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ARTICLES

THE COMPARATIVE AND THE CRITICAL PERSPECTIVE IN INTERNATIONAL AGREEMENTS

Angel R. Oquendo†

I. INTRODUCTION

The dramatic increase in transnational business has given rise to a new international legal reality. Nations with diverse legal backgrounds have been increasingly creating both substantive and procedural law to regulate the abundance of international economic activity.¹ It would have seemed natural to start the process of generating a new international legal reality by pondering the differences and similarities of the existing national systems. This kind of approach would have opened up the prospect of choosing intelligently among the various options or of combining them in a coherent manner. More importantly, the deliberative effort might have paved the way for a critique of the prevailing paradigms and ultimately suggested previously unimagined possibilities.

It appears, however, that there has been virtually no comparative or critical introspection along these lines. International lawmakers all too often view the creation of a new multinational legal scheme as a mere technical problem,² that is, as a question

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1. See, e.g., General Agreement on Tariffs and Trade (hereinafter GATT); North American Free Trade Agreement (hereinafter NAFTA).

2. Lucie White rejects the instrumental view that regards procedure as "a technical problem". Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990). She thus chastises proceduralists who disregard procedure's normative dimension. *Id.* In

of patching together a series of legal devices to deal with a problem that has attained international prominence. In some cases, these lawmakers take the mechanisms from a particular legal system—usually that of the dominant nations—and simply transpose them onto the international context, ignoring potential contributions from other systems.³ In other cases, the international legislators derive the new internationally constructed institutions almost randomly from different legal orders and fail to generate a novel picture of law that is coherent in a thick sense, i.e., in which the diverse legal components not only avoid direct clashes but also reinforce each other. In both cases, there is no critical evaluation of the fundamental premises upon which the underlying national systems rest.

The process leading to the North American Free Trade Agreement provides a case in point of the first kind, i.e. the transposition of a dominant nation's mechanisms onto an international context.⁴ The framers thoroughly and uncritically built legal concepts imported from the United States into the Agreement's international legal apparatus. In this article, I will show that this is so, at least with respect to the Agreement's procedural dimension or, more specifically, with respect to the instruments introduced to resolve antidumping and countervailing duties disputes. Though innovative in many respects, the panel procedure established in the Agreement's Article 1904 to review final antidumping and countervailing duty determinations is essentially a creature of United States law. It reproduces, often word for word, U.S. federal procedural rules. More importantly, it reflects a conception of procedure derived from the common law tradition.

I will discuss antidumping and countervailing duties and the Agreement's approach to such duties in section II. In the two sections thereafter, I will demonstrate the pervasive influence of the U.S. and common law procedure on the panel review system. In section III, I will show how the Panel Rules reproduce, often word for word, the U.S. Federal Rules of Civil and Appellate Procedure. In section IV, I will argue that the Article 1904 procedure embodies the common law picture of procedure.⁵ Inas-

contrast, I am criticizing international jurists here for their myopia. They cobble together diverse legal contraptions and fail to give much thought to the picture of law to which they are unknowingly giving birth.

3. See Angel R. Oquendo, *NAFTA's Procedural Narrow-Mindedness: The Panel Review of Antidumping and Countervailing Duty Determinations Under Chapter Nineteen*, 11 *CT. J. INT'L LAW* 61 (1995).

4. NAFTA, *supra* note 1.

5. In the context of this discussion, I will define a picture of procedure as an interpretation of a procedural practice that represents but, at the same time, is deeply embedded in that practice.

much as it allows peremptory challenges in the panel selection process, institutes a long-winded pleading phase, encourages detailed majority and dissenting opinions, establishes a thin scope of appellate review, and requires participants to pay their own attorney's fees, the panel review system reflects the influence of the common law procedural picture, particularly as developed in the United States. Moreover, the system follows fundamental common law norms in presenting written procedural precepts as an aggregation of discrete rules, in centering procedural activity around a single (rather formal) oral proceeding, and in granting participants rather than decision makers control over the procedure.

I will then, in section V, present the predominant procedural picture in the Mexican legal system and contrast that civil law picture with the one prevailing in the United States. Mexico's civil procedure contains nothing like the practice of peremptory challenges, establishes a very limited pleading phase, does not contemplate elaborate judicial opinions, provides for non-deferential appellate review, and often imposes attorney's fees on the losing party. The Mexican procedural picture follows the civil law tradition more basically inasmuch as its written precepts form a systematically integrated code instead of a set of independent rules, rides on various (rather flexible) written and oral communications, and expects the judge and not the parties to direct the process.

After describing the Mexican picture of procedure, I will reassess (in section VI) the Article 1904 procedure from the comparative perspective. In other words, I will draw upon the Mexican procedural picture in order to start imagining a new and richer legal procedure. The article will next move to the critical perspective, thus taking the exercise in imagination a step further. In section VII, I will cast a critical eye upon shared premises of the civil and common law procedural traditions. The critical perspective ultimately points toward a vision of international procedure that transcends those two pictures.

The comparative approach does not simply consist of randomly selecting and combining diverse features derived from different procedural systems. Rather, it entails instead first studying the different pictures immanently and contextually and then reworking select elements of each into a coherent novel paradigm. It leads, in the best of cases, to the critical approach, which calls into question even those elements shared by the various existing paradigms. The new international procedural picture will ultimately reject deeply held assumptions common to all its national counterparts and even to previous international procedural regimes.

Had the framers of the Article 1904 panel procedure taken the comparative perspective, they would have been in a position to design a procedure that coherently integrated elements of the Mexican civil law approach to procedure, e.g., its flexible and business-like process or its thoroughly engaged decision maker, with features of the United States common law procedure already embedded in the panel review system such as the aversion to imposing attorney's fees on the losing party and the insistence on detailed, written justification for decisions. The critical perspective, in turn, would have enabled jurists to challenge premises shared by the two pictures, such as the assumption that legal procedure's sole end is to resolve disputes. The framers would have been able to see that an important, in fact, paradigmatic, goal of international procedure is to reconfigure international spaces, i.e., to alter radically the premises under which international actors interact in specific transnational contexts. The Article 1904 review system's main objective is to reconfigure the space within which nations impose antidumping and countervailing duties to prevent the use of these duties to thwart free trade. The critical approach would have made it possible systematically to build this goal into the procedure. This kind of a critical undertaking would have ultimately led beyond the exclusively instrumental view, according to which procedure is taken to serve particular ends, to a reflexive conception, which regards procedure as having intrinsic value. The value of procedure would thus be a function of not only the objectives advanced but also the internal constitution of procedure, e.g., how it processes the arguments made, how it treats the various actors, what kind of power relations it supports.

Needless to say, there was no room for comparative or critical reflection in the North American Free Trade Agreement negotiations. Mexico could not bring its peculiar civil law viewpoint to the debate in part because it was a latecomer to the bargaining table. The United States and Canada had already worked out a dispute resolution scheme, as well as the essence of the Agreement, in their prior Free Trade Agreement. As the North American Free Trade Agreement's weakest party, Mexico hardly could have forced its partners to change the structures already in place. The perception of the Mexican legal system as inferior, of course, also contributed to the neglect of the Mexican legal outlook.

A call for a critical reassessment of the panel review system would have stood even less of a chance than a plea for the Mexicanization of that procedure from the comparative perspective. Any such reconsideration would have required even more radical changes in an atmosphere that was terribly hostile to altering the

existing scheme. There was clearly no time or patience for critical suggestions.

In a sense, this kind of negotiation environment is rather typical in international lawmaking. As explained in section VIII, international actors negotiate international agreements under pressure, with economic and political muscle steering the course. It is unrealistic to expect international negotiators to take, on their own, the comparative or the critical perspective. The ground must be prepared. It is crucial to make space for any such perspective long before the bargaining begins. Only thus will there be a real chance of transforming international agreements along the lines suggested.

Of course, regardless of the stage in which it takes place, any attempt to restructure international treaties from the comparative and critical perspective will run into impediments. It will be vehemently opposed both out of ignorance and out of interest. On the one hand, lacking a full understanding of the value of a serious consideration of existing or potential alternative approaches, jurists may fail to either open their minds to previously discarded national alternatives, or direct their imagination toward unprecedented international possibilities. On the other hand, dominant international actors may have an interest in imposing their procedures in order better to control the internationalization process. Therefore, they will not hesitate to use their upper hand to undermine any endeavor to bring in the comparative or the critical perspective.

A comparative and critical debate among scholars and practitioners would contribute significantly to overcoming the impediment of ignorance but minimally to removing the impediment of interest. Making interest less of a factor in international agreements would require changing practical rather than theoretical circumstances. A more balanced distribution of the international political power, for instance, might preclude any single international actor from imposing its ways and thus help create a situation in which all national legal points of view have an equal chance of influencing international law. Such a situation would be ideal for the comparative perspective to flourish. And once the comparative perspective takes hold, the prospects for the adoption of the critical perspective improve. International actors would have to adapt to a partially unfamiliar international legal terrain anyway and would therefore have less aversion to the innovations that the critical perspective might effect.⁶ By the same

6. There is, of course, the possibility that these actors might react to the initial change with an adamant refusal to accept any additional alteration, especially of a more fundamental kind. Yet, they will undoubtedly face a decreasing marginal cost

token, a critical transformation of national legal paradigms would probably facilitate an analogous critical effort at the international level: International actors would have less of a stake in the international legal status quo. To be sure, any such national critical legal transformation would also confront impediments of ignorance and interest. The best hope would be to conduct the national and the international critical campaigns simultaneously. The two processes would thus reinforce and feed off of each other.

A long and uncertain process of theoretical and practical development must precede any fundamental change in the prevailing, relatively narrow approach to legal internationalization. In the end, international actors might answer only partially, if at all, the call for a comparative and critical reconstruction of international treaties. For instance, international jurists might come to appreciate, but lack the will or the power to realize the promise of radically restructured international agreements. Alternatively, international lawyers might adopt some comparative or critical proposals but not others, while struggling to stay as much as possible within the bounds of coherence. At any rate, the project of comparative and critical reassessment cannot be telegraphed, let alone rushed, from the outset. Once set in motion, the project develops a logic of its own and marches at its own pace.

II. ANTI-DUMPING AND COUNTERVAILING DUTIES AND NAFTA

The General Agreement on Tariffs and Trade defines dumping as the practice "by which products of one country are introduced into the commerce of another country at less than the normal value of the products."⁷ The Agreement identifies the normal value primarily with the price charged "for the like product when destined for consumption in the exporting country."⁸

of adjustment to change, which will make it relatively inexpensive to embrace critical changes after the introduction of comparative changes.

7. GATT, *supra* note 1, at art. VI ¶ 1; See also GATT Agreement on Antidumping art. 2.1 (1994) ("For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.").

8. GATT, *supra* note 1, at art. VI ¶ 1(a); See also GATT Agreement on Antidumping, *supra* note 7, at art. 2.4 ("A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time."). "[I]n the absence of such a domestic price," the GATT identifies the normal value with "the highest comparable price for the like product

The Agreement adds the following qualification: "Due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability."⁹ The Agreement thereupon empowers nations to impose antidumping duties: "In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product."¹⁰ "Thus," in the words of international trade scholars Víctor Carlos García Moreno and César E. Hernández Ochoa, "an anti-dumping duty brings the price of the merchandise to the price at which it is sold in the exporting country's market."¹¹

Article VI also authorizes nations to take action against bounties or subsidies "granted, directly or indirectly, on the manufacture, production or export of [any] product in the country of origin or exportation, including any special subsidy to the transportation of a particular product."¹² In these cases, the importing country may impose a countervailing duty up to "an amount equal to the estimated bounty or subsidy."¹³ García Moreno and Hernández Ochoa explain that "a countervailing duty is applied [to counterbalance] the subsidy granted to the product."¹⁴ Generally, a determination "that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten

for export to any third country in the ordinary course of trade" or with "the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit." GATT art. VI ¶ 1(b).

9. GATT, *supra* note 1, at art. VI ¶ 1; *See also* GATT Agreement on Antidumping, *supra* note 7, at art. 2.4 ("Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.") (footnote omitted).

10. GATT, *supra* note 1, at art. VI ¶ 2.

11. Víctor Carlos García Moreno & César E. Hernández Ochoa, *Neoprotectionism and Dispute Resolution Panels as Defense Mechanisms Against Unfair Trade Practices: A Focus on Mexico*, in *MAKING FREE TRADE WORK IN THE AMERICAS* 692, 699 (Boris Kozolchyk ed., 1993).

12. GATT, *supra* note 1, at art. VI ¶ 3.

13. *Id.* Article 2.4 of the GATT Agreement on Antidumping declares: "In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties." GATT Agreement on Antidumping, *supra* note 7, at art. 2.4.

14. Moreno and Ochoa, *supra* note 11, at 699. *See* GATT, *supra* note 1, at art. VI(2).

material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry" must precede the imposition of antidumping and countervailing duties.¹⁵

Antidumping and countervailing duties have been controversial in part because of the widespread perception that they tend to serve as barriers to trade.¹⁶ That is, countries impose or threaten to impose them on producers who have neither dumped nor received a subsidy but who, due to their competitive edge, threaten domestic production.¹⁷ As a world leader in the use of these duties, the United States has repeatedly faced accusations of employing the duties to hinder free trade.¹⁸ When negotiating

15. GATT, Art. VI ¶ 6(a). See GATT Agreement on Antidumping, *supra* note 7, at Art. 3.1 ("A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.") This general requirement may be waived by agreement of the contracting parties "so as to permit a contracting party to levy an antidumping or countervailing duty on the importation of any product for the purpose of offsetting dumping or subsidization which causes or threatens material injury to an industry in the territory of another contracting party exporting the product concerned to the territory of the importing contracting party." GATT, *supra* note 1, at art. VI(6)(b). Subparagraph (c) allows contracting parties to impose countervailing duties "for the purpose referred to in subparagraph (b). . . without the prior approval of the CONTRACTING PARTIES" if there are "exceptional circumstances. . . where delay might cause damage which would be difficult to repair" and if the duty is "reported immediately to the CONTRACTING PARTIES." *Id.* at art. VI(6)(c). If the contracting parties disapprove "the countervailing duty shall be withdrawn promptly." *Id.*

16. Moreno and Ochoa, *supra* note 11, at 700 ("Since the 1980's, countervailing and anti-dumping duties have proven to be substantial barriers to trade and among the most contentious issues of free trade."). García Moreno and Hernández Ochoa see a neoprotectionist trend in the use of antidumping and countervailing duty determinations as non-tariff trade barriers. *Id.* at 692, 94 ("evidence of neoprotectionism can be found in the increase in non-tariff barriers to international trade") ("non-tariff barriers include. . . unfair anti-dumping or countervailing duties or procedures"). See also Rodolfo Cruz Miramontes, *The Mexican Law of Unfair Trade Practices-A Synopsis*, MAKING FREE TRADE WORK IN THE AMERICAS, *supra* note 11, 648, 658 ("In the final analysis, any countervailing duty is a protectionist measure.").

17. Moreno and Ochoa, *supra* note 11, at 693 ("Since the 1970's. . . there was a marked increase in non-tariff barriers, due mainly to the adverse reaction by those sectors of the economy (mostly labor and management) affected by imports from nations that were previously only marginal exporters. The affected sectors were quick to ask for protection.") (footnote omitted).

18. See e.g., Rodolfo Cruz Miramontes, *Legal Aspects of International Trade: Regulation and Effect Particularly on Mexico-United States Relations*, THE NEW FOREIGN TRADE L. 181, 193 (Mexican Bar Association 1987) ("The domestic North American producer, more inefficient day after day, attributed great importance and to some degree even necessity to the invocation of these protectionist measures, even without justification, and the government is increasingly concerned about the development of international trade.").

the 1989 Free Trade Agreement with the United States, the Canadian government was particularly concerned that the United States was relying on those duties to keep Canadian products out of the United States market.¹⁹ The Canadian government first sought an exemption from those duties for Canadian products.²⁰ The United States government made it clear that such a blanket exemption or any dilution of U.S. trade law was simply out of the question. The United States' position was that for free trade to prosper it was crucial to check dumping and unfair subsidies.²¹ These unfair trade practices, the U.S. government insisted, constitute an abuse of, and therefore damp the enthusiasm for, free trade.²²

One way out of this impasse would have been to arrive at a common set of standards stringent enough to deter dumping and subsidizing but also specific enough to keep the authorities from manipulating the system to hamper free commercial exchange.

19. See, e.g., RALPH H. FOLSOM & W. DAVIS FOSLUM, UNDERSTANDING NAFTA AND ITS INTERNATIONAL BUSINESS IMPLICATIONS 112 (1996) (Canadian "products had been repeatedly hit by the United States trade protection actions, many of which seemed arbitrary to the Canadians. If free trade access to the U.S. market was to be genuinely insured, something had to be done."); M. Jean Anderson & Jonathan T. Fried, *Subsidies and Countervailing Duties in the United States-Canada Free Trade Agreement*, in THE U.S./CANADA TRADE AGREEMENT 133, 142 (Judith Hippler Bello & Homer E. Moyer, Jr. Eds. 1989) ("Canada viewed the U.S. [countervailing duty] law as a significant obstacle to securing access to the U.S. market").

20. See Robert P. Deyling, *Free Trade Agreements and the Federal Courts: Emerging Issues*, ST. MARY'S L. J. 353, 359-60 (1996) ("In negotiations over the CFTA, Canada sought substantive changes in United States trade law to address what Canada viewed as unfair bias against Canadian firms and a lack of impartiality by United States courts in reviewing administrative agency determinations."). By refusing to do away with antidumping and countervailing duties within the free trade block, the United States-Canada Free Trade Agreement, and later the North American Free Trade Agreement, rejected the approach of the European Union. See RALPH H. FOLSOM & W. DAVIS FOSLUM, *supra* note 19, at 220-21. Andreas F. Lowenfeld argues that while it may be possible to do away with antidumping duties on trade between the United States and Canada, countervailing duties would be extremely hard to do away with: "It seems likely that some kind of anti-subsidy law will remain even when all customs duties between the United States and Canada are eliminated; it is less obvious that an anti-dumping law is necessary for goods moving in a single market." Andreas F. Lowenfeld, *Binational Dispute Settlement under Chapter 19 of the Canada-United States Free Trade Agreement: An Interim Appraisal*, 24 N.Y.U. J. INT'L L. & POL. 269, 336 (1991).

21. See Robert P. Deyling, *supra* note 20, at 360 ("The United States would not agree to change its trade laws and wished to avoid weakening existing trade law as interpreted by United States courts.").

22. "Many in the United States viewed Canadian federal and provincial governments as prolific subsidizers whose programs often distort trade and place U.S. industries at a competitive disadvantage." M. Jean Anderson & Jonathan T. Fried, *Subsidies and Countervailing Duties in the United States-Canada Free Trade Agreement*, in THE U.S./CANADA TRADE AGREEMENT 133, 142 (Judith Hippler Bello & Homer E. Moyer, Jr. eds. 1989).

