused on facilitating cross-border movement, establishing the so-called PACE lane to simplify land border crossings and transportation. This resulted in the creation of a special commuter lane at the main Pacific Northwest border crossing, which was quickly adopted at other Canada-U.S. border crossings and renamed as CANPASS (Cohn 1999: 8).
14. E.g., the "eco-information weaver" Cascadia Planet ([www.tnews.com](http://www.tnews.com)), the Cascadia Education and Research Society (Cohn 1999: 8).
15. This strategy is material to the ADR discussion later herein.

in the pursuit of justice.

I have argued elsewhere (Gal-Or 1998a) that legal standing is crucial for free trade to be fair and freer.<sup>16</sup> The NAFTA has created two kinds of justice by practically distinguishing between two classes of economic actors: Big business versus small and medium size businesses. Enjoying lobby leverage, big business maintains a quasi-institutional framework through which to resolve disputes (with government or among big business) aided by means of an arbitration process and government representation (NAFTA, Chapter 2022). Small and medium size companies have been locked out of this vehicle of dispute resolution.<sup>17</sup> Unless grouping in professional and sectoral associations, or engaging in "sector lobby" action, the small entrepreneur remains powerless and, in fact, may be deterred from engaging in cross-border trade.<sup>18</sup> Faced with obstructions to justice, the opportunities for such economic actors to partake in the local -- and also larger -- RMIs are being curbed, their chances of benefiting from the freer trade reduced.<sup>19</sup>

The NAFTA has not only caused apprehensions but has also created opportunities.<sup>20</sup> It is up to the NAFTA citizens (corporate and others) to take the initiative and carve out their special regime within the still institution-poor free trade region. By-passing some conflict of law and choice of law impediments by drafting and adopting ADR rules of the game to facilitate the resolution of private disputes involving small and medium size firms may be exactly one such open avenue. This may also contribute to bolstering the welfare of the integrating societies.

## Alternative Dispute Resolution (ADR)

ADR consists of three general categories: unassisted negotiation, assisted negotiation, and adjudication (Fashler 2000). In unassisted negotiation -- typically the initial step of most dispute resolution processes -- communication occurs directly between the parties or their agents. Assisted negotiation is divided into two categories: Without and with outcome prediction. The former includes mediation, conciliation, and facilitation, and reflects different stages of the negotiation process as well as different "levels" of mediation (i.e. regarding the role of the neutral third party). The latter consists of neutral evaluation to provide a non-binding opinion on the likelihood of either party winning the dispute; fact finding by a third party with or without a recommended solution; minitrial where a panel

16. To be truly free, the free mobility of persons is a necessary ingredient (Gal-Or 1998b).
17. Except for the investor chapter, see section II, *infra*.
18. This situation applies also to immigration procedures, constraints of red-tape regulations, etc. Although they are part of the larger picture of integration and intensification of free trade, disputes or problems arising in this context are not the subject of this paper which concentrates on private commercial disputes.
19. I document relevant support for this sentiment in the next section.
20. See the precedents set by the professional associations of engineers, chartered accountants, and lawyers, discussed in Gal-Or (1998b).



or key decision makers of the parties negotiate with the assistance of a neutral advisor in a court-like setting; and med-arb which consists of two steps, the second one, i.e. arbitration, activated only upon failing mediation. The neutral may either stay on for the second stage or be replaced.

Adjudication may include med-arb, arbitration, and institutional procedures (e.g. the Universal Dispute Resolution Policy of the Internet Corporation for Assigned Names and Numbers). While the latter is prescribed by a particular organisation and adhered to by its members, arbitration is more flexible in the choice of rules and procedures (Fashler 2000).

At the *domestic level*, ADR has been widely used as an *ad hoc* practise. Main and Park report that (whether in Britain or the U.S.) over 90 % of cases entering the legal system settle out of court in what is known as "bargaining in the shadow of the law" (2000: 37). While the procedural frameworks to administer civil justice vary among these states, such variance does not produce differences in the frequency of pre-trial settlements, although it may affect the extent of settlement.<sup>21</sup>

At the *international level*, ADR has since long figured as the system of choice. While applied to a range of international legal areas, ADR has become increasingly attractive as a means to resolve economic disputes. At the International Federation of Commercial Arbitration Institutions (IFCAI)'s 1999 meeting, arbitration has been described as "a key to economic and political development" ([www.adr.org/publications](http://www.adr.org/publications)). ADR utilised under the GATT and the WTO has been adopted also by the NAFTA drafters. The NAFTA encourages particularly arbitration, although in the environmental side-agreement (NAAEC 1993) a much lower level of dispute resolution mechanism -- the submission procedure -- is provided for.

