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Alternative Dispute Resolution and Peace Making for Resolving Agribusiness and Food Management Conflict Resolution in the Free Trade Area of the Americas Grass Roots Initiatives with International Applications

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Abstract

The FTAA (Free Trade Area of the Americas) will bring together 35 countries with five different languages and over 300 ethnic and cultural groups. As trade, cultural discourse, and other joint efforts develop between countries, private organizations, public entities and individuals, many disputes will arise. In a few countries, the rule of law can solve these disputes effectively. In most others, the rule of law cannot work because of political, social or even criminal events. As NAFTA showed, developing a successful and efficient dispute resolution mechanism is an important component of developing a successful working relationship of the agreement among all the parties and countries. Other Trade Agreements including NAFTA and WTO have found that the successful functioning of these agreements require all private and public parties to think carefully about resolving disputes ahead of time and setting up a number of alternative processes to be used by the parties. Only in Government-to-Government disputes is the system quite simple. Otherwise, there are several models which have been developed in the U.S. and other American countries which can assist in resolving agribusiness and food management conflict resolution in rural communities. Grass roots initiatives with international applications, disputes over land, grazing rights, homes, credit issues and financial resources can be a serious impediment to growth. In Arizona, U.S. and the

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Americas, this has caused large dollar value disputes, ill will, riots and even death. In both rural and agricultural based Arizona, U.S. and the Americas, this presentation highlights methodology and courses being developed to solve some of these conflicts.

Mediation, alternative dispute resolution, peace making and arbitration are techniques that can help solve both commercial and civil disputes. This is particularly true where the rule of law or courts cannot, or will not, be able to solve issues quickly, economically and efficiently. In fact, rural alternative dispute resolution grew out of farmers' disputes, which could not be resolved by the existing institutions. In the U.S., over 70% of disputes referred to mediation are solved to the satisfaction of all parties. Today, around the world, mediation and similar techniques are used in trade matters, cross border issues, land issues, health determinations, divorce and a wide variety of other issues before the courts, government agencies, and other organizations.

U.S. and the Americas have more than 100 ethnic groups, which have distinct cultural, business, civil and commercial practices. As an emerging market, it faces a number of problems in multicultural and commercial practices. These problems are challenging the ability of rural agribusiness and food commerce and development. The FTAA Objectives from the San José Ministerial Declaration suggest that this will not be easy. The objective of FTAA will be to establish a fair, transparent and effective mechanism for dispute settlement among FTAA countries, taking into account *inter alia* the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes. The FTAA must design ways to facilitate and promote the use of arbitration and other alternative dispute settlement mechanisms, to solve private trade controversies in the framework of the FTAA.

Many people fail to realize that restructuring the trade and financial sectors (and many others) without restructuring the judiciary will end in failure.¹ The need for alternative dispute resolution continues to grow, as well as the need to empower the people.

The U.S. and the other countries in the Americas, as relatively young countries, can learn a lot from America's Southwest in Arizona, with its long history of disputes and resolution. These techniques have also been tried in other emerging countries, such as Indonesia, with some success. The southwest of the U.S. has over 45 Native American nations, a large Asian and Hispanic community gender issues, and five major religions that must work together to solve disputes, mediate crises and build communities in rural areas. The techniques and institutions that grew out of the U.S. farm credit crisis and America's Southwest's cultural and ethnic diversity could provide a number of ideas, techniques, and educational tools that are useful in alternative dispute and crises resolution.