However, both governments soon realized that their sharply divergent views on these unfair trading practices precluded any quick development of common standards.²³ Therefore they struck a deal, according to which each country would essentially preserve its laws regarding antidumping and countervailing duties but allow binational panels to review final determinations.²⁴ They declared the panel review procedure temporary with the hope that there would eventually be a meeting of minds on antidumping and countervailing duties.²⁵ Commentators have praised this binding procedure as well as its implementation.²⁶

23. See, e.g. M. Jean Anderson & Jonathan T. Fried, *Subsidies and Countervailing Duties in the United States-Canada Free Trade Agreement*, THE U.S./CANADA TRADE AGREEMENT 133, 144 (Judith Hippler Bello & Homer E. Moyer, Jr. eds. 1989) ("Given the complexity of the subsidies issue, the different viewpoints on the legitimacy of subsidies and countervailing duties, and the imperfect match between the two [666], it proved impossible to reach a subsidies agreement in the context and time frame of the negotiations."); Debra P. Steger, *The Dispute Settlement Mechanisms of the Canada-U.S. Free Trade Agreement: Comparison with the Existing Systems*, in UNDERSTANDING THE FREE TRADE AGREEMENT 49, 51 (Donald M. McRae & Debra P. Steger eds., 1988).

24. Deyling, *supra* note 20, at 360 ("The binational panel scheme is an outgrowth of this disagreement [over trade law on dumping and subsidies], and represents a political compromise adopted to gain support for the CFTA.").

25. See Deyling, *supra* note 20, at 360 ("The United States and Canada intended to follow the CFTA with negotiations over a new system of antidumping and countervailing duty principles that would eventually eliminate the need for national laws on those issues. Pending the negotiation of such 'substitute rules,' and in any event for a maximum of seven years, the countries agreed to use the binational panel process.") (footnotes omitted); RALPH H. FOLSOM & W. DAVIS FOSLUM, *supra* note 19, at 221 ("A working group created at Canada's insistence will consider harmonization possibilities.").

26. Homer E. Moyer, Jr., Esq., "Chapter 19 of the NAFTA: Binational Panels as the Trade Courts of Last Resort", 6 MEX. TRADE & L. REP. 9, 13 (1994) ("Many might now agree that the Chapter 19 approach to dispute settlement, particularly in the contentious area of antidumping and countervailing duty law, is not a modest innovation. A commitment to be bound by binational decisions made by five-member panels that bridge different legal cultures but apply the law of just one is a long step from appellate review. . . . The promise of Chapter 19 is that it will come to be a mutually acceptable means of resolving inflammatory economic conflicts among the three Parties. Under NAFTA, the panel process will build on the experience gained under the CFTA. If it becomes fully institutionalized, the Chapter 19 process could ultimately inspire a new effort to achieve the objective that has substantially eluded the Uruguay Round and been formally abandoned in the NAFTA—the development of a new set of rules on dumping and subsidies that is comprehensive, precise, and mutually agreed."); Joint ABA/CBA/BM Working Group on Dispute Settlement, "American Bar Association Section of International Law and Practice Reports to the House of Delegates," 26 INT'L LAW. 855, 865 (1992) ("Whether or not [the binational panel system] is altogether logical and whether or not it responds fully to the real legal difficulties in the trade relationship, as between Canada and the United States, experience has shown that the system works."); Lowenfeld, *supra* note 20, at 334. ("All things considered, the unique binational dispute settlement mechanisms created by the Canada-United States Free Trade Agreement have worked extraordinarily well. Surprisingly, the Chapter 19 procedures, involving at least one and usually two or more private parties in a quasi-judicial setting, have

As it strove to become part of the North American trade block, the Mexican government had concerns similar to those of its Canadian counterpart. It also felt that the United States was unfairly employing antidumping and countervailing duties to exclude Mexican products.²⁷ It therefore sought inclusion in the panel review procedure.²⁸ The U.S. and Canadian governments were initially reluctant to accede to this demand.²⁹ The Mexican government, however, insisted vehemently on this point and the U.S. and Canadian governments eventually yielded.³⁰ Thus the North American Free Trade Agreement ended up with Chapter

been more successful than the Chapter 18 procedures, involving only governments. In both sets of procedures, the panelists have been thoughtful; their opinions have been thorough and articulate, and their conclusions on the whole persuasive.”). See also GARY CLYDE HUFBAUER & JEFFREY J. SCHOTT, *NAFTA: AN ASSESSMENT* 1, 102 & 104 (1993). But cf. Robert E. Hudec, *The FTA Provisions on Dispute Settlement: The Lessons of the GATT Experience*, IN UNDERSTANDING THE FREE TRADE AGREEMENT, *supra* note 23, at 41 (“The Chapter 19 procedure is a delicate hybrid that owes its existence to the very unusual context of AD/CVD issues in the negotiations; while it is a nice piece of work that can probably achieve its objectives if not taxed too hard or too often, in the long run I feel certain that Chapter 19 will end up hanging from the ceiling of . . . some legal museum.”).

27. Moreno and Ochoa, *supra* note 11, at 702 (“Developing nations such as Mexico have adopted an economic development plan which is heavily dependent on exports. As a result, Mexico’s industrial sector is highly vulnerable to the U.S. imposition of anti-dumping or countervailing duties. Unlike the industries of developed countries, Mexico’s industry does not have a sufficiently large internal marketplace to absorb the volumes of production lost to U.S. anti-dumping and countervailing duties.”).

28. See Lisa B. Koteen, *Life after NAFTA: Review of Antidumping and Countervailing Duty Proceedings under Chapter Nineteen of the North American Free Trade Agreement*, 863 *PLI/CORP* 841 (1994) (“During negotiations for the North American Free Trade Agreement (‘NAFTA’ or ‘the Agreement’), Mexican negotiators made clear that extension of the binational panel system to Mexico was one of their main goals.” Moreno and Ochoa explain, more generally, that “[i]nternational trade remains one of Mexico’s most important developmental goals, and any problems in attaining greater trade liberalization, to the extent they affect Mexico’s products or services, are also increasingly important to Mexico. Hence, one of the most important items on Mexico’s trade agenda is foreign non-tariff barriers.” Moreno and Ochoa, *supra* note 11, at 695.

29. Miramontes, *supra* note 16, at 662. (“Initially, the U.S. and Canada objected to chapter 19.”).

30. See Robert E. Burke & Brian F. Walsh, *NAFTA Binational Panel Review: Should It Be Continued, Eliminated or Substantially Changed?*, 20 *BROOK. J. INT’L L.* 529, 534 (1995) (“The final and most compelling point in favor of the continued existence of the panels is the fact that they were necessary components of the CFTA and NAFTA: since Canada and Mexico would not have become parties to these trade agreements without the inclusion of these dispute settlement procedures, a powerful incentive was provided for the establishment of the panels and, presently, for their continuance.”); Lisa B. Koteen, *Life after NAFTA: Review of Antidumping and Countervailing Duty Proceedings under Chapter Nineteen of the North American Free Trade Agreement*, 863 *PLI/CORP* 841 (1994) (“The United States was willing to include Mexico in the process, as was Canada, but exacted certain commitments from Mexico to reform its administrative procedures in antidumping and countervailing duty proceedings and also demanded a number of key modifications to

Nineteen, which is quite similar to Chapter Nineteen of the Canada-United States Free Trade Agreement.³¹ The review system became permanent when national parties abandoned the goal of arriving at transnational standards on antidumping and countervailing duties.³²

In the words of Homer E. Moyer, Jr.,

The binational panel process of Chapter 19 will in many respects be the crucible of the North American Free Trade Agreement (NAFTA). As the vehicle for resolving antidumping and countervailing duty cases brought in any of the three contracting countries, Chapter 19 panels will be required to deal with the types of trade conflicts that have historically generated intense, sometimes passionate, controversy.³³

Chapter Nineteen establishes a review procedure for final antidumping and countervailing duty determinations imposed by any of the parties on the products of any of the other parties.³⁴

Chapter 19. Chapter 19 of the CFTA has now been replaced by Chapter 19 of the NAFTA.”)(footnote omitted).

31. Lisa B. Koteen, *Life after NAFTA: Review of Antidumping and Countervailing Duty Proceedings under Chapter Nineteen of the North American Free Trade Agreement*, 863 PLI/CORP 841 (1994) (“Chapter 19 largely duplicates its CFTA counterpart”); LESLIE ALAN GLICK, *UNDERSTANDING THE NORTH AMERICAN FREE TRADE AGREEMENT* 83 (2nd ed. 1994); Miramontes, *supra* note 16, at 662. Ralph H. Folsom and W. Davis Folsom point to four innovations in Chapter Nineteen of the North American Free Trade Agreement. “One change that NAFTA does make is to favor the inclusion of judges and retired judges on the roster of acceptable Chapter 19 panelists. . . . A second change . . . is the possibility of consultations and ‘special committee’ review in situations where there are fundamental failures in the dispute settlement process. . . . A third change involves amendments to national antidumping and countervailing duty laws. Each country may amend its laws consistently with the GATT, its Codes and the NAFTA objective of maintaining ‘effective and fair’ rules in these areas. . . . Finally, NAFTA adds an example of when a panel manifestly exceeds its powers, authority or jurisdiction; ‘for example by failing to apply the appropriate standard of review.’” Folsom & Folsom, *supra* note 19, at 219-21. (footnotes omitted).

32. Deyling, *supra* note 20, at 361. (“Ultimately, the substitute rules were never adopted, and the binational panel system became permanent when it was incorporated into the NAFTA in 1994. Under the NAFTA, there is no limit on the duration of the binational panel system, nor is there any requirement for the development of a new system of antidumping and countervailing duty rules for the United States, Canada, and Mexico.”)(footnote omitted); LESLIE ALAN GLICK, *UNDERSTANDING THE NORTH AMERICAN FREE TRADE AGREEMENT* 80 (2nd ed. 1994) (“A basic change is that the bi-national panels themselves, which were temporary under FTA, are now permanent.”); RICHARD G. LIPSEY ET AL., *THE NAFTA: WHAT’S IN, WHAT’S OUT, WHAT’S NEXT* (1994) (“The NAFTA has dropped the FTA requirement for a working group to develop a substitute system of rules for dealing with unfair pricing and government subsidization.”) Hufbauer and Schott point out that “the three countries did commit to consider reform of subsidy and antidumping practices in future work of the NAFTA Trade Commission.” Hufbauer & Schott, *supra* note 26, at 102.

33. Homer E. Moyer, Jr., Esq., *Chapter 19 of the NAFTA: Binational Panels as the Trade Courts of Last Resort*, 27 INT’L LAW. 707 (1993).

34. NAFTA, *supra* note 1, at art. 1904.

Upon the request of any person entitled to judicial review of the determination, a binational panel conducts the review. Participants may appeal panel decisions to an extraordinary challenge committee only if the panel is guilty of gross misconduct, fundamental procedural error, or exceeding its authority.³⁵

The panel decides whether the determination "was in accordance with the antidumping or countervailing duty law of the importing Party,"³⁶ i.e., of the country where the investigating authority sits.

For this purpose, the antidumping or countervailing duty law consists of the relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority.³⁷

The panel, in addition, has to follow the standard of review of the national court that would ordinarily review the final determination. The panel, hence, must not only review the final determinations against the same antidumping and countervailing duty rules and but also grant the same degree of deference as an ordinary national court would.³⁸ The panel review is substantively equivalent to ordinary judicial review. What varies is the identity of the decision maker and the applicable procedural law.³⁹

The binational panel review procedure is set forth generally in Article 1904 of the Agreement.⁴⁰ Pursuant to Article 1904,⁴¹

35. NAFTA, *supra* note 1, at art. 1904 §13; NAFTA Annex 1904.13.

36. NAFTA, *supra* note 1, at art. 1904 ¶ 2.

37. NAFTA, Art. 1904 ¶ 2.

38. The Agreement provides that the panel must apply the same standard of review and "general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigating authority." *Id.* It defines the standard of review by reference to the statutes that establish the standard of review for the respective domestic courts in Canada, the United States, and Mexico. The Senate Joint Report on NAFTA declared "that the NAFTA, just as the CFTA, [i.e., the Free Trade Agreement between the United States and Canada], requires binational panels to apply the same standards of review and general legal principles that domestic courts would apply. This requirement is the foundation of the binational panel system . . . [Failure] to apply the appropriate standard of review, potentially undermine[s] the integrity of the binational panel process." Senate Joint Committee Report, North American Free Trade Agreement Implementation Act, S. REP. NO. 189, 103d Cong., 1st Sess. at 42 (1993).

39. See Homer E. Moyer, Jr., Esq., *Chapter 19 of the NAFTA: Binational Panels as the Trade Courts of Last Resort*, 4 NO. 6 MEX. TRADE & L. REP. 9, 12 (1994) ("In reviewing antidumping and countervailing duty determinations, panels stand in the shoes of the domestic reviewing court that would otherwise decide the case."); Senate Joint Committee Report, *supra* note 38, at 43-44. ("the central tenet of Chapter 19 is that a panel must operate precisely as would the court it replaces").

40. For a detailed exposition of the procedures see Oquendo, *supra* note 3, at 66-78.

41. NAFTA, *supra* note 1, at art. 1904 § 14.

the parties adopted "the NAFTA Article 1904 Panel Rules" to specify the details of this procedure. In case of any inconsistency between the Panel Rules and Article 1904, or any other part of the North American Free Trade Agreement, the Agreement prevails.⁴² Procedural questions not covered by the rules may be resolved by analogy to the rules or by reference to the rules of procedure of the court that would otherwise have jurisdiction to review the administrative determination.⁴³ Moreover, "a panel may adopt its own internal procedures . . . for routine administrative matters," as long as those procedures are not inconsistent with the 1904 Panel Rules.⁴⁴

One objective in creating the binational review option was to augment the speed of appealing final antidumping and countervailing duty determinations.⁴⁵ The Agreement in conjunction with the Panel Rules sets forth a strict timetable. The Agreement specifically requires that the rules be designed "to result in final decisions within 315 days of the date on which a request for a panel is made".⁴⁶ Figure 1 provides an overview of the procedure's time frame and different stages.⁴⁷

42. 1904 Panel R. 2; Rules of Procedure for Article 1904 Binational Panel Reviews, US-Canada Free-Trade Agreement, 59 Fed. Reg 5892 (1994).

43. 1904 Panel R. 2.

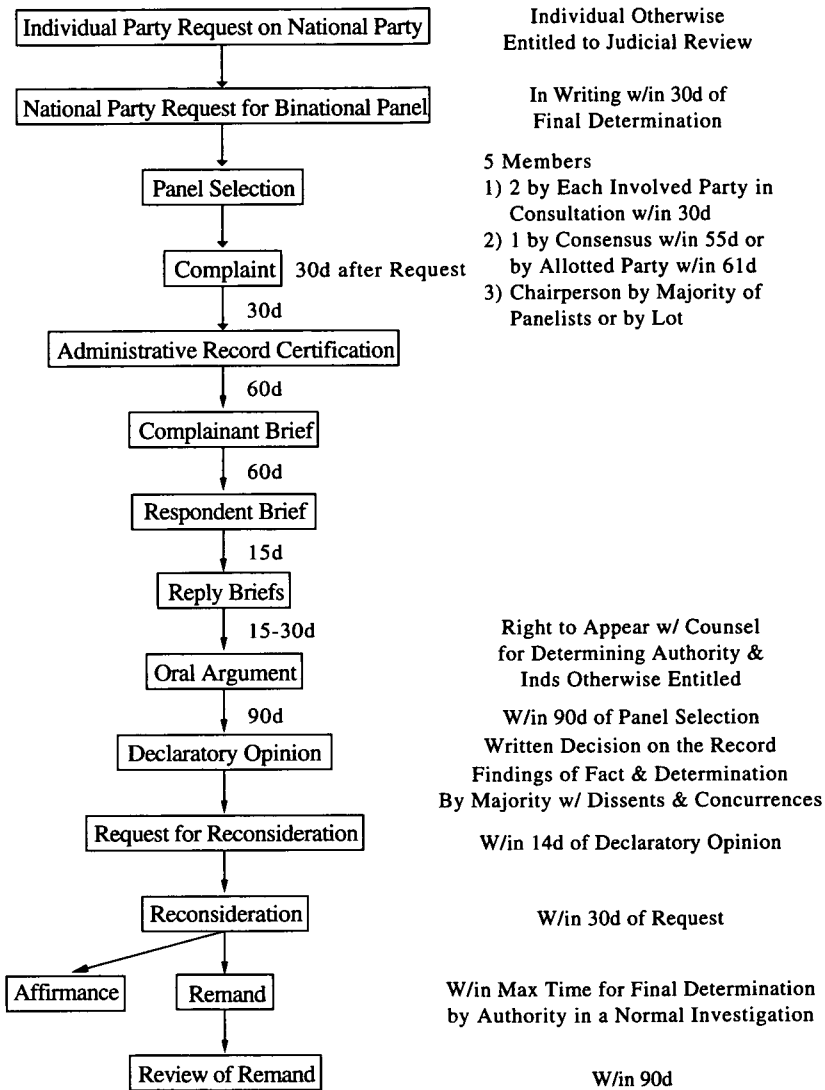
44. 1904 Panel R. 17.

45. Moyer, *supra* note 33, at 716. ("A principal objective of the compromise that became Chapter 19 of the CFTA was the desire to see trade disputes between the two countries resolved expeditiously."). See also Deyling, *supra* note 30, at 363. ("[B]ecause panelists work under tight deadlines, they may reach decisions more quickly than the national courts they replace.") (footnote omitted); Burke & Walsh, *supra* note 30, at 530. ("One of the primary benefits of panel review under the CFTA is expeditious review. The CFTA established specific time limits to which all parties and panel members were required to adhere."); Homer E. Moyer, Jr., Esq., *Chapter 19 of the NAFTA: Binational Panels as the Trade Courts of Last Resort*, 4 No. 6 MEX. TRADE & L. REP. 9, 12 (1994). Burke and Walsh nonetheless note "that the advantages of the above-cited time limits as compared to the procedures of the Court of International Trade (CIT) have been significantly undercut as a result of changes which have been made to the Rules of the Court of International Trade." *Id.* at 531-32. They explain that CIT rules have been amended to incorporate time limits similar to those of the panel procedure. They point at two additional facts that make it unclear whether the panel procedure will be speedier than the CIT procedure. First, the former will tend to be more cumbersome to the extent that a panel has the authority not to reverse but only to remand a determination, whereas the CIT may straightaway reverse determinations before it. Second, a panel's decision will tend to become effective more quickly than that of the CIT insofar as it may be reviewed only in very limited circumstances, i.e., when an extraordinary challenge committee finds a panel guilty of gross misconduct, of fundamental procedural error, or of exceeding its authority. *Id.*

46. NAFTA, *supra* note 1, at art. 1904 ¶ 14.

47. See also Burke & Walsh, *supra* note 30, at 53-31.

FIGURE 1. FINAL AD/CD DETERMINATION REVIEW



Once one of the Agreement's government party requests a binational panel, usually at the behest of the person entitled to judicial review of the determination, the pleading phase is set in motion. The instigating participant files a complaint. The adversaries, in turn, submit a responsive pleading called a "notice of appearance."⁴⁸ The participants may also make motions.⁴⁹ After the investigating authority forwards the administrative record,

48. 1904 Panel R. 40; 59 FR 5901.