The main arguments in favour of international ADR begin by listing the numerous disadvantages associated with litigation in the international context (Naranjo 1996). The vast majority of international disputes are resolved on a case-by-case basis, which causes unpredictability and uncertainty. By its nature, the international scenario entails disadvantages such as time, cost (capital and personal), limitations regarding personal jurisdiction, and subjection to the judicial process in foreign courts with differing legal systems. Even if an award results from the international litigation, its practical enforceability is in question, which eliminates the benefit in getting it in the first place. In fact, the United States, as other countries, are concerned with protecting their sovereign public policy and may deny recognition to a foreign judgment. Finally, a "greater

21. Main and Park (2000) provide a good survey of the abundant theoretical literature of models explaining the approach to pre-trial negotiation. Having themselves conducted an experimental (laboratory) research, they deplore the almost total absence of relevant empirical study. According to Spier (1992), most of the lawsuits that are settled out of court are settled close to the trial date or even in the first days of trial. She proposes a model making the legal expenditures endogenous suggesting that expenditures might signal information about the case. For other relevant modelling of out-of-court settlement see, Gould (1973).

disadvantage resulting from litigation is a general chilling effect on international business transactions. Because of these disadvantages, there has been a trend toward the use of arbitration as "the best alternative for the resolution of private commercial disputes" (Naranjo 1996: 118).

The NAFTA has incorporated ADR in several ways. Chapter 20 on institutional arrangements and dispute settlement procedures provides for a generic ADR formula starting with consultation which may end in arbitration; Chapter 19 on anti-dumping and countervailing duty, and Chapter 11 on investments, are the significant dispute resolution highlights of this instrument (Gal-Or 1998a, Paterson et al 1994, Horlick and DeBusk 1993, Housman 1994, Johnson 1993).<sup>22</sup> Nevertheless, the chief drawback of the NAFTA ADR provisions is that a party to a dispute must be represented by its national government. In other words, the ADR process allows standing only to the member governments. The only three exceptions allowing private party initiation of ADR processes stipulate sectoral limitations. Chapter 11 provides for consultation and binding arbitration for the settlement of investor-state disputes. Chapter 19 establishes the procedure for the review of relevant administrative determinations made under national law allowing an involved party to request a panel review, and ordering a NAFTA Party to request a review when requested to do so. Finally, the NAAEC allows private persons and non-governmental organisations to file a submission. These represent an extremely limited range of non-litigation remedies in a free-trade environment with an abundance of private sector actors.

What emerges then is the NAFTA's indifference to international, RMI private commercial disputes. This had elicited the concern of lawyers who at the outset of the NAFTA remarked that "the settlement of business disputes between private firms will remain a problem" (Miller 1994: 1316, referring to the U.S.-Mexico context) and that "under NAFTA, small businessmen without the requisite clout seem 'left out in the cold', as NAFTA does relatively little to empower small and medium-sized businesses to effectively resolve their own commercial trade disputes" (Miller 1994: 1318).<sup>23</sup>

Yet, deplorable as it may be, that the NAFTA ignores private and small and medium size businesses must not necessarily be considered a failure.<sup>24</sup> Withholding from imposing a dispute resolution regime on such actors may be interpreted as a license to private actors to carve out their own appropriate dispute resolution space within the NAFTA. After all, Article 2022 calls on private parties to settle their international commercial disputes by the use of arbitration and other ADR

22. Clearly, international ADR is not a panacea to all ills, particularly not the regulatory ones, and even not at the domestic level as it has been observed that even in the context of anti-dumping and countervailing duty "the administration of the trade remedy laws in the United States can be [domestically] biased in favour of the home plaintiff against the importer, as has occurred in this sector" (Rugman and Anderson 1997: 936, who corroborate the claim with a long list of studies).

23. Miller cites the Bush administration's NAFTA chief negotiator stating that NAFTA does not deal with private party-to-private party disputes.

24. "At over 1000 pages in length, [it] has only one article dealing with private commercial disputes" (Miller 1994: 1319).



mechanisms.

Returning the attention to Cascadia, in B.C., domestic ADR has been widely practised in the area of family law. Recently however, government and the courts started piloting with ADR in the civil non-family arena as well (McEwen 1999).<sup>25</sup> Among other things, this may also be attributed to a spill over effected by experience with ADR at the international level, where the economic rationale reigns supreme and guides the process of justice.

At the institutional level, several initiatives have been under way. The Court Mediation Practicum in B.C. trains mediators in settling disputes of no more than \$10,000 value filed in Small Claims Court. Since May, 1999, a Supreme Court Notice to Mediate applies in the construction area. A similar procedure has been available since April, 1998, in matters of personal injury in motor-vehicle accidents. A Notice to Mediate (General) Regulation applying in all civil procedures at Supreme Court level came into force in February, 2001. A mediator roster has been established with the Ministry of the Attorney General, is however not anchored in any statutory form to professional accreditation and licensing, and at best operates as a general referral list. Expanded settlement conferencing involving lawyers, judges, and the parties has taken the role of the judges beyond the traditional adjudicative function and was successfully applied in the suits related to denominational residential school abuse of native children (McKwen 1999). Finally, the climax of this concerted push to promote ADR within the court system was ironically reached with the resignation of B.C. Supreme Court Chief Justice, Bryan Williams, who encountered mounting objection to court ADR from many on the bench (*Vancouver Sun* 2000).