¹ ¹ International Herald Tribune January 14, 2000, page 7

Few people appreciate that Arizona is an emerging market in many ways. Arizona is a unique state due to its culture and ethnic diversity. For the past five hundred years, the Spanish territory, Mexican territory and U.S. territory, has faced disputes in the rural areas. While Hollywood movies have focused on the "Wild West" for the region's lore, the realities are quite different in regards to settling disputes and trade issues. The Early Spanish explorers such as Cabeza de Vaca (1536), Marcos de Niza (1539), and Francisco Vásquez de Coronado (1540), and several Spanish missions were founded in the late 17th century. They helped establish trade and other links with the many tribes and Native American nations. Disputes were settled by force during this period. The region came under Mexican control after 1821, and lands north of the Gila River passed to the U.S. territory of New Mexico at the end of the Mexican war (1846-48). Lands between the Gila River and today's southern boundary were added through the Gadsden Purchase (1853). Arizona became a separate territory in 1863, and settlement accelerated after the surrender (1866) of Geronimo ended 25 years of Apache wars. Rapid development of irrigated agriculture, spurred by construction of the Roosevelt dam (1911), and industrial and urban expansion beginning during World War II strained limited water resources. Unfortunately, in many areas, dispute resolution means force and violence which remains as a way to settle commercial and rural disputes. The rural areas show this diversity as most of northern and eastern Arizona lies within the arid Colorado plateau region, and most of the south and west in the flat desert basins (many now irrigated) and jagged mountain ranges of the Basin and Range region. Major rivers are the Colorado, Gila, and Salt. A total of 20,036,000 acres (8,108,000 hectares), or 38%, of all U.S. Native American tribal lands, are in Arizona; the largest are the Navaho, Hopi, Fort Apache, and Papago (Tohono O'Odham) reservations. All are into trade with the outside nations such as Mexico and the United States. In 1990, Arizona was 81% white, 26% Hispanic, 19% Native American and others. Like Arizona, Russia and Indonesia have challenges settling disputes. Thus, many commercial agribusiness transactions, trades, and disputes do not have traditional ways of settling disputes. In some extreme cases violence and death has been the result of these disputes.

After twenty years of American Rural Mediation to assist rural commercial businesspersons and farmers, there are a number of key developments in these areas. This paper highlights a number of possible options for those interested in commercial mediation, peacemaking and dispute resolution. This paper outlines the background, law, and efforts by U.S. states and federal government to focus on mediation as a way of settling disputes. As of FY2001, there have been close to 39,000 cases in the U.S. submitted to formal state and local mediation units. Estimates suggest that 70%, or over 27,000, have been successful in solving the

dispute². Finally, the paper will enumerate the lessons mediation and peacemaking organizations have learned.

1. Background

In the transformation and commercialization of agribusiness and resource-based communities, disputes over land, economic systems, environmental resources and financial fortune can be a serious impediment to growth and societal progress. In the rural areas, the rule of law is not always an accepted way of settling all disputes. In Arizona, less than 100 years ago, the six-gun was used to settle disputes. In Arizona and twenty-five other states, Rural Mediation centers currently are operating successfully. In Indonesia, one of the world's major emerging markets and democracies, rural disputes have caused riots, and death. In both rural and agriculturally based Arizona and Indonesia, this paper highlights methodology and courses being developed to help solve some of these conflicts. Mediation, alternative dispute resolution, peace making and arbitration are techniques that can help solve both commercial and civil disputes. This is particularly true where the rule of law or courts cannot, or will not, be able to solve issues quickly, economically, and efficiently for all participants. Historically, rural alternative dispute resolution grew out of farmers' and ranchers' disputes, which could not be resolved by the existing institutions. In the U.S., over 70% of disputes referred to mediation are solved to the satisfaction of all parties. No party wins all but on the other hand, no party loses all either. This has significantly slowed appeals and litigation in certain important areas. Today around the world, mediation and similar techniques are used in trade matters, cross border issues, land issues, health determinations, divorce, and a wide variety of other issues before the courts, government agencies, and health organizations.

Globally in other parts of the world, mediation can work. For example, in 2002, after 15 years of bloodshed and disputes, Java and Aceh reached agreements by mediation. Assisted Mediation has brought peace to the region, and clear understanding by both parties of the differences and issues. Trade has restarted; incomes and jobs are growing. In the Americas, we also have many countries with similar challenges. Brazil, as an emerging market, has more than 100 ethnic groups, which have distinct cultural, business, civil and commercial practices. Brazil faces a number of problems in multicultural and commercial practices. These problems are challenging the ability of rural community development and even rural lives. For example, the "Terra Problem" of little land for the landless who have lived over 100 years on land which is formally owned by someone else. The Minister Justice in Sao Paulo has used mediation to improve the understanding and bring schools, rural health centers and even land titles to communities, which before were only rural armies fighting against the legal owners. Hundreds were killed before mediation was used to develop a clear road map to possible solutions. While all

² Successful conclusion means no legal suit or dispute follows mediation.

disputes have not been solved, others have. Business and trade has restarted after decades of open hostility—clearly a win for both sides.