49. 1904 Panel R. 61; 59 FR 5903.

the panel review procedure shifts to appellate mode. The participants write complainant, response, and reply briefs.⁵⁰ The panel holds a pre-hearing conference and then oral argument.⁵¹ Finally, the panel announces its decision in writing.⁵²

The assemblage of this procedure took place while the free trade effort concerned only the United States and Canada. Not surprisingly, the procedure reflects those countries' interests. For instance, the Rules allow the use of English or French when a panel reviews a determination made in Canada. Rule 29 declares: "Either English or French may be used by any person or panelist in any document or oral proceeding."⁵³ Further, if legal issues of "general public interest or importance" are involved or if the proceedings are conducted, at least in part, in both languages, there must be simultaneous translation and the panel orders must be made available in both English and French.⁵⁴

Virtually all of Mexico's over ninety million inhabitants speak Spanish, whereas extremely few speak fluent English. Hence, there is as much need to accommodate the Spanish language as the French. Yet, there is no provision whatsoever for the use of the Spanish language in the proceedings to review determinations made in Mexico.⁵⁵ The absence of a specific provision on language in panel reviews of Mexican final determinations is most probably a consequence of the fact that

50. 1904 Panel R. 57.

51. 1904 Panel R. 66 & 67; 59 FR 5904.

52. NAFTA, *supra* note 1, at annex 1901.2 ¶ 5 ("The panel shall issue a written decision with reasons, together with any dissenting or concurring opinions of the panelists."). See also 1904 Panel R. 72.

53. 1904 Panel R. 29; 59 FR 5899.

54. 1904 Panel R. 30 & 31; 59 FR 5899. The complaint as well as all notice of appearances must specify whether the person "intends to use English or French in pleadings and oral proceedings before the panel" and "requests simultaneous translation of any oral proceedings." 59 FR 5901; 1904 Panel R. 39(2)(d); & 39(2)(d)(ii). See also 1904 Panel R. (Schedule-Procedural Forms) Form(3) & Form(4); 59 FR 5907.

55. See generally Lisa B. Koteen, *Life after NAFTA: Review of Antidumping and Countervailing Duty Proceedings under Chapter Nineteen of the North American Free Trade Agreement*, 863 PLI/CORP 841 (1994) ("The question of translation remains open. How will American or Canadian panelists fare when reviewing Mexican cases? How will Mexicans handle cases in English? Will there ever be a safeguard proceeding and, if so, how well will it work? These are some of the unknowns. Of course, procedural rules and regulations can be amended to correct unforeseen and unforeseeable problems that inevitably arise."); Moyer, *supra* note 33, at 714. ("In the case of the NAFTA panels involving Mexico, panelists will be required to bridge even wider cultural and legal gaps. Unlike both Canada and the United States, Mexico is a civil law country, not a common law country. In addition, Mexico does not have the trade law history and experience of either the United States or Canada. Language differences will present new challenges generally not encountered in CFTA proceedings. In these respects NAFTA panels will face new complications.").

the Rule drafters essentially copied the Panel Rules designed for the 1989 United States-Canada Free Trade Agreement.⁵⁶ In all likelihood, the drafters simply did not give enough thought to the extent to which the original Rules had to be modified before being applied to a different kind of proceeding.

Moreover, Canadian law probably safeguards the right to use the French language far more zealously than Mexican law protects the right to use Spanish. For instance, the Canadian "Official Languages Act" declares English and French official languages and specifically orders "every judicial, quasi-judicial or administrative body . . . established by or pursuant to an Act of Parliament" to make sure that at its central office "members of the public can obtain available services from it and can communicate with it in both official languages."⁵⁷ Mexico has no equivalent statute.

In any case, in reviewing Mexican final determinations, panels may adopt an approach to incorporate Spanish speakers parallel to that established to include Francophones in Canadian panel review proceedings. Rule 2 declares, as already noted, that procedural questions not covered by the Rules may be resolved by analogy to the Rules.⁵⁸ In fact, the wisest approach would be to provide for the use of English, Spanish, and French in all panel review proceedings.

The language issue is not in itself crucial. It acquires importance as a symptom of a larger problem with the panel review system as a whole. The system completely disregards the Mexican viewpoint. It makes no attempt to accommodate Mexican needs or potential contributions. In the next section, I will show that the Article 1904 procedure draws much of its content from U.S. law. Thereafter, in section IV, I will contend that the procedure's main concepts derive from the common law tradition, of which both the United States and Canada are part.⁵⁹ In section

56. Compare North American Free Trade Agreement: Rules for Article 1904 Binational Panel Reviews, 59 Fed. Reg. 8686 (1994) with Binational Panel Reviews and Extraordinary Challenge Committees: United States-Canada Free Trade Agreement, 53 Fed. Reg. 53212 (1988). See Stacy J. Ettinger, *NAFTA Chapter Nineteen: Rules of Procedure and Regulations*, 863 PLI/CORP 809 (1994) ("The rules of procedure for binational panel review and for extraordinary challenge committee review largely duplicate the CFTA rules of procedure amended just prior to negotiation of the NAFTA rules of procedure.") (citing United States-Canada Free Trade Agreement: Amendments to Rules of Procedure for Article 1904 Binational Panel Reviews, 59 Fed. Reg. 5892 (1994) and United States-Canada Free Trade Agreement: Amendments to Rules of Procedure for Article 1904 Extraordinary Challenge Committees, 59 Fed. Reg. 5910 (1994)).

57. Official Languages Act. R.S.C. 1985, c.0-3, s.10.

58. 1904 Panel R. 2; 59 FR 5895.

59. Only Anglo-Canadian civil procedure belongs to the common law tradition. Quebecois civil procedure has to a great extent remained true to its civil law roots.

V, I will maintain that the framers failed to take into account the radically different Mexican civil law standpoint.

III. THE REPRODUCTION OF U.S. PROCEDURAL DETAILS

The Panel Rules are, in fact, a creature of U.S. law. Relying on its superior bargaining position, the United States imposed its procedural norms in the earlier free trade negotiations with Canada. Access to the larger United States market was more important to the Canadian industry than access to the smaller Canadian market was to the United States industry. More specifically, however, the dynamics of the negotiation led to a situation in which Canada was mainly interested in having a panel review system for antidumping and countervailing duties, almost irrespective of that system's details. As already noted, Canada insisted on protection (if not exemption) from duties imposed by the United States. The Canadian government had to use up its bargaining chips to make a reluctant United States government agree to have those duties reviewed by binational panels. Thereafter it was hardly in a position to make strong demands with respect to the particular form that the panel review procedure was to take.

Mexico's situation was even more precarious than Canada's. Its general bargaining position was clearly weaker than that of Canada. Mexico required access to the other North American economies even more urgently than Canada had needed access to the United States economy. To make matters worse for Mexico, Canada and the United States were quite wary about the prospect of integrating their economies with the less efficient, low-wage Mexican economy.⁶⁰ More specifically, Mexico possibly had to spend more of its bargaining capital to join the panel review regime than Canada. The negotiators from the north were loath to expand the scheme to include the final determinations of a jurisdiction that diverged radically from their Anglo-American systems and that they perceived as backward.⁶¹ Also,

60. Gary Clyde Hufbauer & Jeffrey Schott note that NAFTA is "the first reciprocal free trade pact between a developing country and industrial countries." Hufbauer & Schott, *supra* note 26, at 1. Folsom & Foslom report that the Canadian government was less interested in free trade relations with Mexico than the U.S. government: The Canadians "had no real need or preference for free trade with Mexico, but did not wish to be left out of negotiations that might dilute or adversely impact CFTA." Folsom & Foslom, *supra* note 19, at 119.

61. See Hufbauer & Schott, *supra* note 26 at 103. ("During the negotiations, questions were raised as to whether the Mexican legal system could accommodate the FTA procedures and provide sufficient basis for the review of final determinations by Mexican officials."). Hufbauer & Schott "believe these concerns have been assuaged by Mexico's commitment in the NAFTA to overhaul its trade laws and

since its establishment, the panel review regime had given rise to considerable skepticism in the United States because of the perception that it operated against U.S. interests.⁶² Having pressed intensely for admission, the Mexican government was not in a position to demand significant changes in the content of that regime.

The Mexican government's comparative disadvantage was, hence, greater than that of its Canadian counterpart in the earlier negotiations. Mexico had to fight harder for inclusion into the Agreement and into the panel review system than Canada. It was less able to make demands with respect to the details of that system. More importantly, it came on board when the panel procedure not only was already in place but also had been operating for several years. The Mexican representatives were in this sense worse off than their Canadian counterparts, who got involved in the process before the establishment of an antidumping and countervailing duty review scheme.

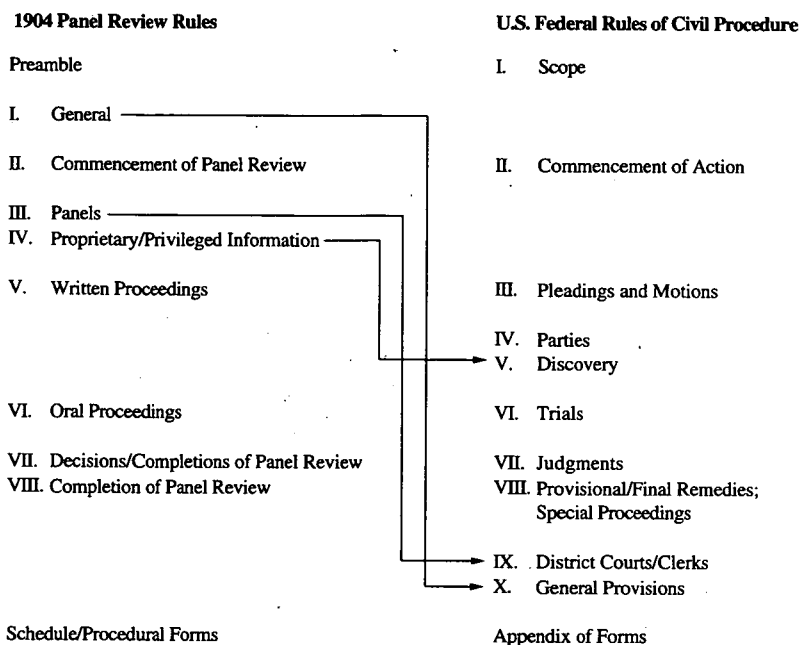
It is impossible to exaggerate the extent to which the 1904 Panel Rules bear the imprint of U.S. law. The organization of the Rules is remarkably similar to the U.S. Federal Rules of Civil Procedure. The Panel Rules break down into several parts, which resemble the headings that divide the federal rules. Figure 2 shows how even the sequence is quite similar. Only the Federal Rules section addressing "parties" has no equivalent in the Panel Rules. The Panel Rules describe the party-configuration briefly in the preamble, under "Definitions and Interpretation."⁶³

procedures. In particular, Mexico has agreed to undertake significant legal and judicial reforms to provide due process guarantees and effective judicial review for disputing parties. These reforms should create greater transparency in the application and administration of Mexican trade laws and enable Mexico to follow the administrative practices and procedures that were already established for chapter 19 panels under the Canada-US FTA." *Id.* at 103.

62. FOLSOM & FOSLUM, *supra* note 19, at 115.

63. In addition to the involved NAFTA parties and the investigating authority, the participants in the proceeding are interested persons, i.e., persons "who, pursuant to the laws of the country in which a final determination was made, would be entitled to appear and be represented in a judicial review of the final determination." 1904 PR 3; 59 FR 5896 (Definitions and Interpretation) "participant", "interested person".

FIGURE 2: 1904 PANEL RULES AND U.S. FEDERAL RULES OF CIVIL PROCEDURE



Beyond a general structure, the 1904 Panel Rules duplicate, often word for word, many particular elements of the United States Federal Rules of Civil Procedure and Rules of Appellate Procedure. The Panel Rules delineate a hybrid procedure with the initial pleading phase derived from U.S. federal trial practice and the second phase of briefs and oral argument based on U.S. federal appellate practice. The extent to which they resemble the federal rules is astonishing.

Rule 2 of the Panel Rules, for example, enunciates: "The purpose of these Rules is to secure the just, speedy and inexpensive review of final determinations" ⁶⁴ The framers clearly borrowed this language from Rule 1 of the Federal Rules of Civil Procedure, which declares that the Rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." ⁶⁵ Even in setting its purpose the panel review procedure simply imitates the United States civil procedural system.

There are, of course, many more similarities. The Federal Rules of Civil Procedure and the Rules of Appellate Procedure state that a court may adopt "Rules governing its practice not

64. 1904 Panel R. 2; 59 FR 5895.

65. FED. R. CIV. P. 1.

inconsistent with these Rules.”⁶⁶ Panel Rule 17(1), for its part, declares: “A panel may adopt its own internal procedures, not inconsistent with these Rules, for routine administrative matters.”⁶⁷ In addition, the Panel Rule on computation of time is very similar to its counterpart in both sets of federal rules. That is, all three regimes first establish that a time period excludes the day of the event that sets off the time clock but includes the last day of that period and then go on to explain the conditions for extending a time period.⁶⁸

Moreover, section 3 of Panel Rule 55, requiring every pleading to be signed either by counsel or by a pro se participant, has its mirror image in Federal Rule 11.⁶⁹ More significantly, the pleadings in both procedural schemes are quite similar in content. The complaint and the responsive pleading mainly consist in a statement of the person’s claim and a demand for relief,⁷⁰ while motions essentially include a statement of the supporting grounds and the proposed order.⁷¹

The briefs allowed in panel reviews are the same as the ones used in federal appellate procedure. There is a brief by the petitioner, a brief by the respondent, and then a reply brief by the petitioner.⁷² Like the Rules of Appellate Procedure, the Panel

66. See FED. R. CIV. P. 83; FED. R. APP. P. 47.

67. 1904 Panel R. 17(1); 59 FR 5898.

68. 1904 Panel R. 19 & 20; 59 FR 5898; FED. R. CIV. P. 6; FED. R. APP. P. 26.

69. Compare 1904 Panel R. 58(3); 59 FR 5903 (“Every pleading filed on behalf of a participant in a panel review shall be signed by counsel for the participant or, where the participant is not represented by counsel, by the participant.”) with FED. R. CIV. P. 11 (“Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney’s individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party’s pleading, motion, or other paper and state the party’s address.”).

70. Compare 1904 Panel R. 39(2); 59 FR 5900 (“Every Complaint . . . shall contain the following information”: “the precise nature of the Complaint, including the applicable standard of review and the allegations of errors of fact or law, including challenges to the jurisdiction of the investigating authority” and “a statement describing the interested person’s entitlement to file a Complaint”.) and 1904 Panel R. 40(1); 59 FR 5901 (The “Notice of Appearance” shall contain “a statement as to the basis for the person’s claim of entitlement to file a Notice of Appearance” and “a statement as to whether appearance is made” in support of opposition to the complaint.) with FED. R. CIV. P. 8(a) (“A pleading” shall contain “a short and plain statement of the claim showing that the pleader is entitled to relief, and a demand for judgment for the relief the pleader seeks.”). The notice of appearance, however, is somewhat simpler than an answer or a motion for intervention. See Burke & Walsh, *supra* note 30, at 533.

71. Compare 1904 Panel R. 63 (“Every Notice of Motion . . . shall be accompanied by a proposed order of the panel” and “shall contain . . . a statement of the grounds to be argued”) with FED. R. CIV. P. 8(a) (The motion generally “shall state the grounds therefore, and shall set forth the relief or order sought”). See also FED. R. APP. P. 27(a).

72. Compare 1904 Panel R. 60(1, 2, & 3) with FED. R. APP. P. 28(a,b, & c).

Rules also provide for amicus curiae briefs, though in more limited circumstances.⁷³

The Panel Rules define the content of the briefs in virtually the same way as the Rules of Appellate Procedure describe the brief of the appellant. The Panel Rules require five parts: (1) Table of contents and table of authorities; (2) Statement of the case; (3) Statement of the issues; (4) Argument; and (5) Relief.⁷⁴ The brief of the appellant in federal appellate proceedings must have five identical headings.⁷⁵ Both sets of rules also coincide in mandating that briefs include an appendix including the authorities referenced.⁷⁶ They also contain almost identical provisions on joint briefs. Panel Rule 60(5) reads: "Any number of participants may join in a single brief and any participant may adopt by reference any part of the brief of another participant."⁷⁷ Appellate procedure Rule 28(i) dictates that "any number of either [appellants or appellees] may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another."⁷⁸

The prehearing conference in a binational panel review is hard to distinguish from that in a federal appeal. Panel Rule 66 affirms:

(3) The purpose of a pre-hearing conference shall be to facilitate the expeditious advancement of the panel review by addressing such matters as: (a) the clarification and simplification of the issues; (b) the procedure to be followed at the hearing of oral argument; and (c) any outstanding motions. . . .

(5) Following a pre-hearing conference, the panel shall promptly issue an order setting out its rulings with respect to the matters considered at the conference.

In the same vein, prior to its 1994 revision,⁷⁹ appellate procedure Rule 33 dictated that

73. FED. R. APP. P. 29 permits amicus curiae to file briefs generally when the parties consent or when the court grants leave. 1904 Panel R. 60(7), in contrast, simply states that in a review of a determination made by a United States investigating authority, another investigating authority, which has made a determination involving the same goods and related issues, "may file an *amicus curiae* brief."

74. 1904 Panel R. 62.

75. FED. R. APP. P. 28. In 1991, the Federal Rules of Appellate Procedure were amended to require an additional heading on subject matter and appellate jurisdiction.

76. Compare 1904 Panel R. 60 with FED. R. APP. P. 30.

77. 1904 Panel R. 60(5).

78. FED. R. APP. P. 28(i).

79. Now the rule reads: "The court may direct the attorneys, and in appropriate cases the parties, to participate in one or more conferences to address any matter that may aid in the disposition of the proceedings, including the simplification of the issues and the possibility of settlement. A conference may be conducted in person or by telephone and be presided over by a judge or other person designated by the

a prehearing conference to consider the simplification of the issues and such other matters as may aid in the deposition of the proceeding by the court. The court or judge shall make an order which recites the action taken at the conference. . . .⁸⁰

This rule defines the purpose of the prehearing conference somewhat more generally than the Panel Rule. Yet, the conferences in both procedures perform the same role in essentially the same way.