In conclusion, while the current wisdom suggests that ADR is the panacea to many of the ills of a post-modern "new economy" as well as an overburdened judicial system, the negative aspect of ADR merits mention, and caution is called for regarding its use: At the end of the day, ADR still remains partly dependent on the judiciary, e.g. when the issue of enforcement of arbitral awards or mediated settlement agreements arises, or where the impartiality of an arbitrator is at stake.<sup>26</sup>

25. Increasingly, it has gained in popularity also in criminal law, particularly concerning aboriginal criminals and in view of combining rehabilitation with law enforcement, e.g. the healing circles.

26. These issues have been discussed at length at the conference on Alternative Dispute Resolution (1999).

## Cross-Border Commercial ADR in Cascadia

Awareness of the ADR option and its use in private party cross-border commercial transactions in Cascadia is at an early embryonic stage. In addition to other factors delaying the spread of commercial ADR in cross-border transactions, ADR supporters deplore the lack of education both of business and the legal profession. I will now describe and analyse the attitude to ADR and to RMI as manifested by three types of actors relevant to the fostering of cross-border trade. Although at this stage of research the sample of the population surveyed (over 55 interviews and written communications) is relatively small, it is nevertheless sufficiently varied to imply an attitudinal pattern towards commercial ADR in cross-border trade held by stakeholders in B.C. and in "Main Street" Cascadia at large.

### The legal profession

A very vocal lobby of lawyers and para-legal ADR practitioners who are particularly impassioned about the virtues of ADR, has been pressing for its wider use, conveying the impression that ADR has already gained popularity.

Established in 1986, the British Columbia International Commercial Arbitration Centre (B.C.I.C.A.) is said to have played an important role in the development of ADR in B.C. and to be Canada's best-known international arbitration institution.<sup>27</sup> While reckoning that parties are likely to use ADR for such clauses are included in many contracts, and because ADR is a less expensive procedure than litigation, the B.C.I.C.A. does not compile statistics about the extent to, and the circumstances in, which ADR is being used (Grove 1999).

For 15 years, the B.C. ADR Chambers, a commercial/civil mediation centre, has been organising the service of mediation and engaged mediators for the parties, while refraining from involvement in the mediation itself (Gardiner 2000). To date it has organised only very few cross-border mediations. Several factors explain this lack of cross-border ADR (Gardiner 2000). First, an impression prevails that the volume of cross-border commercial activity is negligible. Second, the legal profession has not yet come to terms with ADR and lawyers lack sufficient knowledge as to its operation. Because litigation is the conflict resolution method entrenched in the mind-set of most lawyers, proposing mediation early on in the process is not an option, on the contrary -- it is frequently considered a sign of weakness.<sup>28</sup> Moreover, as negotiation has not yet been integrated by lawyers as a preparatory step towards litigation, the recognition that

27. However, according to unrelated sources the "facility may be non-existent as it is under-utilised, the B.C. government which has supported it, cut the funding as there was no matching financing coming from the business community" (1999).

28. This sentiment was echoed by Robert Fashler addressing a B.C. Continuing Legal Education (CLE) audience (April, 2000), who complained about the inability of adversarial-minded litigators to employ what enjoys the reputation of a "touchy/good feel" sentimental strategy.



mediation may also represent such a stage is even less prevalent. Third, even when a commercial contract does include a mediation clause, it most often remains unused: Its wording is likely to be very generic leaving much leeway not to act on it, a practise reinforced by the perception that mediation is a time consuming process. The situation differs somewhat when arbitration is defined as a mandatory term of contract, and where it prescribes mediation as a prerequisite. Fourth, their unfamiliarity with mediation evokes in clients almost total distrust of the method. According to typical "client psychology", the lawyer is expected to solve the problem while the client is relegated to a passive position refraining from pressing for any specific method. But even should a client wish to proceed by mediation, lawyers are inclined not to take such client's instruction seriously and prefer to prepare for trial. Fifth, counsel tend to feel that their role is to negotiate a settlement and not to mediate. As the clients are left at the margins of the process and are "prohibited" from communicating directly, the parties fail to address the core issues. Mediation is resorted to only when the lawyers reach a stalemate, but often such stalemate does not depend on a substantive issue but results rather from posturing by the lawyer. In sum, all the above reflects that the legal profession in B.C. is still lagging behind when compared to its American colleagues in Cascadia. The Washington bar is proactive in mediation, and the U.S. bar at large is more open to both arbitration and mediation.

Finally, confidentiality is a bar to the collection of information on ADR. As a matter of ADR practise, a written memorandum records mediation, and a written award -- an arbitration; yet the confidentiality requirement which lies at the core of ADR permits their release only upon the parties' agreement and knowledge of the identity of the subject to whom the memorandum or award is being released (Sanderson 1999).

The B.C. Arbitration and Mediation Institute (BCAMI) is an ADR training, referral, and appointment facility but similar to the other organisations, does not maintain any statistics on ADR neither concerning domestic B.C. nor regarding cross-border disputes (Ladner 1999). The Society of Practitioners of Dispute Resolution (SPIDR) is a North America wide network of ADR practitioners but was unable to provide any information as to the extent and nature of commercial ADR whether in general, across the NAFTA, or specifically in Cascadia.