The strategies of these institutions is to promote courses and training, which focus on civic and mediation centers from the rural areas and to teach courses leading to mediation certificate and dispute resolution programs. The purpose is that the various parties can assist each other to focus on the techniques and alternative dispute resolution process in Indonesia and Southeast Asian emerging markets. Just south of Tucson, these techniques are being developed also to assist in disputes over NAFTA related to trade and associated issues.

In the U.S. there is a similar Federal State Partnership. Section 502 of the Agricultural Credit Act of 1987 (P.L. 100-233) authorized the Secretary of Agriculture to help States develop the Department of Agriculture's (USDA) Certified State Mediation Programs and participate in those programs. The Farm Service Agency (USDA) through its Executive Director for State Operations (EDSO) administers the program.

State mediation programs assist agricultural producers, their creditors, and other persons directly affected by the actions of the USDA to resolve disputes, thereby reducing participants' costs associated with administrative appeals, litigation, and bankruptcy. The USDA Mediation Program gives farmers and ranchers a confidential way to work out distressed or delinquent loans.

Agricultural mediation is a way of settling disputes within a producer's own means. The program provides a neutral mediator who can sit down with the parties or work on the phone to resolve very problematic issues. Instead of years it can take for a case to filter through the courts, mediation generally takes only a few meetings to complete.

A critical feature of mediation is confidentiality in working out differences concerning farmers and ranchers' business operations. Mediation documents are not to be used for any other legal action. This is one of the key requirements for State mediation certification. Confidentiality is the key to making mediation work.

2. Historical Development and the Law

The Agricultural Credit Act of 1987 authorized federal efforts as a result of the problems throughout the rural areas in America. It was based on a number of state programs principally in the Mid-West. It set up a series of matching grants for state formulated programs. Today there are 25 different programs in 25 states. The Food, Agriculture, Conservation and Trade Act of 1990 (P.L. 101-624) extended this authority through FY 1995. The Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994 (P.L. 103-354) further refined the program.

The Agriculture Credit Improvement Act of 1992 (P.L. 102-554) also redefined the roles of states and federal agencies in this partnership. Section 282 of the 1994 Reorganization Act expanded the program to include wetland determinations, conservation compliance, agricultural credit, and rural water loan programs, grazing on national forest system lands, pesticides, and other issues the Secretary of Agriculture deems appropriate. Today Congress is strongly supportive of this system and has increased financial support as a way of assisting rural areas in the financial challenges of the new millennium. The BLM has participated in many of these mediations as an agency, which is directly affected by the challenges of farmers and ranchers in rural areas. Today for all adverse decisions, Section 275 of the Act required that if a USDA Certified State Mediation Program is available as part of the informal hearing process, and the appeal participant would be offered mediation.

3. What is Rural Mediation?

Mediation is a process in which a trained, highly respected and impartial person--a mediator--helps people look at their mutual problems, identify and consider options, and determine if they can agree on a solution. A mediator has no decision-making authority. Unlike a judge or an arbitrator, a mediator cannot decide what is right or "make" anyone do anything. Successful mediation is almost always based on the voluntary cooperation and participation of all the parties.

USDA enters mediation to explore all available options to help agricultural producers, their creditors, and other persons directly affected by the actions of USDA to resolve disputes and reduce costs associated with administrative appeals, litigation, and bankruptcy. USDA representatives try to set a positive, constructive tone and encourage others to do the same in order to provide a positive atmosphere for good settlements.

4. How Does Mediation Work?

1. Any affected party can request mediation at any time, but it usually takes place after a government official advises the customer that mediation is available before or after receipt of formal adverse actions. The customer may request mediation or waive the opportunity to use the service.
2. If mediation is requested, State mediation officials contact the requesting party to get a complete list of potential participants and their addresses and suggest steps the participants should take to prepare for mediation. The mediation service then assigns one or more mediators to the case.
3. Participants may select or eliminate the mediators offered by the mediation service. Once a mediator is selected, all potential participants are advised that a mediation process is underway. If a meeting is scheduled, the parties

are informed of the time, place, and nature of the mediation process. Ground rules are set to ensure that the conference is productive.

4. Once an agreement is reached, the mediator makes sure that it is in writing, is signed, and made available to all participants. If an agreement is not reached, the case is closed, all parties are advised of the outcome, and all remain free to pursue other legal courses. Mediation does not favor one side or the other, but helps both consider their situation. The main idea is to provide a low-cost alternative to expensive, lengthy litigation or bankruptcy.