The framers unquestionably modeled the panel review oral hearing after the oral argument in federal appellate procedure. The usual format, including the order of the argument, is basically that employed by United States Courts of Appeal. First, the petitioner's side makes its oral argument. Second, the respondents present their side of the argument. And, third, petitioners argue in rebuttal.⁸¹ Upon describing the oral argument, Panel Rule 67 avers:

If a participant fails to appear at oral argument, the panel may hear argument on behalf of the participants who are present. If no participant appears, the panel may decide the case on the basis of briefs.⁸²

Making the same point more circuitously, appellate procedure Rule 34(e) reads:

If the appellee fails to appear to present argument, the court will hear argument on behalf of the appellant, if present. If the appellant fails to appear, the court may hear argument on behalf of the appellee, if present. If neither party appears, the case will be decided on the briefs unless the court shall otherwise order.⁸³

Regardless of whether all or some of the participants show up, the panels run oral proceedings from the same script as federal appellate courts.

IV. THE INFLUENCE OF THE COMMON LAW PROCEDURAL PICTURE

Naturally, Article 1904 and the Panel Rules have assimilated, along with the details, the underlying conceptions of United States procedural law. James F. Smith has made the following comments regarding the procedure for safeguarding the panel review system set forth in Article 1905:

court for that purpose. Before a settlement conference, attorneys must consult with their clients and obtain as much authority as feasible to settle the case. As a result of a conference, the court may enter an order controlling the course of the proceedings or implementing any settlement agreement." *FED. R. APP. P.* 33 (1994).

80. *FED. R. APP. P.* 33 (1993).

81. 1904 Panel R. 69(2)(c).

82. 1904 Panel R. 69(3).

83. *FED. R. APP. P.* 34(e).

I was recently struggling with NAFTA Article 1905, which I think many of you are going to come to know and have some emotional reaction to. It is a very complicated provision, and I was struck [by] how its concepts are extraordinarily Anglo/American.⁸⁴

He could have made exactly the same remarks about Article 1904, as well as about the Panel Rules stemming from that Article. The Article 1904 panel review procedure embodies the conception of procedure characteristic of the common law, particularly as developed in the United States.

To speak generally about a common law or even a U.S. conception of procedure is, inevitably, to risk simplifying and distorting the existing procedural practice. More than one conception is at play. In fact, that practice is the product of the clash of various such conceptions. It nevertheless makes sense to talk about a U.S. and even a common law conception, or picture, of procedure.⁸⁵ There is a more or less coherent picture that has a dominant function in shaping procedure and that serves as a counterpoint to opposing pictures. Because of their common historical legacy, their parallel development in response to similar subsequent challenges, and their continuous transnational theoretical dialogue, the various common law jurisdictions all tend to converge onto that same procedural picture.

A particular picture of procedure emerges as a consequence of an intricate interplay of praxis and theory.⁸⁶ When engaging in procedural (or any legal) practice, individuals grasp and imagine what they are doing through rough pictures or stories. In the common law tradition, judges and lawyers explain their procedural activity to themselves and to others by invoking a picture (or a story) in which the parties move the process along and finally present their cases to the decision maker in an all-important oral proceeding. This picture, which becomes more complex as

84. *Discussion of the Differences between the United States and Mexican Legal Systems*, 1 U.S.-MEX.L.J. 113 (1993)(answer by James F. Smith).

85. The term "picture" is perhaps preferable to "conception" inasmuch as it underscores the fact that what is referred to is a representation and an approximation. A conception of procedure sounds too much like a worked-out interpretation of procedure, whereas a picture of procedure appears to be less exact. As I am using the term and will make clear below, a "picture" may be well-defined but may also be more tentative and vague. The terms "story" and "narrative" are also possible and perhaps trendier. Though I will draw on those terms every now and then, I will principally employ the term "picture."

86. Thus far I have been referring in singular to "a picture of procedure." Needless to say, this large picture may also be perceived as composed of or including smaller pictures. In other words, the picture of procedure may be taken to include a picture of the role of the judge, counsel, and parties, a picture of the pleading phase, of the trial, of the appeal, and so on. These sub-pictures, though potentially at odds with each other, may be taken to fit loosely into the larger picture.

the details are filled in, affects not only the creation and interpretation of procedural precepts but also what to do in the absence of pre-established procedural guidelines.⁸⁷ In certain procedural situations, we may invoke the words of Ludwig Wittgenstein and assert: "A picture [holds] us captive."⁸⁸ "The picture," Wittgenstein admonishes, "is to be taken seriously."⁸⁹

The picture that comes to life within the common law procedural practice, like any other procedural picture, is tentative, often not explicit, and unsystematic.⁹⁰ To be sure, many aspects of the practice do not fit the picture. Common law civil procedure, in other words, embodies counterpictures.⁹¹ The prevailing picture coexists with, clashes with, and may eventually succumb to its counterparts. If a counterpicture ever becomes dominant, the currently predominant picture will certainly not disappear completely; it will merely take over the role of opposition.

Before I go into the issue of the extent to which the Article 1904 panel review scheme reflects the common law procedural picture, a caveat is in order. Associating the notion of a procedural picture with that of representation would be misleading. There is no strict relationship of separation and correlation between picture and reality. In other words, there is no self-standing procedural reality, which the picture merely mirrors. Picture and reality are inextricably intertwined.⁹² A procedural picture

87. Perhaps this approach to practice is most clearly identifiable in the modern societies, in which the legal system is expected rationally to justify the way in which it operates. Legal actors thus become more reflective and pictures facilitate this process of reflection. Yet, pictures (and especially stories) probably also play a central role in premodern societies, despite the fact that there is less of a need to provide a rational explanation for authoritative decisions. Pictures help legal agents not only rationalize but also understand and go on with their activities.

88. LUDWIG WITTEGENSTEIN, *PHILOSOPHISCHE UNTERSUCHUNGEN* § 115 (1967)(emphasis in original).

89. *Id.* at § 427.

90. Jurists who specialize in theory flesh out the picture. These jurists produce a clearer picture. In doing so they usually first take a leap away from praxis and then seek to push that praxis toward their picture. The efforts of these specialists serve at times to identify the dominant picture and sometimes to reinforce or even establish that dominance.

91. Again, another group of theorists must act as a midwife. These critical theoreticians bring the counter-features together, more explicitly, into a counter-picture.

92. The work of Wittgenstein might help establish a contrast between the purely representational and the interactive notion of a picture. In his *TRACTATUS LOGICO-PHILOSOPHICUS*, Wittgenstein embraces the representational notion. LUDWIG WITTEGENSTEIN, *TRACTATUS LOGICO-PHILOSOPHICUS* §§ 2.1-2.225. "A picture," he explains, "represents its subject from a position outside it (its standpoint is its representation form). That is why the picture represents its subject correctly or incorrectly." *Id.* at § 2.173. Further: "A picture is a model of reality." *Id.* at § 2.12. What picture and reality share is a structure or a form, i.e., the way in which their components are organized. "That is how a picture is attached to reality; it reaches

is part of procedural reality.⁹³ A picture affects procedural actors and actions in a manner that is similar to that of rules or authoritative interpretations. A picture, like a rule, may bind actors to proceed (and may require that actions unfold) in a particular way and thus constitutes an essential part of the procedural practice.⁹⁴

The Article 1904 panel review procedure clearly incarnates what I have been referring to as the common law procedural pic-

right out to it." *Id.* at § 2.1511. Despite this connection, a picture is severable from and subservient to reality.

In his PHILOSOPHICAL INVESTIGATIONS, however, Wittgenstein seems at times to have the interactive notion of a picture in mind. A picture, accordingly, is seen as part of a language game. Wittgenstein treats the concept of a picture as synonymous with that of a paradigm and distinguishes it from that of an image, i.e., "Vorstellung." See LUDWIG WITTGENSTEIN, PHILOSOPHISCHE UNTERSUCHUNGEN § 300 (1967). A picture is a tool in a language game. As such, it may be used to teach beginners how to play. It may also serve as a reference point to decide controversies that might arise in the game. It is not merely a depiction of an object or of reality.

I disagree with Saul Kripke who associates the concept of a picture in the INVESTIGATIONS with that in the TRACTATUS. "Wittgenstein's use of the term 'picture' [in §301 of the PHILOSOPHICAL INVESTIGATIONS] is related to his use of it in the TRACTATUS—a picture is to be compared with reality, it says that the external world is in a state corresponding to the picture." SAUL A. KRIPKE, WITTGENSTEIN: ON RULES AND PRIVATE LANGUAGE 139 (1982). I do not think that this representational account of a picture accurately captures the concept of picture used in the cited passage of the INVESTIGATIONS.

93. A color square offers a model to understand the notion of a picture. A red color square may be used to teach a child what red is. It may also be employed to settle the question of whether a particular object is red. See LUDWIG WITTGENSTEIN, PHILOSOPHISCHE UNTERSUCHUNGEN § 53 (1967)(discussing a table of colors that is "used in teaching the language or brought in to decide certain controversial cases"). Yet, the color square does not represent any kind of object or reality. There is no independent redness entity, which is depicted by the color square. In the language game in which the concept of redness is deployed, players create a color square as an instrument, which is to perform a specific function.

Similarly, a picture of procedure is embedded in a particular language game, in a procedural reality. It does not simply depict a procedural reality. It also may be drawn upon to teach students and to settle disputed cases. Of course, a procedural picture is much more complex than a color square. A procedural picture might be said to be composed of numerous elements or even sub-pictures, such as the picture of the pleading phase or a picture of the role of the decision-maker. Still, a picture of procedure may generally be used to decide whether a particular procedure is legitimate. When the rules and the interpretations do not provide an answer, procedural actors may refer back-explicitly or implicitly-to the procedural picture.

94. A procedural picture emerges over years of procedural activity. It is deeply embedded in procedural reality. Therefore, even though it is a creation, it is not a mere convention that may be easily discarded. Transcending a procedural picture requires a radical transformation in the way procedure is thought about and structured. Moreover, the internal components of a procedural picture hang together as coherently as the picture as a whole does with its corresponding procedural reality. A procedural picture, though never fully coherent, must have a certain degree of coherence if it is to play a significant role within the procedural system. A hopelessly incoherent picture will be incapable of informing procedural actors or actions. Consequently, particular elements of a procedural picture may not be altered or eliminated at will. The inner logic of the procedural picture must be preserved.

ture. It will, like common law civil procedure generally, at times deviate from that picture and come closer to the counterpictures. Nonetheless, the procedural picture will inevitably play a decisive role in molding the panel review system.

As a first example, the panel review procedure transplants the common law practice of preemptory challenges in choosing the civil jury to the selection of panel members. In the Article 1904 review system, each involved party has "the right to exercise four preemptory challenges, to be exercised simultaneously and in confidence, disqualifying from appointment to the panel up to four candidates proposed by the other involved Party."⁹⁵ In U.S. civil cases, each party "is entitled to three preemptory challenges"⁹⁶ in the selection of a jury. "The use of preemptory challenges is of ancient origin and is given to aid each party's interest in a fair and impartial jury."⁹⁷ The Anglo-Canadian practice of preemptory challenges comes from the same origin as and has a scope similar to that of the United States.⁹⁸

The panel review system also incorporates the classic common law notion of a separate, self-standing, and long-winded pleading phase. The common law traditionally viewed that stage as necessary in order thoroughly to prepare the ground for the classic one-shot trial. In common law jurisdictions, Merryman explains, "precise formulation of the issues in pleading and pre-trial proceedings is seen as necessary preparation for the concentrated event of the trial."⁹⁹ By replicating this phase the panel review process almost over-prepares the case for the oral argument. It provides for requests of review, complaints, notices of appearance, and numerous motions.¹⁰⁰ Of course, in addition to these pleadings, the Rules call for various briefs by the participants.¹⁰¹

The manner in which the panel announces its decision at the end also evokes the common law method. Panel decisions have

95. NAFTA, annex 1901.2 ¶ 2.

96. 28 U.S.C. §1870.

97. CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2483 (1995).

98. "Both England and Canada have, for many years, used preemptory challenges in jury selection systems similar to our own." Judith Heinz, Comment, *Preemptory Challenges in Criminal Cases: A Comparison of Regulation in the United States, England, and Canada*, 16 LOY. L.A. INT'L & COMP. L.J. 201, 203 (1993). "Canada, like the United States, still permits the preemptory challenge". Nancy S. Marder, *Beyond Gender: Preemptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1014, 1103 (1995) (citing Judith Heinz, Comment, *Preemptory Challenges in Criminal Cases: A Comparison of Regulation in the United States, England, and Canada*, 16 LOY. L.A. INT'L & COMP. L.J. 201, 227 (1993)).

99. JOHN MERRYMAN, THE CIVIL LAW TRADITION 113 (1985).

100. See 1904 Panel R. 34, 39, 40, & 61.

101. See 1904 Panel R. 58-60.

to be "by majority vote and based on the votes of all members of the panel."¹⁰² The panel must issue a written opinion supporting its reasoning and decision.¹⁰³ The panelists who do not join the majority's decision are supposed to put their concurring or dissenting opinion in writing.¹⁰⁴

Common law systems notoriously are centered around the elaborate opinions of judges, particularly at the appellate level.¹⁰⁵ Those opinions are paramount sources of law. They are the vehicles through which the common law emerges and evolves. As such, the opinions of the judges must be available in print, and in addition must lay out the judges' reasons so that jurists may generalize the content and apply it to other cases.¹⁰⁶

The broad impact of common law court decisions has contributed significantly to the tendency of judges to concur or dissent in writing. First, when more is at stake than the fate of the individuals before the court, judges feel more inclined to distance themselves from opinions with which they disagree. Second, the wider applicability of court decisions requires more explicit majority opinions, which in turn invites dissenting and concurring opinions.

Common law judges do not merely issue decisions but also articulate reasons.¹⁰⁷ A separate concurring opinion makes sense only in situations where reasons are attached to the decision. In addition, a dissenting statement has more of a point when contrasted with a majority opinion, and not with a decision that simply announces an outcome. In the former scenario, the dissenter is elaborating her own reasons against those of the majority. In the latter, the dissenter only has the majority's preferred result with which to contend.

In addition, the panel review system borrows from common law appellate procedure the corresponding restricted scope of re-

102. NAFTA, annex 1901.2 ¶ 5.

103. NAFTA, annex 1901.2 ¶ 5. *See also* 1904 Panel R. 74. ("A panel shall issue a written decision with reasons, together with any dissenting or concurring opinions of the panelists, in accordance with Article 1904.8 of the Agreement.")

104. NAFTA, annex 1901.2 ¶ 5 & 1904 Panel R. 74. On this point, the procedures for settling disputes on the Agreement's interpretation diverge from the Article 1904 and the common law approach. Article 2017 declares: "No panel may, either in its initial report or its final report, disclose which panelists are associated with majority or minority opinions." NAFTA art. 2017. *See also* LESLIE ALAN GLICK, UNDERSTANDING THE NORTH AMERICAN FREE TRADE AGREEMENT 11 (2d ed. 1994).

105. *See* ROBERT J. MARTINEAU, MODERN APPELLATE PRACTICE: FEDERAL AND STATE CIVIL APPEALS 239 (1983).

106. "Not content simply to decide the case before them and enter the appropriate judgment, appellate courts have put in written form their reasons for deciding a case one way rather than another." *Id.*

107. *Id.*

view. First, the review is based on the administrative record¹⁰⁸ and no provision is made for consideration of any additional evidence. Second, the panel must either “uphold a final determination, or remand it for action not inconsistent with the panel’s decision.”¹⁰⁹ The panel’s decision does not substitute but rather identifies the errors of the investigating authority’s decision. Finally, though Article 1904 requires the panel to apply the domestic standard of review,¹¹⁰ all three standards defer to the investigating authority’s factual determinations. The degree of deference will depend on the particular standard of review invoked.¹¹¹

The Article 1904 panel review procedure’s approach to attorney’s fees, however, is consistent not with common law procedure generally, but rather with U.S. civil procedure specifically. “In the United States,” John Merryman points out, “if A sues someone, he usually must pay his own lawyer, whether he wins or loses.”¹¹² Similarly, Panel Rule 32 provides that “[e]ach participant shall bear the costs of, and those incidental to, its own participation in a panel review.”¹¹³ The panel review procedure thus adopts the so-called “American rule”¹¹⁴ not just with respect to attorney’s fees, but with respect to all costs. In United States federal practice, costs other than attorney’s fees tend to be saddled on the losing party.¹¹⁵ Other common law courts, including

108. 1904 Panel R. 41 requires that the investigating authority file the administrative record. NAFTA mandates expressly that the review for Mexican determinations be “based solely on the administrative record.” NAFTA, annex 1911 (“standard of review”).

109. NAFTA, art. 1904 ¶ 8.

110. NAFTA, art. 1904 ¶ 3 & annex 1911.

111. Article 238 of the Mexican Federal Tax Code simply establishes that the Federal Tax Court must set aside the determination if it finds “incorrect or misunderstood facts.” CÓDIGO FISCAL DE LA FEDERACIÓN [C.F.F.] art. 238 (Mex.) Not just any determination may be overturned under these circumstances, however. Only an “unfair determination”. *Id.* So the Federal Tax Court must in fact defer to incorrect findings of fact of the investigating authority, unless the determination is unfair.

Subsection 18.1(4) of Canada’s Federal Court Act, in turn, authorizes reversing determinations if the investigating authority “based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it”. S.C. 1990, c.8, s.5.

112. MERRYMAN, *supra* note 99, at 119.

113. 1904 Panel R. 32.

114. See *Key Tronic Corporation v. United States*, 114 S.Ct. 1960, 1962 (1994) (“Under the longstanding ‘American rule’, attorney’s fees generally are not a recoverable cost of litigation absent explicit congressional authorization”) (citing *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975)).

115. FED. R. CIV. P. 54(d)(1); FED. R. APP. P. 39(a).

those of Canada,¹¹⁶ tend to impose costs, including attorney's fees, on the losing party.

The Article 1904 procedure's treatment of the selection of panelists, the pleading phase, the panel's decision, the scope of review, and attorney's fees is thus faithful to the common law procedural picture, especially as it has evolved in the United States. The panel review procedure actualizes the common law procedural picture in other, more fundamental, respects. That procedure, for one, endorses the common law understanding of the nature and role of procedural rules. The common law tradition regards each rule as a self-standing precept, which courts must apply in each procedural situation independently of the rest of the rules. The rules do not constitute an integrated system. Nor does the meaning of each rule depend on the entire body of rules or on the place that the rule occupies within that totality.