The NAFTA 2022 Committee had attempted to conduct a survey about the extent of ADR use in the NAFTA, however no analysis was undertaken, let alone data made available (Branson, member of the committee 1999). In fact, education regarding the benefit of ADR still requires much to be done at least in order to prevent misuse of the court system. Even where a contract provides for ADR, some parties choose to proceed by litigation in the local courts, oblivious to the fact that such move enables the adversary to stay the court action because of the arbitration prerequisite (Branson 1999).

The B.C. Supreme Court has rarely, if at all, encountered cases of cross-border commercial disputes in which attempted but failed ADR landed the

dispute in trial (Lysyk 2000, Vickers 2000).<sup>29</sup> Judge Vickers attributes the (at least appearance of) lack of ADR to the fact that the older generation of legal practitioners are weary of such mechanisms, while the younger generation of ADR trained people eager to embrace the process have not yet won the upper hand.

An interesting exception emerges from an in-house counsel's perspective who clearly prefers ADR to the traditional court avenue in the cross-border commercial setting (Wallace 2000). Companies that employ in-house counsel are more inclined to use ADR because, among other things, they are "bombarded" with information about it. Typical in-house counsel use of ADR consists of attempting an internal resolution of the dispute first, and mediation as the second option. The use of final binding arbitration is preferably avoided for it is expensive, protractive, and limits the right of appeal.

Based on aggregated information, the impression gained is that the notoriety of ADR in B.C. is due mainly to rhetorical rather than practical presence.<sup>30</sup> It is still in the stage of public education (as a "joint effort" strategy of the legal profession and stakeholders in government) for there simply is not that much ADR activity taking place as the profession would like the public to believe. ADR used is still largely limited to specific legal areas such as family, construction, personal injury, and wrongful dismissal. Disputes in other areas are regulated by legislation and administrative tribunals. Disputes related to the cross-border trade activity (including migration -- both of corporate entities and of their human resources) are private party-to-government matters. These tend to be resolved not through ADR but rather through the administrative tribunals set up by the Department of Justice, State and Labour in the U.S., and the equivalent bodies in Canada, and by the federal courts on both sides (Andersson 1999).

Finally, unlike B.C., in Washington there appears to be some resolute movement in view of promoting the use of commercial ADR in the Cascadia cross-border trade.<sup>31</sup> American lawyers have recently joined forces in drawing up an ADR programme for parties' use across Cascadia (Sailer 2000).<sup>32</sup> Contrary to the information collected in B.C., Sailer maintains that the magnitude of commercial cross-border trade activity in Cascadia is "huge". The degree of pent up frustration is commensurate with the trade expansion for there is no inexpensive and short way available to business to resolve their disputes. Business people feel competent enough to resolve their disputes by themselves, but recognise the need for a third party to act as an intermediary and to provide guidance (Sailer).

29. There may be several explanations for this, amongst them choice of law, namely that the preferred jurisdiction is the American and not the Canadian.

30. Including data collected from other sources, e.g. government and business, see *infra*; several lawyers and para-legal practitioners known as ADR experts in the B.C. community preferred not to express themselves on the issue.

31. On both sides of the border however, neither the B.C. nor the Washington bar associations nor their relevant ADR sections do maintain any statistics on ADR.

32. Members of PNWER (including one member from Alberta) see, PNWER ADR Service, section IV, *infra*.



### **The organised business community, government, post-secondary education and research institutions**

Lack of systematically gathered information by the legal profession was not compensated for by researching the public sector.<sup>33</sup>

#### *The organised business community in B.C.*<sup>34</sup>

It appears that the subject of private party-to-private party dispute resolution has not attracted attention at all, in fact, with the exception of PNWER, it remains a non-issue.<sup>35</sup> A recurrent but doubtful explanation was that the number of disputes in the Cascadia trade is minimal as B.C. and Alberta companies carry on business on a scale larger than Cascadia and only to a negligent fraction in Cascadia itself. The commercial activity that does take place is largely of government-to-government nature (Parker 1999).

#### *Government in B.C., Washington State, and Oregon*

A devoted promoter of ADR, the Dispute Resolution Office in the B.C. Ministry of Attorney General has recently undertaken two ADR initiatives: Housing the B.C. Mediation Roster Society which is a general referral service, and introducing the Notice to Mediate (General) Regulation to "allow any party to an action in the Supreme Court to compel all other parties to the action to participate in a mediation of the matters in dispute" (McHale 1999a).<sup>36</sup> However, the Ministry of the Attorney General maintains neither documentation on the status of ADR at the provincial level, nor regarding trans-border trade (McHale 1999b). With the exception of the Canadian Consulate General in Seattle, (Cook 2000) other

33. Confidentiality was occasionally advanced as an excuse to avoid specifying whether ADR is being practised in cross-border commercial dispute settlement.

34. The World Trade Centre, B.C. Chamber of Commerce and the local municipal chambers of commerce, B.C. Board of Trade, Vancouver Board of Trade, B.C. Council of Business, Better Business Bureau, Council of Forest Industries, Lumber Trade Council, Northwest Cruise Ship Association, PACE, PNWER, and the Alliance of Manufacturers and Exporters of Canada were some of the organisations representing business interests contacted in the course of this research.