5. Certification of State Mediation Programs

The U.S. government has a special procedure to help States develop mediation services. Under Federal Regulation 7 CFR 1946, USDA officials determine whether a State program meets the following requirements:

1. By August 1 of each year, the Governor or designated State agency head must notify the USDA of its interest in being certified and eligible to receive matching Federal support funds for the State mediation program.
2. Mediation services must be provided to agricultural producers, creditors, and other persons directly affected by USDA actions to help them reach mutually agreeable settlement of their disputes.
3. The program must be authorized or administered by an agency of the State government or by the Governor.
4. Training and certification must be provided for mediators. Neutrality and familiarity with the problems are a must.
5. Confidentiality of the mediation process must be assured.
6. All lenders and borrowers of agricultural loans and, in cases of other issues covered by the mediation program, persons directly affected by USDA actions must be ensured of adequate notification of the mediation services available.

Each of these represents a lesson learned and are key to the high success rate of the program.

6. State Supplemental Mediation Agreements

Each state can refine the process. Once a State's agricultural mediation program is certified, the USDA and state director jointly develops an agreement with the Governor's State mediation officials and other USDA participating agencies. The agreement will describe how the affected agencies will participate in the program. The USDA SED confers with the State Attorney General's office, all affected USDA agencies, farm and ranch organizations that are interested in development of the State's certified mediation program, and affected departments of State governments, to ensure that all interested parties have an opportunity to participate.

The agreement will contain the essentials of the State mediation structure, procedural guidelines, and forms to be used in the mediation process. Then the Regional Office of the General Counsel reviews it. See Appendix 1 for a state-by-state list.

7. National Performance

The USDA Agricultural Mediation Program was cited for efficiency and effectiveness in the Vice President's Report of the National Performance Review, Creating a Government that Works better and Costs Less. The program was singled out as an example of activity, which other Federal agencies could use as a model.

The National Association of State Departments of Agriculture (NASDA) passed a resolution supporting the expansion of agricultural mediation. NASDA further urged the expansion of mediation to include other Federal agencies, which play a role in land and resource management, including the Department of Interior and Army Corps of Engineers.

8. What Are the Lessons Learned?

There are several key lessons learned during the past two decades of this program. They include:

1. In the U.S. Federal-State Partnerships work. Adapting to local areas each state has a slightly different approach but it works. Before 1987, states were party to over 20,000 litigations against USDA agencies. This program has meant the states and Federal government agencies work together with the difficult restructuring and bankruptcy cases. The taxpayer does not have to pay twice.
2. Farmers and Producers have an important option. In 80% of the cases, no appeal has been filed nor litigation started. With each litigated case costing around \$80,000 according to government estimates. This suggests around \$14,000,000 for each party that has been saved by the government and participant. Subtracting out the current costs for state and federal appropriations, participants and their counsel it suggests savings from all parties of a range of between \$16. Million and \$14. Million per year. See Discussion of Savings and Costs in Appendix II.
3. Both Federal and State Governments can participate and adapt the process to each state's needs. The Attorney General, Agricultural and Environment agencies can refine the process. This means Senators and Congresspersons find this an important part of the program.
4. Training and certification must be provided for mediators. Neutrality and familiarity with the problems are a must for the mediators. Each

participant and party can “pick” a neutral party from a roster maintained by both the Federal and State organization.

5. Confidentiality of the mediation process must be assured. This means that the findings by the parties are not part of the legal process. This is a voluntary process and not part of the legally defined process.
6. All lenders and borrowers of agricultural loans and, in cases of other issues covered by the mediation program, persons directly affected by USDA actions must be ensured of adequate notification of the mediation services available. This means banks, other federal and state agencies, have a right to seek a solution.
7. The success of mediation is expanding to both the public and private sector. Use of trained mediators, is effective in many incidences as an important tool for dispute resolution both in the U.S. and globally. Recent major mediations in the high technology area, Middle East peace process and emerging markets are key to reaching solutions to important issue.

The Arizona Agricultural Mediation Program is setting up new forms of Communication to work toward a better integration of communication, language, and business transactions.

Appendix 1: Certified State Mediation Program Contacts

Executive Director for State
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