The common law vision of procedural rules typically manifests itself in the fact that the main procedural guidelines appear in a set of rules, as opposed to a code. "In Canada, as in England, most countries of the commonwealth and the United States, the principles of civil procedure are embodied largely in written Rules of Court."¹¹⁷ Similarly, the Article 1904 panel review procedure presents its written parameters "as the NAFTA Article 1904 Panel Rules."¹¹⁸ Furthermore, the Rules' "Statement of General Intent" reflects the corresponding common law rules ideology when it makes the following declaration:

Where a procedural question arises that is not covered by these rules, a panel may adopt the procedure to be followed in the particular case before it by analogy to these rules or may refer for guidance to rules of procedure of a court that would otherwise have had jurisdiction in the importing country.¹¹⁹

The implicit idea is that the Rules are discrete precepts that cover only a specific set of procedural questions. If a question emerges that none of the Rules addresses expressly, the panel shifts to a discretionary interpretative mode. The panel may, but does not have to, rely on analogous rules. Those analogous rules do not constitute an essential part of a system whose structure is delineated by the posited rules. Instead they represent a sepa-

116. "In most jurisdictions in Canada costs are said to be in the discretion of the Court. . . . However, in fact this power is overwhelmingly interpreted as indicating that 'costs follow the event'-that is, losers pay costs to winners." GARRY D. WATSON ET AL., *CANADIAN CIVIL PROCEDURE: CASES AND MATERIAL* 266 (3d ed. 1988).

117. *Id.* at 2. *But cf.* CODE DE PROCÉDURE CIVILE DU QUÉBEC (1980).

118. 1904 Panel R. 1.

119. 1904 Panel R. 2.

rate aggregation of discrete procedural precepts, much like the rules of the replaced domestic courts.

Inasmuch as it is centered around a single hearing in which the issues are discussed and decided,¹²⁰ the Article 1904 panel review procedure assimilates another basic component of the common law procedural picture. The concentration of the legal procedure into one event is paradigmatic of the common law tradition. In most common law cases, lawyers bring forth all the evidence and arguments at once before the jury. Because congregating the jury gives rise to considerable difficulty, it does not make much sense to have various jury sessions spread out throughout the duration of the litigation.¹²¹ The "pre-trial" stage narrows down the issues in order to enable the jury to consider them at one time.

Common law jurisdictions preserve this compressed structure even in cases in which there is no jury. In fact, even common law appellate procedure evinces a bent for concentration. During the common law appeal, the procedural activity is similarly built around a single oral argument. In this proceeding, the parties present reasons for reversing or affirming the decision below.¹²² The petition for review, the briefs, and particularly the prehearing conference simplify the issues so that the court may dispose of them during oral argument.

This consolidation of the main litigious activity into a single event leads to an increase in formality and even drama. A precise format is necessary in order to make sure the lawyers are able to make their case during the proceeding. The format is, of course, much more complex at the trial than at the appellate level. But both the trial and the appellate hearing have a general structure that requires the airing of first one and then the other side of the controversy and provides an opportunity for rebuttal at the end. Further, both proceedings have a similar mystique within their procedural context. They are different in character than, provide a center of gravity for, and transcend in importance all other procedural activity. The legal actors—especially

120. See 1904 Panel R. 67; NAFTA art. 1904 ¶ 14.

121. See Arthur Von Mehren, *The Significance for Procedural Practice and Theory of the Concentrated Trial: Comparative Remarks*, 2 *EUROPÄISCHES RECHTSDENKEN IN GESCHICHTE UND GEGENWART: FESTSCHRIFT FÜR HELMUT COING* 361, 364 (N. Horn ed. 1982); John Langbein, *The German Advantage in Civil Procedure*, 52 *U. CHI. L. REV.* 823, 863-64 (1985); JOHN MERRYMAN, *THE CIVIL LAW TRADITION* 112 (1985). Von Mehren argues that trials had to be concentrated also because, "at least until relatively modern times, there was probably no way in which material presented at widely separate points in time could have been preserved in a form that would have enabled the jury to refresh its recollection when it ultimately came to deliberate and render the verdict." Mehren, *supra*, at 364-65.

122. *FED. R. APP. P.* 34.

the attorneys—are under considerable pressure to offer their best performance during this crucial event.¹²³

The Article 1904 review procedure embraces the common law approach inasmuch as it compresses the deliberative activity into a single oral argument.¹²⁴ The oral argument will accordingly tend to take place with rigidity and intensity. The standard format calls to mind a U.S. appeal: First the complainant's side argues, then the respondent's side, and finally there may be (at the panel's discretion) an argument in reply.¹²⁵ Panelists may ask questions at any stage;¹²⁶ yet, their intervention, like that of common law appellate judges, should not upset the pre-established standard format of the oral argument. Moreover, the centrality of the panel review's oral argument will create a high-strung atmosphere, just as the common law trial or appellate hearing.

The Panel Rules, to be sure, provide for two other kinds of face-to-face encounters between the panelists and the attorneys.¹²⁷ However, these meetings are demarcated from and subordinated to the central oral hearing. They pave the way for that final hearing, much like the pleadings and the briefs. First, the panel may hear oral argument before ruling on a motion by one of the participants.¹²⁸ This gathering is supposed to facilitate deciding the preliminary or side questions raised in the motion before going into the main issue during the oral hearing. The panel may, secondly, hold a pre-hearing conference.¹²⁹ This assembly principally purports to clarify the issues or the procedure before the oral hearing.¹³⁰ The pre-hearing conference as well as the motion hearings unequivocally underscore the fact that the oral argument is the heart of the antidumping and countervailing duty review procedure.

The idea of assigning a passive role to the panel and allocating ultimate procedural control to the participants also comports with the common law model. In common law jurisdictions, the traditional view is that the controversy involves and interests only the parties to the action. The parties are accordingly taken to be in the best position, both cognitively and motivationally, to probe into the matter. The parties and their attorneys produce and introduce the evidence and the arguments and generally

123. See JOHN MERRYMAN, *THE CIVIL LAW TRADITION* 113 (1985).

124. See 1904 Panel R. 67.

125. Cf. 1904 Panel R. 67(2) with RAP FED. R. APP. P. 34(c).

126. The rules do not expressly authorize the panelists to pose questions but they do not exclude that possibility either.

127. See 1904 Panel R. 65(2) & 68.

128. 1904 Panel R. 65(2).

129. 1904 Panel R. 68.

130. 1904 Panel R. 68(3).

move the process along. The decision maker (the court or the jury) is reactive; it lets the cause unfold and then chooses among the competing versions of the facts and of the law.¹³¹

The Article 1904 procedure is premised on this model. The participants both start and guide the process. They not only file the pleadings and briefs but also, through motions, direct the course of the litigation.¹³² Panel Rule 63 authorizes them to file motions generally,¹³³ while Rule 68 entitles them to move for a pre-hearing conference to clarify the issues and the oral argument's procedure.¹³⁴ A Rule 68 motion consists in "a written request setting out the matters that the participant proposes to raise at the conference."¹³⁵ More importantly, the participants bring up and discuss the issues during the oral argument. Though the panel, as already noted, may pose any kind and number of questions, the expectation is that panelists, like common law appellate judges, will simply demand explications or probe into the reasoning of the participants. The panelists' function is merely to facilitate the participants' discussion, not to start a separate debate.

Nothing precludes the panel from filing its own motions regarding any of the procedural issues. In fact, the Panel Rules at times explicitly empower the panel as well as the participants to make motions, such as "to issue an order to show cause why the panel review should not be dismissed" when the complainant fails to submit a brief.¹³⁶ Theoretically, a runaway panel could (like a judicially active U.S. Court) orchestrate the procedure proactively, through motions and orders. Such a panel could also completely dominate the oral argument and even radically change the format.¹³⁷ Yet, this kind of activism, inasmuch as it would run against the grain of the panel review system, will be extremely unusual. Further, panelists, whom the system assigns

131. See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282 (1976) (In "the traditional conception of adjudication. . . the trial judge. . . was [generally] passive. He was to decide only those issues identified by the parties.").

132. See generally 1904 Panel R. 39, 40, 57, & 63.

133. 1904 Panel R. 63.

134. 1904 Panel R. 68.

135. 1904 Panel R. 68. The establishment of a joint panel review in the context of rule 36 offers another example of the panel's passivity vis à vis the participants. A joint panel to review two different final determinations involving the same goods may be held only if one of the participants so moves. Yet, if any of the participants objects "the motion shall be deemed to be denied and separate panel reviews shall be held." The panel's views on the desirability of a joint review under rule 36 are irrelevant.

136. 1904 Panel R. 61(2)(b).

137. The Panel Rules establish a format to be followed by the oral argument "unless the panel otherwise orders." 1904 Panel R. 69(2).

to a particular case on an ad hoc basis, will normally lack the time and motivation to stage a coup and take over the process. In general, the participants will define the procedural issues and set the agenda in the Article 1904 review system.

It is crucial to keep in mind that United States civil procedure has recently begun evolving away from the classical approach to procedural structure and propulsion. First, procedure is organized less and less around an all-important, rigid oral event. While at the trial level cases are increasingly decided at the pretrial level through a series of relatively informal hearings, the importance of the appellate oral argument has shifted to other hearings, such as the motion hearings and prehearing conference, and especially to the briefs.¹³⁸ The structure of procedure has thus become less concentrated and formal, and more dispersed and flexible. Second, the decision maker now often assumes responsibility for advancing and shaping the litigation.¹³⁹ The United States legal system has witnessed the emergence of what Judith Resnik terms "the managerial judge":

Many federal judges have departed from their earlier attitudes; they have dropped the relatively disinterested pose to adopt a more active, "managerial" stance. In growing numbers, judges are not only adjudicating the merits of issues presented to them by litigants, but also are meeting with parties in chambers to encourage settlement of disputes and to supervise case preparation. Both before and after the trial,

138. "Oral argument has held center stage for most of the history of appellate review, in part for historical reasons. Appellate review developed in England primarily as an oral process because of the preferences of those involved and the cost and difficulty of printing. . . . Oral argument is no longer the central focus of the appellate process but rather just one step in the process through which the appellate court performs its function of error correction or law development. This is not to say that oral argument is no longer important. . . . Today judges take advantage of oral argument to explore with the attorneys particular difficult legal or factual points in the case; failure to satisfy the judges on that point may result in an adverse decision." ROBERT J. MARTINEAU, *MODERN APPELLATE PRACTICE: FEDERAL AND STATE CIVIL APPEALS* 211 (1983) (footnotes omitted). Most commentators agree that oral argument continues to be crucial. *See, e.g.,* MICHAEL E. TIGAR, *FEDERAL APPEALS: JURISDICTION AND PRACTICE* 263 (1987) ("Oral argument is always important and never to be waived."). Some observers attribute far more importance to oral argument than Martineau does. Justice William Brennan, for instance, contends that "oral argument is the absolutely indispensable ingredient of appellate advocacy. . . . [O]ften my whole notion of what a case is about crystallizes at oral argument." Justice William Brennan, *PROCEEDINGS IN HONOR OF MR. JUST. BRENNAN*, HARVARD LAW SCHOOL, "OCCASIONAL PAMPHLET No. 9", 22-23.

139. Chayes, *supra* note 131, at 1282 ("The judge is not passive, his function limited to analysis and statement of governing legal rules; he is active, with responsibility not only for credible fact evaluation but for organizing and shaping the litigation to ensure a just and viable outcome."). *See also* Abram Chayes, *The Supreme Court, 1981 Term: Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 5 (1982).

judges are playing a critical role in shaping litigation and influencing results.¹⁴⁰

The "managerial judge" described by Resnik departs radically from the prototypically disengaged and dispassionate decision maker.

The movement toward the managerial judge, like that toward a diffuse and relaxed examination of the case, has been irregular. The extent to which this trend has taken place, even within the U.S. federal system, varies from one chamber (and from one case) to the next. There has been, further, a counter-current.¹⁴¹ Jurists have often criticized the informal procedural interaction as well as the expanded involvement of the judiciary.¹⁴² Finally, even cases decided at pre-trial stage or during the prehearing conference by managerial judges do not escape completely the traditional procedural picture. Despite its absence, the trial or the oral argument structures the rest of the procedural ado; the prospect or threat of a trial motivates most procedural actions in the litigation. Managerial judges, in turn, only encourage the parties to move the process along; they do not completely take over the responsibility for directing the procedural course. It is fair to say that, at least in comparison to civil law jurisdictions, the United States legal system continues to be notably influenced by a procedural picture characterized by trial-like process and an inactive decision maker.¹⁴³

In sum, the common law legal tradition has thoroughly influenced the Article 1904 panel review process. In the selection of the panelists, the pleadings, the announcement of the written decision at the end, the scope of review, and the distribution of costs, the panel review system clearly bears the imprint of that

140. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376-77 (1982)(footnotes omitted).

141. Abram Chayes uses the term "countertendencies". Abram Chayes, *The Supreme Court, 1981 Term: Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 7 (1982).

142. Abram Chayes concedes that "the Burger Court may be seen to be embarked on some such program for the restoration of the traditional forms of adjudication." Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281,1304 (1976). See also Chayes, *supra* note 141, at 7. ("[T]he general tone of scholarly, journalistic, and political commentary has been increasingly skeptical of judicial efforts to ride herd on state and federal bureaucracies. Congress has contemplated restrictions on federal court jurisdiction, and the Attorney General has set about by word and deed to bring the judges to heel.") (footnotes omitted); Owen M. Fiss, *The Forms of Justice*, 93 HARV. L. REV. 1, 4 (1979) ("By the mid- and late-1970's, however, a new position had formed on the Supreme Court; a strong bloc of Justices, sometimes obtaining support from the center of the Court, sought to reverse the [structural reform] processes that were still afoot in the lower courts.").

143. See, e.g., Chayes, *supra* note 131, at 1298. ("We may not yet have reached the investigative judge of the continental systems, but we have left the passive arbiter of the traditional model a long way behind.").

tradition, at least as it lives in the United States. But the Article 1904 procedure tracks the common law procedural picture in a deeper sense. It proves to be a quintessential common law procedure inasmuch as it is based on a set of discrete and self-standing rules, organizes all procedural activity around a single hearing, and assigns the task of guiding the process to the participants.

Of course, there are counterpictures at work in the common law tradition as well, such as that associated with an informal and spread out pre-trial proceeding and with the managerial judge. It is possible that the Article 1904 panel review process, like civil procedure in the United States, will occasionally develop toward the counterpictures. Yet the main picture will continue to play a key role: determining how legal actors think of and structure procedure. The next section shows that the dominant picture of civil procedure in Mexico is quite different.

V. A DIFFERENT CONCEPTION OF PROCEDURE

A U.S. lawyer would clearly feel right at home in any of these panel review proceedings. An Anglo-Canadian lawyer would find them familiar, insofar as they reproduce concepts not just of U.S. law but of the common law tradition more generally.¹⁴⁴ A Mexican jurist, in contrast, would find the procedure completely foreign. In this sense, the Mexican jurist would be reacting in part very much like any other lawyer trained in the civil law tradition.¹⁴⁵ This section focuses on how the Mexican procedural picture is, in many ways, close to that of other civil law jurisdictions and fundamentally at odds with the common law conception.¹⁴⁶

The Mexican procedural picture departs from the common law picture on all of the points discussed in the previous section.

144. Of course, Quebecois lawyers would probably feel less connected to this common law procedure than their Anglo-Canadian colleagues. As explained *supra*, Quebec's civil procedure has, to a great extent, remained true to its civil law roots.

145. Víctor Carlos García Moreno & César E. Hernández Ochoa, *Neoprotectionism and Dispute Resolution Panels as Defense Mechanisms Against Unfair Trade Practices: A Focus on Mexico*, MAKING FREE TRADE WORK IN THE AMERICAS 692, 712 (Boris Kozolchyk ed. 1993) ("Mexico follows a legal tradition that differs greatly from that of Canada and the United States. FTA terms, such as 'panels,' and various legal standards are seldom used in Mexican law.").

146. The Mexican legal system belongs to the civil law universe. Civil law jurisdictions have evolved toward a common procedural picture because they share historical roots, they have faced similar subsequent challenges, and there is a significant degree of cross-fertilization in the debate on civil procedure.

First, since it does not provide for a jury,¹⁴⁷ Mexican law (like the civil law tradition generally) never had the possibility of developing a practice such as the peremptory challenge. Second, in civil law systems, "pleading is very general, and the issues are defined as the proceeding goes on."¹⁴⁸ This description of the pleading phase clearly applies to Mexican civil procedure.¹⁴⁹ The pleadings do not have to delimit the disputed matters too sharply in anticipation of a trial. The court may narrow down the issues as the process unfolds.

Third, decisions issued by Mexican judges, both at the trial and the appellate level, are not as elaborate as their common law homologues. The Mexican Federal District's Code of Civil Procedures¹⁵⁰ contains only a short account of the requirements for the judgment: "The judgment shall be clear, precise, and consistent with the complaint and the answer, as well as with the claims that have been raised in a timely manner during the suit. It shall, moreover, condemn or absolve the defendant and decide all the debate's litigated issues."¹⁵¹ The Federal Code of Civil Procedures describes more fully the statement that must accompany a judgment at both the trial and appellate level as follows:

In addition to meeting the requirements for any judicial resolution, the judgment shall contain a succinct account of the issues raised and of the evidence introduced, as well as of the applicable judicial considerations, both legal and doctrinal. Along with the judicial considerations, the judgment shall include the motive for imposing or not imposing costs and shall

147. In Mexico "juries are not used and 'trials' as we understand them are not held in civil cases." JAMES E. HERGET & JORGE CAMIL, *AN INTRODUCTION TO THE MEXICAN LEGAL SYSTEM* 96-97 (1978).

148. MERRYMAN, *supra* note 99, at 113. Merryman links this approach to pleading with the lack of concentration in the civil law tradition. *Id.*

149. HERGET & CAMIL, *supra* note 147, at 74.

150. Whereas the Federal Code of Civil Procedures applies to suits brought in the Mexican Federal Courts, the Federal District's Code of Civil Procedures covers cases litigated in the local courts of the Federal District. The Federal District, like any Mexican state, has its own judiciary, separate from the federal system of tribunals.