35. When addressing the conference Rethinking the Line: The Canada-U.S. Border, Canada's Minister of Foreign Affairs and International Trade, Lloyd Axworthy, remarked that out of 200 U.S.-Canada treaties, only two provide for ADR.

36. This consultation document, which refers to previous experience in B.C. and mediation in Ontario and Saskatchewan, canvassed only lawyers, not the disputants, and reports no systematic analysis from the other jurisdictions to assess their effectiveness. The Rules Committee appointed by the Attorney General objected to a Notice to Mediate court rule (Minutes of the Meeting, ADR Subsection (2000)).

governmental agencies were unable to offer information.<sup>37</sup> Awareness to ADR as a crucial component in facilitating trade relations has simply not yet arisen.

Although ADR is more intensely practised south of the Canadian border, government there appears to be no better informed and knowledgeable than in B.C.<sup>38</sup> The Senior Counsel for Trade Agreements, U.S. Department of Commerce, does not maintain a registry of ADR cases or settlements, nor do the usual sources including the Commercial Arbitration and Mediation Centre for the Americas (CAMCA) (Grier 1999). The U.S. Consulate General in Vancouver does not have but anecdotal information about the subject (Samara 2000; Llorens, Consul General and Brown 2000).

#### *Post Secondary and Research Institutions in B.C.*<sup>39</sup>

Interviewing faculty and researchers studying ADR and free trade has portrayed a picture not unlike the one already gained.<sup>40</sup> While B.C. universities have embarked on the larger domain of conflict resolution studies, and the B.C.<sup>41</sup> Justice Institute as well as the B.C. CLE have been offering conflict resolution training for several years now, none of them maintains any data pool concerning ADR. The Sustainable Development Research Institute, could not provide any data either (Munnis 1999).

### **Private companies**

In the absence of documented data on ADR cases; the lack of systematic statistical data on the attractiveness of ADR to the business community collected by either the legal profession, the organised business community, government, or the post-secondary education and research institutions; and in view of the veil of confidentiality in ADR, the only remaining source of information were the potential parties to a dispute. Supposedly the most authentic source of information, the hurdle to overcome was in determining which type of companies to

37. Canada-B.C. Information Centre, Enquiry B.C., Canada-B.C. Service Centre, Tourism B.C., the Vancouver Economic Development Commission, Western Economic Diversification Canada.

38. This impression is gained from information gathered from state and municipal governments, which in turn referred to some of the above mentioned organisations and practitioners (letters by Paul Schell, Mayor of the City of Seattle, February 18, 2000, Vera Katz, Mayor of the City of Portland, February 3, 2000, and Stan Biles, Mayor of the City of Olympia, February 14, 2000). More research is required, e.g. with the Oregon State Dispute Resolution Commission, and other government branches.

39. American universities, e.g. University of Oregon Law School and, Willamette University, to mention only a few, which offer ADR programs (the former the Active Mediation and ADR Program, the latter the ADR Program), have not yet been canvassed in this research.

40. Professor Dave McPhillips, Faculty of Commerce, UBC, could not be of any further help (personal communication, January 11, 2000) and others contacted did not respond.

41. The University of Victoria, Royal Roads University, and the University of British Columbia.



approach and the size of the sample.<sup>42</sup>

Targeting companies with cross-border awareness, e.g. members of PACE, and companies I was referred to by those interviewed earlier, a sample emerges which is too small to allow grouping by economic sectors. The sample includes custom broker firms, daily involved in cross-border activity, a helicopter company servicing the natural resources industry, some heavy industry, a firm in the tourism business, etc. The overall finding arising from this random survey is of widespread unawareness of the ADR option, lack of education -- and where there is awareness -- presence of "cultural" bias as ADR is being considered an "American" practise not yet adopted in Canada.

Only two companies indicated their awareness and practise of using ADR. The Burnaby based TCS International Inc., a privately held franchise automotive glass repair and replacement company with offices in Canada and the U.S. and a turnover of \$350,000,000 to 400,000,000 (perhaps already at the higher margins of medium-size), has introduced an ADR clause in all its franchise contracts.<sup>43</sup> When addressing the settlement of a dispute, the company begins with unassisted negotiations whereby the senior vice presidents on each side attempt a resolution. Should an internal resolution fail, mediation follows, the mediator being either selected and mutually agreed upon by the parties or chosen by a U.S. court. Failing mediation, the process moves on to arbitration. Confidentiality is central to the process. The process has been found satisfactory as it saves costs and lowers the level of adversariality. Being costlier and limiting the right of appeal, arbitration is used only reluctantly. While arbitration offers the advantage of a quick decision making, the duration of the resolution process is a factor less important in the particular business of TCG (Wallace 2000).

A&A Contract Customs Brokers is the only other firm interviewed which resorts to ADR. Dealing with small and medium size Canadian and U.S. companies, it is engaged mainly in import to B.C. Since the NAFTA, the number of disputes has shrunk thanks to the newly introduced customs and tariff legislation and the formal regulations regarding refunds and redetermination of classifications. Most of the disputes have revolved around import quotas and were private party-to-government rather than private party-to-private party. They are usually settled in the relevant administrative tribunals, the procedure is inexpensive unless the firm elects to retain counsel to represent it. A&A resorts to ADR on a case to case basis only and as a matter of individual, not standard, contract. While conceding that in the custom brokerage business there is room for private party-to-private party disputes, for instance regarding product deficiencies, credit, freight forwarding, etc., such disputes occur largely with small companies. As they are costly to resolve and usually require retaining a trade lawyer, the cost becomes prohibitive and companies prefer not to pursue justice. Small and medium size companies also tend to avoid legal confrontation for fear of

disturbing their business relations (Eros and Danmayer 2000).

All the other companies interviewed were either unaware of the ADR option, maintained that they had no history of disputes (Hemlock Printers Ltd. 2000)<sup>44</sup> or were aware that ADR was a practise popular in the U.S. but not in Canada. For instance, in the service sector, the Vancouver downtown Waterfront Hotel uses its tailor-made hotel contract which does not include an ADR provision although U.S. clients do provide for such term in their contracts. Disputes are uncommon, and should a problem arise the tendency is to resolve it by negotiation (Hicks 2000). A firm providing financial services to corporations in the cross-border region maintains no record of use of ADR, the explanation for ADR underuse being that clients are "probably not aware of it" (Norton, Outsource Financial Services 2000).<sup>45</sup>

In transportation, Helijet Airways Inc., a B.C. carry cargo and passenger airline firm, does not provide for any ADR mechanism in its contracts (ticket).<sup>46</sup> Problems are largely customer service related and are usually resolved informally at the office level. In fact, my interview elicited the response "first time that I hear of it [ADR]" (Dettweiler 2000).

Of special interest because it was dispelling the notion of peaceful commercial relations devoid of conflict and dispute, was Neil Bradely Trucking from B.C. Arising mainly in the relationship with government, e.g. the confiscation of trucks by U.S. authorities for unpaid fines or problems related to the person of the driver, disputes have been handled under relevant federal legislation and regulation. In this relationship, companies look to different business associations to represent them, e.g. the business chambers, B.C. Trucking Association, etc., as these associations participate in government consultation processes regarding also the regulation of cross-border trade (whether transportation or commodities). Cross-border mobility hurdles -- mainly U.S. immigration policies and regulations -- effect the formation of close lines on the part of the immigration "customers", regardless whether big or small, and perhaps alleviate the attention away from private party-to-private party disputes (e.g. with customers or employees) (Bradely 2000).

Notwithstanding the above, the need for affordable justice processes is pressing: "The middle guy needs it. The poor get legal aid, the rich golf with the legal profession" (Bradely 2000). This has prompted resort to means of making justice affordable, albeit through financing, not by seeking alternative legal processes. The company has never provided for ADR in its contracts, but has recently chosen to use and promote pre-paid legal insurance which for a small fee enables the "medium guy" affordable access to legal services. The insurance policy provides free access to legal advice and legal representation (which may

42. See, Introduction, *supra*. At this stage, my research of companies' attitude to ADR has been preliminary, confined to B.C., and only tentatively indicative of the situation in B.C.

43. PACE member.

44. PACE member.

45. PACE member.

46. IATA rules and regulations govern. I have not inquired whether these incorporate ADR.



indirectly lead to the use of ADR) at reduced cost and offered by the "bigger Vancouver down-town firms" (Bradely 2000).

The picture painted on the U.S. side of the border shows small and medium size companies (which comprise roughly 95% of the firms involved in cross-border trade in Cascadia) as unable to afford to write off losses, sue in a foreign jurisdiction, or sue in the U.S. and file the judgment north of the border and have it enforced there. Furthermore, as a general rule, there is a growing sense that even the international arbitration rules are too formal for the needs of Cascadia cross-border business regardless whether in private party-to-private party, private party-to-government, or even government-to-government relations (Sailer 2000). That the experience with the NAFTA ADR procedures has been a "horror story to stay away from" is echoed in the sentiment that the NAFTA complaint procedure does not foster co-operation, and although ADR provisions are being written in contracts as a matter of habit, they have often proven unsatisfactory (Morrison 2000a).

## Conclusion

The main picture arising from the foregoing survey is one of dearth of information. Most of the data available is partisan, haphazard, anecdotal and reflective of lack of understanding of, and awareness to, commercial free trade needs. Confidentiality of the ADR mechanism can not legitimise a system's refraining from self-education.

At a less general level of analysis, the approach to ADR by Canadian versus American firms in Cascadia reveals a significant asymmetry. While in B.C. awareness and use of ADR is rather limited, American companies which already have a history of experience with ADR are dissatisfied with the traditional choice of ADR mechanisms. They are pursuing more relaxed dispute resolution procedures, such which would foster co-operation, rather than emulate or adopt some of the judicial system's adversariality. Given this Canada-U.S. discrepancy in attitude toward ADR, a fresh approach to dispute resolution is recommended. It preferably be founded in a common vision of the partners to commerce and trade on both sides of the border so as to remove this particular barrier to trade and economic development.