151. CÓDIGO DE PROCEDIMIENTOS CIVILES PARA EL DISTRITO FEDERAL [C.P.C.D.F.] art. 81 (Mex.). "The judgement (sentencia) follows a standard format, usually one or two pages in length, in which there are vague findings of fact and law and an order granting the appropriate relief. . . . [T]he judgement of the appellate court also follows a standard format and is usually more extensive than the trial court's judgement. In most cases it will contain the names of the parties and date of the decision followed by a 'whereas' which is then followed by a summary statement of the facts of the case point by point. This is followed by the word 'considering', then the various applicable legal (statutory) authorities are cited and discussed. Finally, 'It is therefore decided' is followed by the ruling of the court. Although this format of court opinion would appear to distinguish carefully between questions of fact and questions of law, the actual discussion found in the cases usually does not do so." HERGET & CAMIL, *supra* note 147, at 76.

conclude by solving precisely the matters submitted to the court's consideration and setting a deadline for compliance.¹⁵²

Mexican judges thus simply attach a brief account of issues and evidence, a list of legal considerations, and an order with a deadline. The opinion included in the judgment is usually extremely brief, even on appeal. "At the appellate level, except for the Supreme Court itself, judges do not write extensive opinions as U.S. appellate judges do. A simple one page judgement normally suffices because the system of judicial precedent is not followed."¹⁵³ "In some cases the opinion is given in a very brief one or two paragraphs."¹⁵⁴ "These appellate judicial opinions are of course kept as a record of the court, but they are not ordinarily published."¹⁵⁵

The brevity of the opinions betrays the civil law antecedents of Mexican courts. In the civil law tradition judges write extremely compact majority opinions and rarely enter concurrences or dissents.

In general, there are no separate concurring or dissenting opinions, even at the appellate level, in civil law jurisdictions. Although exceptions do exist, the general rule is one of unanimity and anonymity. Even dissenting votes are not noted, and it is considered unethical for a judge to indicate that he has taken a position at variance with that announced in the decision of the court.¹⁵⁶

This general statement could be applied to the Mexican legal system. However, as John Merryman acknowledges, there is a trend in the civil law tradition toward writing dissents and concurrences in constitutional cases.¹⁵⁷

Fourth, Mexican appellate tribunals have a relatively broad scope of inquiry. Even though the civil appeal does not involve a completely new decision of the entire case,¹⁵⁸ there is no pre-

152. CÓDIGO FEDERAL DE PROCEDIMIENTOS CIVILES [C.F.P.C.] art. 222 (Mex.).

153. HERGET & CAMIL, *supra* note 147, at 97. Reflecting the wide divergence between the Mexican and the U.S. conception of the opinion, Carlos Arellano García writes that "in the United States, where judicial precedents are so important, opinions constitute true juridical studies of great substance. In our system there should be an opinion of note when the issues are of great significance or judicial interest." CARLOS ARELLANO GARCÍA, *Derecho Procesal Civil* 473 (1981).

154. HERGET & CAMIL, *supra* note 147, at 77.

155. *Id.*

156. MERRYMAN, *supra* note 99, at 121.

157. *Id.*

158. José Becerra Bautista contends that the Mexican appellate system, which is derived from the Spanish, consists in *revisio prioris instantiae*, as opposed to a *novum iudicium*. JOSÉ BECERRA BAUTISTA, *EL PROCESO CIVIL EN MÉXICO* 590 (1986). The appellate suit, he insists, "is not one in which the same problems considered by the trial court are brought up again to the full knowledge of the court of appeals. It is, instead, a review of the resolution dictated by the trial court so as to correct the *errors in iudicando* or *in procedando*, alleged by the petitioning party in

sumption of correctness attached to that judgment. James. E. Herget and Jorge Camil maintain that the appellate court "makes its own decision on both factual and legal issues."¹⁵⁹ José Becerra Bautista notes that in exceptional cases, evidence not considered by the trial court may be admitted on appeal.¹⁶⁰ The Code of Civil Procedures for the Federal District allows the introduction of evidence "when an event has occurred that imports a subsequent exception."¹⁶¹ The Federal Code of Civil Procedure is more liberal on this point and authorizes the parties to bring in new evidence on appeal:

so long as such evidence was not presented at the trial level for reasons beyond the control of the parties or relates to exceptions emerging subsequent to the hearing of allegations by the trial court or to antecedent exceptions, of which the interested party was unaware prior to that hearing.¹⁶²

Further, the appellate tribunal lacks the authority to remand the case to the trial court. In contrast to the common law, both the Federal Code of Civil Procedures and the Code of Civil Procedures for the Federal District allow the appellate court to affirm, reverse, or modify the judgment from below, but not to remand it.¹⁶³

The approach to attorney's fees constitutes a fifth point of divergence between the Mexican and the U.S. procedural pictures. "In civil law countries. . . the loser usually pays the winner's counsel fees."¹⁶⁴ The civil law tradition does not distinguish between attorney's fees and court costs. It shifts attorney's fees to the losing party, as part of the costs. It regards counsel less as an extension of the parties and more as part of the process. Similarly, in the Mexican legal system the losing party normally must pay the prevailing party's litigation costs, including attorney's fees. "The Federal Code of Civil Procedures follows the criterion of those regimes that impose the payment of costs as a conse-

the statement of grievances." *Id.* at 591. See also SEBASTIÁN ESTRELLA MÉNDEZ, ESTUDIO DE LO MEDIOS DE IMPUGNACIÓN EN EL CÓDIGO DE PROCEDIMIENTOS CIVILES PARA EL DISTRITO FEDERAL 73-74 (1987).

159. HERGET & CAMIL, *supra* note 147, at 76. The review is limited to the questions raised by the petitioner, though: "The activity of the appellate judge falls upon the matter which was the object of the process, not exclusively upon the sentence of the trial court. This activity nonetheless has the limitation imposed by the appellant's claim. The tribunal is not permitted to add grievances that have not been formulated at all nor to supplement those that have been formulated deficiently." RAFAEL DE PINA & JOSÉ CASTILLO LARRAÑAGA, DERECHO PROCESAL CIVIL 358 (1990).

160. JOSÉ BECERRA BAUTISTA, EL PROCESO CIVIL EN MÉXICO 591 (1986).

161. C.F.P.C. art. 706 (Mex.).

162. C.F.P.C. art. 253 (Mex.).

163. See C.F.P.C. art. 231 (Mex.) & C.P.C.D.F. art. 688 (Mex.).

164. MERRYMAN, *supra* note 99, at 119.

quence of defeat (Art. 7)."¹⁶⁵ Article 7 of that Code reads: "The losing party shall reimburse its opponent for the process's cost."¹⁶⁶ The Federal District's Code of Civil Procedures, however, takes a less clear cut approach. It generally imposes costs when required by law and when the losing party has proceeded with temerity or bad faith.¹⁶⁷ It also shifts costs in certain specific circumstances, including cases in which the losing party offers no evidence or false evidence on behalf of his claim, raises a claim clearly without merit, or delays the proceedings unnecessarily.¹⁶⁸ At any rate, it is understood in Mexico that the costs include attorney's fees.¹⁶⁹

The Mexican procedural picture also distances itself from the common law picture on the more fundamental issues alluded to in the previous section. First, the procedural precepts are not enumerated as rules of court but rather worked into a code.¹⁷⁰ "Procedure in Mexican courts is governed by codes of civil procedure for each of the state, the local courts of the federal district, and the federal district courts."¹⁷¹ In this respect, Mexico's approach to civil procedure is concordant with that of other civil law jurisdictions. The underlying ideology is that the expressed

165. RAFAEL DE PINA & JOSÉ CASTILLO LARRAÑAGA, *DERECHO PROCESAL CIVIL* 342 (1990).

166. C.F.P.C. art. 7 (Mex.). "The losing party will not have to pay costs if it is not responsible for the failure to achieve a voluntary settlement of the dispute and if it limited itself to what was strictly necessary in the course of the process for a definite resolution of the case. The party shall be deemed not be responsible for the failure to achieve a voluntary settlement of the dispute: (I) when the law requires a judicial decision, (II) when the dispute involves exclusively an undecided legal issue or calls for the substitution of the parties' agreement by a judicial order, and (III) when the party is the defendant and has been sued unnecessarily." *Id.* at art. 8.

167. C.P.C.D.F. art. 140 (Mex.). See generally CARLOS ARELLANO GARCÍA, *DERECHO PROCESAL CIVIL* 502 (1981).

168. C.P.C.D.F. art. 140 (Mex.).

169. See RAFAEL DE PINA & JOSÉ CASTILLO LARRAÑAGA, *DERECHO PROCESAL CIVIL* 342 (1990) ("The concept of costs comprises. . . attorney's fees."); JOSÉ BECERRA BAUTISTA, *EL PROCESO CIVIL EN MÉXICO* 204 (1986) (The award of costs "covers. . . the fees of the attorney representing the opposing party."); Eduardo Pallares, *Derecho procesal civil* 180 (1978) (The costs "encompass the fees of the attorneys representing the parties").

170. See, e.g., C.P.C.D.F. (Mex.) & C.F.P.C. (Mex.). "The cultural center of the nation is the federal district (Mexico City), and it has no serious rivals. Accordingly, the code enacted for the federal district and territories has been copied in most essentials by all of the states. In addition, where federal questions are raised in litigation, resort to the code for the federal district is authorized." HERGET & CAMIL, *supra* note 147, at 35-6.

171. *Id.* at 74. See, e.g., C.P.C.D.F. (Mex.) & C.F.P.C. (Mex.). "The cultural center of the nation is the federal district (Mexico City), and it has no serious rivals. Accordingly, the code enacted for the federal district and territories has been copied in most essentials by all of the states. In addition, where federal questions are raised in litigation, resort to the code for the federal district is authorized." HERGET & CAMIL, *supra* note 147, at 35-6.

precepts delineate the structure of a coherent procedural system.¹⁷² The code's framers strive to make the different articles mesh as smoothly as possible.

Present day codes are probably as logically self-consistent as any body of law will ever be. The use of definitions, uniform terminology, and general principles all work to assure a high degree of consistency, something that Anglo-american case law (and sometimes statutory law) rarely, if ever achieves.¹⁷³

More than just avoiding clashes with each other, the code's articles complement each other. "Different parts of the code . . . are interrelated."¹⁷⁴ The various parts, therefore, form a tightly knit scheme. In interpreting particular provisions of the code, courts refer to other provisions and to the inner logic of the code as a whole.

Civil procedure under Mexican law, moreover, is not built around a single, formal oral hearing. Authors James E. Herget and Jorge Camil explain that the introduction of evidence:

does not occur at one hearing at which all parties and witnesses are present. There is no trial as such. Rather, evidence is introduced at a series of hearings and is almost always reduced to writing by a secretary of the court.¹⁷⁵

Herget and Camil contend that spreading out the trial over a series of proceedings diminishes the element of surprise:

If surprising testimony does turn up, the surprised party can always explore the new matter further or produce counter-testimony at the next hearing, since there is no significant limit on the number of hearings or amount of evidence which either party can offer in good faith.¹⁷⁶

In a number of rather informal sessions, settlement is encouraged,¹⁷⁷ statements by the parties themselves are heard,¹⁷⁸ evidence is received,¹⁷⁹ and arguments of the lawyers are considered.¹⁸⁰ Civil process in Mexico is more episodic and less structured than in common law jurisdictions.

The Mexican legal system does not clearly separate oral proceedings on appeal from those at the trial level. Appellate courts do not have a separate code of procedures; they rely on the same

172. "To a Mexican the term code [accordingly] constitutes the basic structure of the legal system. It is the source not only of most private law, but of the way in which the law is conceptualized and interpreted." *Id.* at 33.

173. *Id.* at 35.

174. *Id.* at 33.

175. *Id.* at 74.

176. *Id.* at 75-76.

177. C.P.C.D.F. art. 272A (Mex.).

178. *Id.* at art. 389. See also C.F.P.C. arts. 105-15 (Mex.).

179. C.P.C.D.F. arts. 390-92 (Mex.). See also C.F.P.C. art. 79-80 (Mex.).

180. C.P.C.D.F. art. 393 (Mex.). See also C.F.P.C. art. 256 (Mex.).

code as trial courts, which includes some special provisions on appeals.¹⁸¹ Upon examining the evidence (if any), the court hears the appellate allegations, proceeding "in the manner prescribed for the trial's final hearing."¹⁸² Before these sessions on evidence and allegations, there is a proceeding on whether to stay the trial judgment's execution,¹⁸³ with a presumption in favor of staying.¹⁸⁴ The tribunal may also stage a hearing on the timeliness and appropriateness of the appeal.¹⁸⁵ The process is accordingly as diffuse and open-ended on appeal as at trial.

Mexican law, hence, makes no attempt to purify the procedure or to concentrate the main procedural activity into a single proceeding. It provides no mechanisms to solve "preliminaries" or to produce a narrowed-down set of issues, which the court may devour in one sitting. This statement applies to both the trial and the appellate stages. Tribunals deal with a multiplicity of matters through a series of oral and written proceedings, which are neither ranked nor systematized. The transition from one session to the next, like the passage from the trial to the appellate level, involves not a quantum leap but rather an incremental progression.

In the debate surrounding the North American Free Trade Agreement, both participants and observers often perceived the difference in the Mexican approach to civil process (as well as other differences in Mexico's legal and economic institutions) as a badge of backwardness. The following comments on the NAFTA panel procedures by Carlos Angulo Parra, a Mexican lawyer, appear to reflect this perception:

With respect to the procedure itself, I believe that an innovative part of the procedure, at least for Mexico, would be the possibility of having one general hearing in the panel procedure. The Mexican system of litigation generally requires a series of separate, written formal submissions to the court. The hearing, where all of the issues of a matter are put into a single time frame and all of the parties are put in a single room to address those issues, provides the panel with a concise and general presentation of the facts and legal issues in the dispute so that a final resolution can be issued. This is an innovation from the Mexican point of view. I believe that this is an op-

181. See C.P.C.D.F. arts. 688-722 (Mex.); C.F.P.C. arts. 231-266 (Mex.).

182. C.F.P.C. art. 256 (Mex.). The Federal District's Code of Civil Procedures similarly suggests that the allegations hearing follows basically the same principles at the trial and the appellate level. It discusses the hearing generically and then states that "no one shall speak for more than 15 minutes at trial and 30 minutes on appeal." C.P.C.D.F. art. 393 (Mex.).

183. C.F.P.C. art. 250 (Mex.).

184. The appellate court must stay the appealed judgment's execution, unless the law expressly provides otherwise. C.F.P.C. art. 239 (Mex.).

185. See generally C.F.P.C. art. 246-49 (Mex.).

portunity for generating an evolution within our system to improve Mexican procedures for solving disputes.¹⁸⁶

Parra puts his finger on the key conceptual divergence between Mexican and common law civil procedure. Mexican procedure, unlike common law procedure, does not aim at formally concentrating all litigious activity into a single point in space and time. However, the difference by no means constitutes evidence of underdevelopment in Mexico or of a need for improvement.¹⁸⁷ Rather it stems from Mexico's peculiar legal background.

In its propensity to dispersion and informality, Mexican procedure is solidly anchored in the civil law tradition. John Merryman writes the following about that tradition:

There is no such thing as a trial in our sense; there is no single, concentrated event. The typical civil proceeding in a civil law country is actually a series of isolated meetings of and written communications between counsel and the judge, in which evidence is introduced, testimony is given, procedural motions and rulings are made, and so on. Matters of the sort that would ordinarily be concentrated into a single event in a common law jurisdiction will be spread over a large number of discrete appearances and written acts before the judge who is taking the evidence.¹⁸⁸

Merryman's account of the civil law system echoes Herget and Camil's description of Mexican civil procedure in pointing out the absence not only of a trial as such but also of an element of surprise. Merryman states:

[t]he element of surprise is reduced to a minimum, since each appearance is relatively brief and involves a fairly small part of the total case. There will be plenty of time to prepare some sort of response before the next appearance.¹⁸⁹

The German procedural system, which has been put forth as a model for the United States,¹⁹⁰ is also based on a multiplicity of informal hearings. In German civil procedure:

186. Carlos Angulo Parra, *Comments on the Potential Influence of NAFTA on Procedures for the Settlement of Disputes*, 1 US-MEX L. J. 29, 30 (1993).

187. Improving Mexican procedure should not be achieved by blindly transplanting common law norms but rather by immanent development. In other words, Mexico should probably seek to perfect its unconcentrated and flexible approach to procedure instead of completely abandoning that approach in favor of the concentrated and formal common law system. In doing so, Mexico would be well advised to turn to the experience of other civil law jurisdictions. The Mexican approach might be improved from the comparative and critical perspectives, along the lines suggested in the next two sections.

188. Merryman, *supra* note 99, at 112.

189. *Id.* at 113.

190. John Langbein submits "that, by assigning judges rather than lawyers to investigate the facts, the Germans avoid the most troublesome aspects of our practice." Langbein, *supra* note 121, at 824.(footnote omitted).

there is no distinction between pretrial and trial, between discovering evidence and presenting it. Trial is not a single continuous event. Rather, the court gathers and evaluates evidence over a series of hearings, as many as the circumstances require.¹⁹¹

Thus, "the various oral hearings in the same case form a unity and constitute the basis of the judgment".¹⁹² They do not have to follow a particular sequence.¹⁹³ What happens from one hearing to the next, as well as what happens within each of those hearings, does not have to follow an ironclad pattern.

Civil law appellate process is also characteristically diffuse and flexible. There is, in fact, no clear demarcation between appellate and trial proceedings. In Germany, for instance, "[t]he new oral proceeding on appeal is a continuation of the proceeding at trial. . . . The norms regarding the procedural presuppositions also hold on appeal. . . . The same kinds of procedure. . . and the same kinds of judgment apply as at the trial level."¹⁹⁴

Hence, in civil law jurisdictions, both trial and appellate procedural activity takes place in a series of loosely connected oral and written proceedings. There is no build-up toward a single all-important procedural event, such as the common law trial or appellate oral argument. The Mexican approach to the civil pro-

191. *Id.* at 823, 826 (footnote omitted). John Langbein insists that even in simpler cases, which are decided in one main hearing, significant procedural differences between the German and the United States common law system persist. "[E]ven in such cases, because the court has the option to schedule further hearings if developments at the initial hearing seem to warrant further proofs or submissions, German procedure is devoid of the opportunities for surprise and tactical advantage that inhere in the Anglo-American concentrated trial." *The German Advantage in Civil Procedure*, *Id.* at 823, 826-7 n.9. See §136 Nr. 3 ZIVILPROZESSORDNUNG (Code of Civil Procedure)[ZPO]. German procedural law cultivates the difference of its civil proceedings in ways other than by allowing the possibility of further hearings. Regarding the oral hearing, the German Code of Civil Procedure states that "[t]he parties shall make their submissions in an open discussion." *Id.* at §137. The format of the hearing is kept deliberately loose. Judges are given substantial freedom to structure and run the oral hearing as they see fit. Rosenberg, Schwab and Gottwald, *Id.* at § 79, p. 435 ("The direction of the proceedings is the responsibility of the court by virtue of its office."). Benjamin Kaplan refers to the distinct character of German civil procedure as the "conference method" of adjudication. Benjamin Kaplan, *Civil Procedure-Reflections on the Comparisons of Systems*, 9 *BUFF. L. REV.* 409, 410 (1960). Langbein, accordingly, underscores the "business-like" character of German civil procedure: "German civil proceedings have the tone not of the theater, but of a routine business meeting-serious rather than tense." Langbein, *supra* note 121, at 831.

192. ROSENBERG ET AL., *Zivilprozessrecht* § 81, p. 446 (15th ed. 1993).

193. The principle of equivalence "means that one oral hearing is as valid as the next." *Id.* at 447.

194. *Id.* at § 139, 841, 846.

cess departs from that of the United States not because it is less developed but because it stems from a different legal tradition.

Merryman cautions, however, that "the trend in civil law jurisdictions has been toward greater concentration, with the rate of development varying widely."¹⁹⁵ "Austria and Germany seem to be moving most rapidly in this direction."¹⁹⁶ Mexico has experienced this general development, though certainly to a lesser extent than Germany or Austria. Mexican legal scholar Rafael de Pina has argued:

there should be the least number possible of hearings because the more proximate the procedural activities are to the decision, the lesser the danger that the impression received by the decision-maker will be erased and that his memory will deceive him.¹⁹⁷

In their gravitation toward increased concentration, Mexico and other civil law jurisdictions have moved closer to the common law world. The Mexican and other civil law systems now tend to compress procedural activity into a few oral sessions. The civil law tradition, to the extent possible, reduces the number of oral meetings and stacks them up against each other. The proceedings that make up the trial thus resemble the common law pre-trial and trial hearings, while the proceedings that constitute the appeal parallel the common law appellate sessions: the prehearing conference and oral argument.

The Mexican and civil law procedural picture has nevertheless preserved its distinctness. The procedural hearings, even when limited in number, relate to each other differently than in the common law tradition. There is no internal ranking; there is no one proceeding that is paramount and to which the others are subservient. The procedural conferences within the civil law picture handle a multiplicity of issues in a somewhat free-floating

195. Merryman, *supra* note 99, at 112. This increase in procedural concentration has been accompanied by an evolution toward orality and immediacy. CARLOS ARELLANO GARCÍA, *TEORÍA GENERAL DEL PROCESO* 39 (1992)(citing RAFAEL DE PINA, *DICCIONARIO DEL DERECHO* 68 (1965)). Arellano García connects the principles of concentration, orality, and immediacy. *Id.* Merryman, in turn, speaks of "the interrelated criteria of concentration, immediacy, and orality". Merryman, *supra* note 99, at 116. He expounds the point thus: "A trend toward immediacy in civil proceedings carries with it a trend toward orality, and orality is promoted also by the trend toward concentration. Civil law proceduralists think of the three matters as related to one another, and one frequently encounters discussion in which concentration, immediacy, and orality are advances as interrelated components of proposals for reform in the law of civil procedure." *Id.* at 114.

196. *Id.* at 112. See, e.g., §272 Nr. 1 ZPO ("As a rule, the case should be resolved in a single hearing, comprehensively prepared."); ROSENBERG ET AL., *supra* note 192, at § 84, 452.

197. CARLOS ARELLANO GARCÍA, *TEORÍA GENERAL DEL PROCESO* 39 (1992)(citing RAFAEL DE PINA, *DICCIONARIO DEL DERECHO* 68 (1965)).

way. In addition to the structural uniqueness of the relationship between the various proceedings, the hearings themselves distinguish themselves in content from their common law equivalents. They are relatively flexible and unceremonious; they take place as an open discussion¹⁹⁸ and come across as a business conference.¹⁹⁹ Needless to say, civil procedure in Mexico, as in other civil law nations, often deviates from the aspirations embodied in this procedural picture. Nevertheless, one cannot truly understand Mexican civil procedure unless one grasps the kind of process it aims at and the procedural picture within which that process is embedded.

Though the extent of their involvement in civil procedure has been exaggerated, civil law judges are more engaged than their common law counterparts.²⁰⁰ This is certainly the case in Mexico. Mexican civil judges are very active throughout the judicial proceeding. They must, for instance, reject all "pleadings that are notoriously frivolous or unmeritorious"; they must "discard them out offhand and do not have to notify the other party."²⁰¹ The Federal District's Code of Civil Procedures declares further: "If the complaint were obscure or inadequate, the judge shall ask the plaintiff to clarify, correct, or complete it. . . , pointing out the defects with specificity; once he does this he shall process it."²⁰²

During the preliminary conciliation hearing, moreover, the Code grants the judge "broad powers in conducting the proceeding."²⁰³ Judges carry their "broad powers" into the evidentiary phase of procedure, both at the trial and appellate level. They take a leading role, for instance, in the examination of the witnesses.²⁰⁴ The Code announces: "The judge may, by virtue of his

198. Regarding the oral hearing, the German Code of Civil Procedure states that "[t]he parties shall make their submissions in an open discussion." §137 ZPO.

199. Benjamin Kaplan refers to the distinct character of German civil procedure as the "conference method" of adjudication. Kaplan, *supra* note 191, at 410. Langbein, accordingly, underscores the "business-like" character of German civil procedure: "German civil proceedings have the tone not of the theater, but of a routine business meeting-serious rather than tense." Langbein, *supra* note 121, at 831.

200. Merryman, *supra* note 99, at 114-15. Merryman concedes that "in Germany the law and the judicial tradition encourage the judge to play an active role in the proceedings." *Id.* at 115.

201. C.P.C.D.F. art. 72 (Mex.). See also C.F.P.C. art. 57 (Mex.) ("Tribunals shall not admit petitions, pleadings, or motions notoriously malicious or unmeritorious. They shall discard these papers offhand and do not have to notify the other parties, provide them with a copy, or make a record.").

202. C.P.C.D.F. art. 257(Mex.).

203. *Id.* at art. 272A.

204. "When a witness testifies, the judge asks the questions, although lawyers for either side can request the judge to ask certain questions or to explore a certain

office, broadly interrogate the witnesses with respect to the facts at issue in the evidentiary hearing in order better to ascertain the truth."²⁰⁵ Only after making this statement, does the code establish that "the parties may also interrogate the witness".²⁰⁶ The code cautions that the parties "must limit themselves to the disputed facts or issues" and adds: "The judge must strictly exclude pointless or irrelevant questions."²⁰⁷

In Mexican procedure, the parties themselves are required to make statements, i.e. to provide "confessional evidence."²⁰⁸ The Federal District's Code of Civil Procedures allows the parties to pose questions to each other during this stage.²⁰⁹ Not surprisingly, the Code also states that "[t]he court may freely interrogate the parties with respect to the facts and circumstances relevant to finding out the truth."²¹⁰ Generally, regarding the interrogation of the parties as well as of the witnesses, the Code declares: "The court shall have the broadest powers to ask witnesses and parties those questions deemed relevant to establishing the truth with respect to the disputed issues."²¹¹

The Federal District's Code of Civil Procedures bestows upon judges extensive powers in the consideration of all evidence, not just testimonial. The parties usually offer the evidence. Yet, the judges, in addition to deciding whether the evidence is admissible,²¹² must "receive and examine it".²¹³ Judges have substantial latitude in terms of the kind of evidence upon which they rely:

In order to find out the truth about the disputed issues, the judge may rely on any person (parties as well as others), object or document (belonging to the parties or others). The only limitation is that the evidence may not be prohibited by law or be morally objectionable.²¹⁴

subject in his interrogation. There is no cross examination." HERGET & CAMIL, *supra* note 147, at 74.

205. C.P.C.D.F. art. 392 (Mex.). See also C.F.P.C. art. 179 (Mex.) ("The tribunal shall have the broadest authority to ask witnesses and parties questions deemed conducive to the ascertainment of the truth. . .").

206. C.P.C.D.F. art. 392 (Mex.). See also C.F.P.C. art. 173 (Mex.).

207. C.P.C.D.F. art. 392 (Mex.). See also C.F.P.C. art. 175 (Mex.).

208. C.P.C.D.F. art. 308, 389 (Mex.).

209. C.P.C.D.F. art. 317, 389 (Mex.). See also C.F.P.C. art. 102 (Mex.).

210. C.P.C.D.F. art. 318 (Mex.). See also C.F.P.C. art. 113 (Mex.) ("While presiding over the confessions session, the court may freely interrogate the parties about any facts or circumstances that might contribute to ascertaining the truth of the matter.").

211. C.P.C.D.F. art. 366 (Mex.). See also C.F.P.C. art. 179 (Mex.). See generally Bautista, *supra* note 158, at 125-26.

212. C.P.C.D.F. art. 298 (Mex.). See generally Bautista, *supra* note 158, at 104-05.

213. C.P.C.D.F. art. 299 (Mex.). See generally Bautista, *supra* note 158, at 106.

214. C.P.C.D.F. art. 278 (Mex.). See also C.F.P.C. art. 79 (Mex.) ("In order to ascertain the truth, the adjudicator may rely on any person—both parties and third parties—

Judges also have great discretion in deciding how the evidence will be examined and evaluated.²¹⁵ The judges' broad authority to examine evidence includes the right "personally [to] inspect items or physical evidence including premises."²¹⁶

The courts may, at any time and in any kind of case, order the execution and extension of any kind of evidentiary hearing, if conducive to the ascertainment of the truth with respect to the contested issues. In conducting these hearing, the judge shall proceed as he sees fit in order to obtain the best result, without violating the rights of the parties. He must listen to the parties and treat them equally.²¹⁷

"Articles 278 and 279 give the judge very broad powers with respect to the timing of the production of evidence, the manner in which the production of evidence is carried out, and the kind of evidentiary means to be utilized."²¹⁸

"At the end of the reception of the evidence the court shall order the parties to make allegations—personally or through their attorneys: first the plaintiff and then the defendant."²¹⁹ This phase sounds quite similar to the closing arguments at trial or to appellate oral argument in the common law systems. Again, the Mexican trial or appellate judge is more involved:

The courts shall direct the debate, admonishing the parties to concentrate themselves on the disputed issues and to avoid digressions. The courts may interrupt the parties to request ex-

and on any thing or document—whether it belongs to the parties or to third parties. The only limitation is that the evidence be recognized by law and be immediately related to the disputed facts."). See generally EDUARDO PALLARES, *DERECHO PROCESAL CIVIL* 357 (1978); Bautista, *supra* note 158, at 100.

215. See, e.g., C.F.P.C. art. 197 (Mex.) ("The court has the broadest liberty to analyze the evidence offered and to evaluate and compare the different evidentiary items, and to arrive at a conclusion with respect to this comparative evaluation.").

216. HERGET & CAMIL, *supra* note 147, at 74. See C.F.P.C. art. 161 (Mex.) ("Judicial inspection may be carried out—at the parties' request or by the court's motion and with due notice—whenever it might serve to clarify or determine the controversy's facts that require no special technical knowledge.").

217. C.P.C.D.F. art. 279 (Mex.). See also C.F.P.C. art. 80 (Mex.). See generally Pallares, *supra* note 169, at 357; Bautista, *supra* note 158, at 98-99.

218. Pallares, *supra* note 169, at 357. See also C.F.P.C. art. 79 (Mex.) ("The court shall face no time limit when ordering the production of the evidence it considers indispensable to judge to form an opinion with respect to the litigation's content. None of the limitations and prohibitions on evidentiary matters imposed on the parties shall apply to the court.").

219. C.P.C.D.F. art. 393 (Mex.). See also C.F.P.C. art. 344 (Mex.) ("At the end of the discussion [of the evidence], the hearing of allegations shall begin, in which the following rules shall be observed: (I) The secretary shall read those parts of the record requested by the party speaking; (II) The plaintiff shall make his allegations first and then the defendant. The Public Ministry shall make allegations if it is a party in the case; (III) Each party may speak only twice and in his reply shall make allegations about the underlying issues as well as about the issues that came up in the the process.").

planations and they may interrogate the parties with respect to those issues they deem relevant.²²⁰

Carlos Arellano García elaborates on the judge's obligations during this proceeding:

The adjudicator has a duty to direct the debates. This means that his role in the evolving hearing during the procedural period of allegations is not merely passive. He may interrupt the litigants to demand explanations and interrogate them, as he sees fit, about the issues-i.e., about the evidence in the record or about other matters related to the process.²²¹

Unlike their counterparts in the common law, Mexican judges must, in essence, argue along with the attorneys for the parties.

Mexican trial and appellate judges are thus more involved throughout the civil process than common law judges. Beyond all the instances of wide procedural engagement already mentioned, Mexican judges are bound by a judicial obligation unknown in the common law world. The civil law duty of process direction has been described in the following terms:

The court has a duty to carry forward the procedure lawfully and purposively, to process the legal dispute exhaustively and expeditiously, and to bring the dispute to an end in the most efficient way. This engagement by the court is called process direction. This is one of the court's most important tasks, inasmuch as the final judgment on the goods and the adequacy of the procedure depend on it. . . . The process's direction is the court's responsibility by virtue of its office and does not require the parties' motion or a request. Nor can the parties relieve the court of this duty. The court must dutifully deliberate upon those decisions placed within its discretion.²²²

The parties get the case started but "keeping in motion the already begun process is in essence the court's task."²²³ The parties may provide assistance in this task, but the ultimate responsibility rests with the court. In imposing the duty of process direction on the judge, the Mexican procedural picture dramatically sets itself apart from its common law counterpart.²²⁴

220. C.P.C.D.F. art. 395 (Mex.).

221. CARLOS ARELLANO GARCÍA, *DERECHO PROCESAL CIVIL* 434 (1981).

222. *See, e.g.*, ROSENBERG ET AL., *supra* note 192, at § 79, 435.

223. *Id.* at 436.

224. The principle of process direction sounds like what Carlos Arellano García denominates the principle of procedural impulsion. CARLOS ARELLANO GARCÍA, *TEORÍA GENERAL DEL PROCESO* 39 (1992). Yet, Arellano García attributes the principle to the parties and not to the judge. "Procedural impulse," according to him, "is the pressure exerted by one of the parties on the process to move on to the next stage." *Id.* *See also* EDUARDO PALLARES, *DICCIONARIO DE DERECHO PROCESAL CIVIL* 595 (1966) ("The process unfolds until it comes to a conclusion at the parties' initiative. The parties must make the necessary motions to this end. The judge is not allowed to take over this role, except in exceptional cases."). If Arellano García believes that the *direction* of the process also is the parties' duty, he is

In conclusion, the Mexican civil law procedural picture differs immensely from the U.S. common law picture. Within the Mexican picture, there are no peremptory challenges; the short pleading stages does not aim at distilling a limited set of issues for a trial; judgments include short opinions and no dissents or concurrences; the appeal involves no factual deference to the trial court; and the losing party pays the attorney's fees. More importantly, the Mexican picture calls for a systematically integrated procedural code, a series of loosely connected oral and written proceedings which gradually define the issues, and a decision maker in charge of moving the process forward.

VI. THE COMPARATIVE PERSPECTIVE

The assertion that the Mexican civil law approach to procedure is superior to the common law approach is as incorrect and pointless as its opposite. Claims of this sort are usually associated with an attitude of tribalism that precludes any possibility of an enlightened conversation about legal divergence. My main aim has been simply to show that Mexico has a distinct and valuable picture of civil procedure, partly because of its civil law heritage. It is unfortunate that the debate on dispute resolution in the North American Free Trade Agreement, particularly in the area of anti-dumping and countervailing duties, did not appreciate Mexico's different procedural picture. By openly drawing on the different national pictures, the Agreement's framers would have been able to design a richer international procedure.

Even when they have incorporated more than one nation's procedural mechanisms into the new international procedure, international jurists have typically failed to face the fact that the real challenge is to generate not just a novel but a coherent picture of procedure. If they limit themselves to technically connecting procedural devices that are narrowly consistent with each other or randomly incorporating procedures from the various legal systems involved, they risk ending up with a tossed salad of discrete procedural mechanisms that do not mesh conceptually.²²⁵ These mechanisms might be capable of coexisting without directly undermining each other; yet, they will not reinforce each other. They will not form a coherent picture of procedure.

wrong. He may mean, however, that the parties must initiate the action and keep it alive. I will actually agree with this assertion in my discussion of the dispositive principle in § VII. This position does not exclude the possibility of imposing on the judge the duty to direct the action that the parties initiate and maintain.

225. I am indebted to Detlef Leenen for pressing upon me the reality of this danger.

If international jurists understood and valued each procedural picture on its own terms, however, they would probably be less inclined to patch together, mindlessly, a selection of diverse elements from the various pictures. They might instead fully realize the intricate way in which the multiple aspects of the various pictures hang together. They would be more aware that the diverse features of the new procedural picture must be similarly well-knit. They would ultimately aim at a procedural picture with aesthetic value in the sense of "unity in diversity" or "organic unity".²²⁶ They would seek, in the words of Robert Nozick, "to integrate great diversity of material into a tight unity, often in vivid and striking ways."²²⁷ They would cease to be plumbers and become architects of procedure.

The comparative approach thus leads to the creation of a diverse but unified new international procedural picture.²²⁸ The comparative standpoint would have enabled the framers of the panel procedure to draw on the Mexican as well as the Canadian and U.S. procedural pictures in bringing to life a new international procedural picture. By the same token, the comparative perspective might make it possible at this point to transform the current international procedural system by coherently incorporating some features of the Mexican procedural picture. The reformed procedure might not only resolve disputes in a more effective manner, but also, by virtue of its versatility, blend better with the very different national procedural systems with which it interacts.²²⁹ In this section, I will sketch a few ideas on how to

226. ROBERT NOZICK, *THE EXAMINED LIFE* 163 (1989).

227. *Id.*

228. The construction of a new international procedural picture along these lines is not exactly like the formation of novel national procedural picture. Inasmuch as the national and the international contexts differ, their corresponding procedural pictures will also diverge. It is nonetheless important to keep in mind that the process of generating a national procedural picture and that of creating an international picture give rise to similar general questions.

229. See Angel R. Oquendo, *NAFTA's Procedural Narrow-Mindedness: The Panel Review of Antidumping and Countervailing Duty Determinations Under Chapter Nineteen*, 11 *CONN. J. INT'L L.* 61, 65 (1995) (Chapter 19 imposes on the Mexican legal system a procedural superstructure based on an alien legal tradition.) See also Koteen, *supra* note 28, at 841. ("The procedural rules for binational panels and extraordinary challenge committees under Article 1904 should work well, as they were negotiated based upon recently amended U.S.-Canada rules of procedure. Nevertheless, there is less assurance that the system will function smoothly with the introduction of Mexico's civil law system than with the similar common law systems of the United States and Canada."); Homer E. Moyer, Jr., *Chapter 19 of the NAFTA: Binational Panels as the Trade Courts of Last Resort*, 27 *INT'L LAW* 707, 714 (1993) ("In the case of the NAFTA panels involving Mexico, panelists will be required to bridge even wider cultural and legal gaps. Unlike both Canada and the United States, Mexico is a civil law country, not a common law country. In addition, Mexico does not have the trade law history and experience of either the United States or Canada. Language differences will present new challenges generally not encoun-

enrich the existing international procedural scheme from the comparative perspective.