## New ADR Alternatives

Two ADR initiatives were born out of the dissatisfaction with the present ADR (and non-ADR) dispute resolution mechanisms employed in the NAFTA region.

### PNWER ADR Service

Continuing barriers to trade encountered in various trade sectors, e.g. tourism, construction, waste recycling, and failure to successfully apply the NAFTA dispute resolution mechanisms, which culminated in a crisis in the cattle growing industry, have contributed to increased frustration with the available ADR mechanism.<sup>47</sup> Indeed, so much so, that PNWER members have reached the conclusion that the ways disputes have been dealt with consisted a barrier to trade in itself (Morrison 2000b). Although dissatisfaction has arisen more in the context of government-to-government and private party-to-government trade rather than in private party-to-private party transactions, it has been the PNWER Private Sector Council which launched the ADR Service project in view of serving also the business-to-business needs. This project is designed to develop and promote a pre-formal ADR process to provide facilitated mediation services for trade, business, and government disputes within the PNWER region before resorting to existing ADR systems. "It will allow each business or government to speak on its own behalf, and would limit attorneys or negotiators to be in advisory capacity only. The PNWER ADR will be informal and confidential, without written record, at a moderate cost to applicants" (PNWER 2000a: 2). True to the RMI spirit, the project's organisational structure features Canadian and American co-chairs, an advisory committee, and a timeline for launching the service by early May, 2000.

Inspired by the Hong Kong International Arbitration Centre, PNWER offers among the attractions of its ADR service:

- ▶ A fixed fee ranging between US \$2,500 to \$10,000 of which 50 % will go to PNWER;
- ▶ Tailor-cut "PNWER Region" facilities for mediations and arbitration;
- ▶ The prevention or resolution of "cross-border commercial and business disputes (e.g., involving vendors, customers/clients, competitors, distribu-

47. Cattle growers looked for redress to free trade problems plaguing the industry by lobbying government, and upon failure embarked on a fruitless NAFTA process. PNWER offered its services to assist in breaking the stalemate in its Northwest Cattle Pilot Project consisting of mediating a solution between federal governments, states, and provinces. A so-called Cattle Summit was held in Idaho, January 19-20, 2000, calling for transparency and cooperation between the jurisdictional authorities as well as endorsing the continuation of the Pacific Northwest Pilot Project and cooperative and communication endeavours by the Pacific Northwest Cattle associations (PNWER 2000a: 1-2).



tors)" as well as "business-governmental agency disputes (e.g. rule interpretations, permits, rulings)"; and

- ▶ A service menu including dispute management (consulting/program design), training, early neutral evaluation of business disputes prior to commencement of adjudicative proceedings, mediation, and arbitration (Proposed Timeline: 1 [sic]).

I suggest that it might be useful to develop a register indexing the activities of the project (without compromising confidentiality) so as to enable longitudinal assessment, comparison with other similar enterprises, and consequently the introduction of informed improvements in the future.

### The NAFTA Advisory Committee on Private Commercial Disputes

The NAFTA Advisory Committee on Private Commercial Disputes, Sub-Committee IV of the NAFTA 2022, has been presented with a report (Paradis and Delisle 1998), which followed the sub-committee's decision to explore the possibility of developing solutions or programs "to enhance the means to settle small international private commercial disputes in the context of the North-American market. The goal is to provide those involved in such small claims a quick and inexpensive way to resolve the matter" (Paradis and Delisle 1998: 1).

Based on a roundtable discussion with representatives of small and medium size businesses in Canada and the U.S., the study recommends to address several "aching spots". Being slow, costly, inequitable, and resulting in an unpredictably prohibitive opportunity cost, current forms of ADR present a significant impediment to small businesses. The contractual relationship of small businesses dealing with big corporations is most often dictated by the larger business and in terms difficult to understand. In addition, the most frequent users of ADR are expected to be big businesses involved in small-scale disputes with, e.g. disputes with small exporting firms over collecting payments and over the quality or specifications of products supplied. Yet, small businesses are still uneducated about ADR. Also, such knowledge could come handy also in the very simple contractual relationship among small companies themselves. Any successful ADR mechanism would have to be fast, cheap, fair and consistent, and measures securing the enforcement of any award or decision are critical ADR concerns for small businesses (Paradis and Delisle 1998: 1-2). A "People's Court" to deal with small-scale disputes arising from international commercial transactions was suggested as an interesting possibility to explore. An institutionalised solution might be more attractive to small businesses which are said to "put the most faith in a private commercial dispute resolution mechanism set forth by the NAFTA Parties with some kind of tribunal to deal with cross-border enforcement questions" (Paradis and Delisle 1998: 1-2).

Consequently, Paradis and Delisle propose to be "imaginative" and ask the Advisory Committee to consider proposing to the NAFTA Parties "*judicial ways or new institutions* for 'small claims'" to be settled in the North-American con-

text (1998: 2). Having reviewed the small claims "simplified procedure" project in Ontario, the procedure adopted in the Quebec *Code of Civil Procedure*, and various expedited "fast-track" arbitration models in non-American jurisdictions, they suggest a study "to determine what is considered as a 'small claim' in each of the NAFTA parties, both legally and statistically speaking. Surveys could also be conducted to ascertain the range of international disputes experienced among the small and medium-sized business [sic.] North-American community in order to get a sense of what really constitute 'small' and 'large' claims" (Paradis and Delisle 1998: 10).<sup>48</sup> Furthermore, the drafting of a list of matters or disputes considered as being simple enough to proceed in an expedited or simplified fashion is desirable. Finally, Paradis and Delisle recommend to foster the use of expedited procedures of arbitration, analyse "the possibility of and conceiving a *Model Law on the Judicial Settlement of International Small and/or Simple Claims* to be adopted by each of the NAFTA countries", and "the possibility and conceiving a *NAFTA Court of Justice for the settlement of private commercial claims* with a 'small and/or simple claims' division" (1998: 29).

While out of line with PNWER's "even-less-than-ADR" initiative, the rationale behind this proposal, and the recommendation for a preparatory study, reflect concerns similar to those which have led PNWER to embark on its ADR project, and which are applicable to Cascadia regardless of any commercial cross-border ADR.

## Conclusion

I have argued that in order to generate the welfare promised to ensue from free trade, small and medium size companies must be assured that the RMI structures and processes will not leave them by the roadsides. One relevant condition, overlooked particularly in the international political economy literature, is equitable access to legal justice. Similarly, this subject has been ignored by drafters of international legal instruments designed to promote economic integration among states. When a dispute arises between companies based in two (or more) national jurisdictions, the already prevailing "non-legal barriers to justice" such as burden of costs, duration of process, type of procedure, etc. are further compounded by hurdles erected by the conflict of law, namely the enforcement of foreign judgments, differences in legal procedure, etc. Economically, these amount to represent prohibitive costs which may deprive the small and medium size actors in the market place from reaping the full benefits of trading across international borders.

Practice in Cascadia -- chosen as a micro-cosmos to test the above argument and to study the relevance and applicability of ADR -- is revealing. First, from studying the attitude of legal and para-legal ADR practitioners, business associations, government, post-secondary education and research institutions, and the

48. Such study could be instructive to the PNWER project as well.



small and medium size business community itself, a clear picture emerges. But for very few exceptions, there is no awareness of the linkage between free trade, economic integration, and access to justice.

Second, while access to justice, and facilitating it through ADR mechanisms are domestically (and to a negligible extent internationally) promoted by the local legal profession, commercial ADR is still very scantily applied; and if so, it is used chiefly in the context of private party-to-government disputes. Commercial ADR appears to be practically non-existent in business-to-business commercial trans-border disputes. Post-secondary education and research institutions reveal a similar level of interest. Business associations are almost oblivious to the issues of business-to-business conflict management and dispute resolution. Private companies are practically "illiterate" in ADR.

Third, there are several explanations for the indifference to ADR, and perhaps for the failure to integrate the subject of dispute resolution within the larger picture of RMI. Confidentiality constraints hinder assessment of ADR, lawyers' traditional adversarial attitude combined with expediency stand in the way of such options, and Canadian cultural attitudes (self-distinction and reluctance to adopt American ways), are some among other reasons listed in this paper.

Fourth, while central and provincial governments have failed to address the issue of access to justice, this want of attention does not necessarily spell the death knell for a "levelled" playing field for small and medium size versus big companies. The NAFTA framework is still open-ended, leaves much room for improvements on the original instrument, and encourages ADR without distinguishing between businesses according to their size. Thus, in a world in which national governments are overwhelmed by the amount of problems and challenges they are facing, the following statement continues to apply today as it did 15 years ago:

"Establishing hierarchies, setting up international regimes, and attempting to gain acceptance for new norms are all attempts to change the context within which actors operate by changing the very structure of their interaction. It is important to notice that these efforts have usually not been examples of forward-looking rationality. Rather, they have been experimental, trial-and-error efforts to improve the current situation based upon recent experience". (Axelrod and Keohane 1985: 251)

The growing number of groupings forming in Cascadia, whether public-private or private alone, reflect such realignment. Transnational interactions and constituent diplomacy are on the rise, focusing on issues which escape exhausted national governments' attention, and may result in policies complimentary to national socio-economic programs. In Cascadia, the PNWER ADR initiative provides such example. On a larger scale, the NAFTA Advisory Committee on Private Commercial Dispute's concern about institution building and the proposal to consider the setting up of a NAFTA small claims court are cases in point.

Laudable endeavours as they are, it must be remembered that these efforts

are based on impressionistic assessments of the RMI situation and the obstacles to freer trade. The findings of this paper suggest that more needs to be learnt about the connection between free trade and legal justice; more specific information about the situation in Cascadia must be collected; obtaining a systematic and scientific evaluation of ADR is crucial to the designing of new structures and the introduction of new norms; and lastly but not least, such knowledge is politically indispensable in deciding on further relevant resource allocation (also regarding the Free Trade Agreement of the Americas).

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