Some of the changes contemplated will require a modification of the written parameters of the procedure, i.e., Article 1904 or the Rules of Procedure.²³⁰ Others will simply call for a transformation in the approach to and the implementation of those parameters. In fact, one noteworthy addition to the Panel Rules when they were incorporated into the North American Free Trade Agreement is that a panel "may refer for guidance to Rules of procedure of a court that would otherwise have had jurisdiction in the importing country" whenever "a procedural question arises that is not covered by [the Panel Rules]".²³¹ Thus, a panel reviewing a Mexican determination is explicitly authorized to invoke Mexican procedures in resolving unsettled procedural questions. Of course, a panel may generally rely on Mexican principles in any case when dealing with procedural questions that it cannot answer by referring to the Panel Rules.²³²

The comparative reform effort should not underestimate the difficulty of introducing changes that require no amendment of the Rules. After all, such modifications call upon the panelists to alter their conditioned reflexes in a given procedural situation.

tered in CFTA proceedings. In these respects NAFTA panels will face new complications."); Andreas F. Lowenfeld, *Binational Dispute Settlement under Chapter 19 of the Canada-United States Free Trade Agreement: An Interim Appraisal*, 24 N.Y.U. J. INT'L L. & POL. 269, 338 (1991) ("[T]he procedural solution to a previously intractable problem of substance was possible only because of a similar legal/administrative tradition, so that the panel review procedure could be designed as a surrogate for a familiar institution of judicial review of administrative action. Without such a tradition, and without a detailed statutory framework in Mexico, caution seems in order before assuming that the Canada-United States experience can readily be adapted to a trade relationship among the three countries.").

230. Stacy J. Ettinger believes that making amendments to the rules should not be too difficult. "The NAFTA rules of procedure and regulations," she explains, "are intended to provide for the smooth functioning of the NAFTA dispute resolution mechanisms. As issues arise that are not adequately addressed under these rules and regulations, the Parties may meet to review and renegotiate as appropriate." Stacy J. Ettinger, *NAFTA Chapter Nineteen: Rules of Procedure and Regulations*, 863 PLI/CORP 809 (1994): The rules were actually amended shortly before the transition from the Canada-United States to the North American Free Trade Agreement. Yet, because of the controversy surrounding the panel review process in general, getting the parties to agree on substantial changes to the rules may turn out to be very complicated. The government of Mexico might have a particularly hard time persuading its trading partners to Mexicanize the panel review system.

231. 1904 PR 2.

232. Rule 2 declares: "Where a procedural question arises that is not covered by these rules, a panel may adopt the procedure to be followed in the particular case before it by analogy to these rules." 1904 PR 2. The permissive language here suggests that when there is no direct answer and only an answer by analogy, the panel also has the option of disregarding the analogy and proceeding as it sees fit.

Most panelists will have a common law background and will be hard-pressed to embrace a civil law point of view. Because of the procedural system's common law bias, even panelists brought in by Mexico will either have had common law training or significant exposure to the common law system.

The comparative reformation would unfold more sensibly if it constructed first the novel picture's more basic features and then, gradually, other elements. In this way, the former would give the picture a particular form and the latter would simply have to fit in. This section's discussion will proceed accordingly, moving from the more central to the more peripheral procedural aspects examined in the previous two sections. I will derive my recommendations on the first of the main aspects, i.e., the conception of the nature and role of written procedural precepts, from the very notion of the comparative perspective. I will base my proposals on the two other pivotal issues, the procedural structure and the decision maker's role, on a close examination of the particular controversy with which the 1904 procedural system has to deal. Only after analyzing these fundamental procedural matters will I make suggestions on the other procedural items.

The comparative perspective is obviously more amenable to the civil law view of the nature and role of written precepts. Inasmuch as the it seeks to forge a new picture, the comparative project will tend to regard those precepts as outlining such a picture. It will lean toward the civil law tradition in demanding the enactment and application of procedural precepts not as an aggregate set of rules but as a coherent whole. The choice between referring to those standards as "rules" or as a "code" is in itself immaterial. What is essential is the interconnection and inner logic of the underlying principles. In originating and interpreting any of these norms, international jurists should refer not only to other norms but also to the larger meaning expressed by the totality of norms.

The comparatively transformed international procedure should nevertheless shun the overtones of the civil law tradition. Civil law jurists often regard the procedural code as representing an abstract system from which adjudicators simply derive particular applications. This reading precludes a pragmatic approach to concrete questions. The ideal solution would be to see the procedural code as expressing not a scientific system but a procedural picture. The particular applications would not be automatic nor exclude practical judgment. Decision makers would have to construct creatively the written precepts on the basis of the underlying picture. The picture only provides a framework to deal

with the specific procedural questions that arise. The picture, moreover, is not fixed; it evolves with every new interpretation.

In order to continue developing an eclectic but reasonable international procedural picture, it is crucial to understand the context in which that procedure must operate. In other words, international actors must study the kind of dispute that the decision maker has to resolve. Only then will it be possible to work some existing procedural concepts and some new ones into a new procedural picture, capable of settling those disputes adequately. The particular controversy that the panel must resolve is that between, on the one hand, the importing country and the domestic producers and, on the other hand, the exporting country and the foreign exporters. The importing country, usually goaded by the domestic producers, starts an antidumping or countervailing duty proceeding against the exporters at the administrative level. Once the investigating authority issues its final determination, either the exporting country, at the insistence of the foreign exporters, or the importing country, at the suggestion of the domestic producers, requests a panel review.

The controversy turns on the highly technical question of whether the exporters are dumping merchandise or benefiting from an illegitimate subsidy.²³³ In dumping cases, the investigating authority must determine what is a comparable merchandise in the exporting country or, under some circumstances, in a third country.²³⁴ It is also key to decide whether, and if so to what extent, there is a price difference between the exported merchandise and the comparable merchandise, making "all of the necessary price adjustments to reflect differences in selling expenses, transportation costs, excise taxes, customs duties, and the like. . . ." ²³⁵ In subsidy cases, the investigating authority must establish whether there has been any kind of "support, stimulus, incentive, premium, bounty, grant, or benefit, bestowed directly or indirectly, by a government upon its domestic citizenry, including producers, resellers, or exporters of merchandise," and whether such benefits are granted "contingent, in law or in fact . . . , upon export performance. . . or export earnings," or bestowed not generally but on a specific class of beneficiaries.²³⁶ The international panel must determine whether the administra-

233. See GATT art. VI ¶¶ 1 & 3.

234. See GATT art. VI ¶ 1.

235. Craig R. Giesze, *Mexico's New Antidumping and Countervailing Duty System: Policy and Legal Implications, As Well As Practical Business Risks and Realities, for United States Exporters to Mexico in the Era of the North American Free Trade Agreement*, 25 ST. MARY'S L.J. 885, 899 (1994)(footnote omitted); See GATT art. VI ¶ 2.

236. *Id.* at 908.

tive agency dealt with all these issues appropriately in light of the specific principles set forth in the importing country's trade laws.²³⁷ As already noted, the panel has to employ the same standard of review as the tribunal that would normally review the determination.

In view of the complexity of the issues involved,²³⁸ the comparative approach would suggest following the civil law model in order to make the procedure less concentrated and structurally rigid. The most obvious way of achieving this objective would be to abolish the hub-and-spoke construction that the Agreement and the Rules establish for the panel review scheme. Under this arrangement, the oral argument is at the hub and the other procedural devices, such as pleadings, hearings on motions, briefs, and pre- and post-hearing conferences, constitute the spokes. The amended Rules would simply provide for a series of writings and hearings through which to define and decide the general case as well as specific issues. Of course, another option would be to work with the existing procedural apparatus. In other words, panelists would treat the other procedural mechanisms as having equal standing with the oral argument. They would regard the prescribed writings and hearings as a series of business documents and meetings through which panelists and attorneys discuss openly the intricacies of the case.

It would be fundamental to prevent any move towards less concentration from leading to redundancy and delay. Even if it succeeded in amending the Agreement and the Rules, the comparative reform would preserve strict deadlines. It would require the panelists to conduct the entire review within the current 315-day time limit.²³⁹ An additional possibility would be, following the German model,²⁴⁰ to urge the panelists to try to settle all the

237. NAFTA, art. 1904 ¶ 2.

238. Burke & Walsh, *supra* note 30, at 534; *see also* Deyling, *supra* note 20, at 358 ("These [antidumping and countervailing duty] determinations are, of course, difficult to make and involve detailed analyses of numerous economic factors, including domestic and foreign production costs, the volume of imports and exports, and the impact of imports on domestic prices."); Giesze, *supra* note 235, at 897. Dumping and government subsidization constitute "a topic so esoteric that only a few individuals are actually familiar with them." (quoting *Dispute Resolution and Unfair Trade Practices: Hearings on the Negotiation of NAFTA: Hearing Transcript, part 8(a), LRC 3, Mexican Senate*, Mexico City, Mex. (Nov. 13, 1992) (statement of Álvaro Baillet Gallardo)). Giesze, in turn, reports that "many commentators generally agree with Dr. Baillet's characterization, considering that the study, analysis, and regulation of dumping and government subsidy practices constitute an arcane and overly complicated subject." Giesze, *supra* note 235, at 897. Giesze nonetheless insists that the rudiments are easy to grasp. *Id.*

239. NAFTA, art. 1904 ¶14.

240. As amended in 1976, the German Code of Civil Procedure reads: "As a rule, the case should be resolved in a single hearing, comprehensively prepared."

issues with only one hearing. But the Rules would have to underscore the option of having more hearings. The panelists would not feel that they had to stage the proceeding so that when it closed the discussion automatically ended. Allowing for the possibility of more than one hearing, each being equal in importance, would loosen the procedural setup and allow the discussion to run its course.

In addition to abandoning the concentrated procedural structure, the comparative project would recommend altering the format of the oral argument and other hearings to allow more of a free exchange between the decision makers and the attorneys. There would be no need to amend the Rules for this purpose. They explicitly empower the panelists to deviate from the default format according to which the complainant argues first, then the investigating authority, and finally the complainant replies.²⁴¹ Even if they adhered to the default format, the comparatively transformed panelists would use their interventions to turn the proceeding into a real discussion on the technical issues involved, as sometimes happens in the U.S. appellate practice. They would interrupt counsel to keep her on the issues,²⁴² to clear up her assertions, to contradict her contentions, to force her to confront her adversary's arguments.

The panelists would thus use their interventions to undertake their own investigation into the matter and not just to clarify, contrast, and choose between the participant's positions. The ultimate goal would be to make the hearing into a business conference, along the lines contemplated in the procedural picture I described in the previous section. In such a meeting, the panelists would be better able to conduct a thorough examination of the numerous business-related issues involved. The panel would allow the participants, through counsel, to provide their input but not to control the public deliberation.

This, to be sure, is no earth-shattering change. In fact, the panelists already take a very active posture in some cases.²⁴³ The

§272 Nr. 1 ZPO. "The simplification amendment of 1976," a leading treatise notes, "imposed on the courts more emphatically the duty finally to dispose of the legal dispute through a comprehensively prepared oral hearing, i.e., the main hearing. . . . The experience with the new law up to now has been that courts actually take advantage of the opportunity to speed up the procedure." ROSENBERG ET AL., *supra* note 192, at § 84, 452.

241. 1904 Panel R. 67(2).

242. "Oral argument," according to rule 67(5), "shall be limited to the issues in dispute." 1904 Panel R. 67(5). Presumably, the panelist may enforce this rule by stopping the argument and insisting on a return to the issues in dispute.

243. See Moyer, *supra* note 39, at 714. ("Five-member binational panels tend to be inquisitive. CFTA panel hearings commonly last several hours or more.") (footnote omitted).

suggestion here is simply to move to a procedural picture in which such engagement by the panel members becomes the norm. The panelists would see themselves as working through a set of complex issues, paying attention to the concerns of the affected parties as voiced by the attorneys. They would *not* conceive of their mission as just choosing between alternative solutions offered by the parties.

The transition to a less concentrated procedural structure and to a flexible, business-conference model of the proceeding would both require and reinforce the emergence of a more engaged decision maker. The procedure would unravel and the hearings would be chaotic without the panel's careful direction. The panelists would therefore have to define the agenda, guide the exchanges, determine when to allow or disallow the attorneys' input, and decide when to close the debate for the day or for good. This general increase in involvement by the panelists, particularly during the oral proceedings, would not require a change in the Agreement or the Rules.

A radical change in the decision maker's constitution, however, would facilitate this transformation of the decision maker's function. The comparatively reformed procedure would accordingly substitute the ad hoc panels with a permanent tribunal.²⁴⁴ Instituting such a permanent court would require doing away with the provisions of the Agreement that control the selection and operation of the panels.²⁴⁵ A permanent tribunal would be much better situated than an ad hoc panel adopt an attitude of procedural engagement, along the lines proposed.²⁴⁶ In addition to their potential common law bias, panelists (as already noted) will seldom have the time or the energy to play a proactive role

244. See Moreno & Ochoa, *supra* note 11, at 713. ("It is possible that the panel system may need to be replaced by permanent courts. One factor that could lead to this is the fact that trained individuals who can act as panelists are increasingly scarce. Also, Mexico's inclusion into the system of panels poses serious problems, namely, the complexities of adding a civil jurisdiction and a third language, which would require specialists that only a permanent tribunal could provide."); Debra P. Steger, *The Dispute Settlement Mechanism of the Canada-U.S. Free Trade Agreement*, in UNDERSTANDING THE FREE TRADE AGREEMENT 49, 50 (Donald M. McRae & Debra P. Steger Eds. 1988) ("[T]he advantage of a permanent court for the resolution of trade disputes is that it provides greater internal consistency."). "The main disadvantage of these courts," according to García Moreno and Hernández Ochoa, "is political. The appointment of judges would give rise to opposition as the appointments are debated in each country." Moreno & Ochoa, *supra* note 11, at 714.

245. This would also mean doing away with the peremptory challenge system, which (as already noted) is taken from the common law tradition.

246. This opens up the question of the manner in which judges on such a permanent court would be selected to guarantee independence, competence, and fairness. The comparative and the critical perspectives would undoubtedly help in addressing this question.

in the procedure as a whole. A permanent court, in contrast, would be able to develop a strategy of procedural management over a series of cases and would have the additional incentive of knowing that it may apply the already formed strategy to many cases into the future. It would probably enjoy more prestige and develop more judicial expertise than the ad hoc panels and would incidentally eliminate the conflict-of-interest problem associated with a system in which the panelists in one case may be attorneys in another.²⁴⁷ The comparatively amended Rules would assign cases to a panel of judges rather than to a single judge in order to preserve the dialogic advantage of multiple decision makers, which commentators have pointed out in the context of the existing system.²⁴⁸

The final goal would be to shift the ultimate responsibility for process direction from the participants to the tribunal. The tribunal would thus be in a position not only to keep the process going but also to give the process the direction it considers most appropriate. In light of the complexity of the issues involved, the diversity of the interests presented, and the power imbalance between the participants, not only must the procedure shed its structural rigidity but also the decision maker must be able, procedurally, to stay on top of the case. Antidumping and countervailing duty cases are not unlike those cases in which U.S. procedure has tended to flow towards the counterpictures of ad hoc pre-trial litigation and the "managerial judge".²⁴⁹

Upon thus transforming basic procedural elements such as the conception of the rules, the procedure's structure, and the adjudicator's role, the comparative approach would proceed to alter other features of the Article 1904 review scheme. After

247. See Deyling, *supra* note 20, at 356. ("While panelists are carefully selected based on their knowledge of trade law, objectivity, and judgment, they serve on an ad hoc basis and do not enjoy the usual protections associated with judicial independence."); Burke & Walsh, *supra* note 30, at 562. ("International trade attorneys appearing before the agency as counsel for private parties and also serving as panelists in other simultaneous cases represent an inherent opportunity for bias.").

248. Burke & Walsh have claimed that: "It may be that some benefit is derived from the fact that issues are reviewed, in the first instance, by a panel rather than by a single individual." Burke & Walsh, *supra* note 30, at 533. See also Moyer, *supra* note 39, at 714. ("Like arguments before panels of three or more judges, the dynamics of hearings before five-member panels frequently differ from single-judge hearings. Five-member binational panels tend to be inquisitive. CFTA panel hearings commonly last several hours or more. Presumably the deliberative and decision-making process of panels likewise reflects both the advantages and complications of adjudicating as a panel.") (footnote omitted). As already cited, Andreas F. Lowenfeld has pointed out that "it seems that the collective decision-making of the panels results in less variation from one panel to another than, for instance, from one judge to another in the Court of International Trade." Lowenfeld, *supra* note 229.

249. Resnik, *supra* note 140, at 378.

thus sketching the contours of the new procedural picture, the comparative reform would deal with other aspects on the basis of that sketch. With the institution of a permanent court, for instance, the panel selection method, including the peremptory challenges, would become superfluous. The comparative effort would call for an elimination of the language on that method in the Agreement.²⁵⁰ Secondly, the pleadings would not have to distill from the case a set of issues that the decision makers can handle in a single proceeding. Within the procedural picture, the pleadings would play an equal part in the procedure, along with and not subservient to the oral argument. The pleadings would serve, together with the other procedural mechanisms, to define the issues as the process unfolds. There would be no need to amend the written parameters to this end.

A decrease in accountability should not, however, accompany the increase in the responsibilities and powers of the decision maker. It would therefore be a mistake to shift to the civil law approach to opinion writing. Opinions would have to be detailed and well-reasoned, in accordance with the common law tradition. The court would also have the common law power to establish precedent. The panels currently do not have this authority though they frequently refer to previous panel opinions.²⁵¹ Furthermore, the Rules would continue to encourage concurring or dissenting judges to expound their views in writing. The judicial debate would take place out in the open. A procedural picture that invests the decision makers with extensive procedural power should require them to disclose their reasons. The inner logic of the new procedural picture would thus insist on the preservation of the existing practice with respect to opinions. It is worth noting that observers of the panel review procedure

250. NAFTA, annex 1901.2 ¶ 2.

251. See Burke & Walsh, *supra* note 30, at 545-46. (“[P]anels do cite to previous panel decisions. While such decisions do not have the effect of precedent, panel members may view previous panel decisions as persuasive on a particular matter.”); Moyer, *supra* note 39. (“[P]anel decisions have tended to be substantively consistent with one another. Notwithstanding the fact that the composition of panels differs from case to case, results before Chapter 19 panels have not tended to be either erratic or contradictory. Consistency among panel decisions has undoubtedly been enhanced by the inclination of panels to cite to earlier panel decisions that they have found to be particularly persuasive in their analysis or discussion of applicable law. . . . As the case law from CFTA and the NAFTA panels accumulates, it may thus become an important resource for domestic courts presented with similar issues. Although panel decisions are not binding precedents, the Parties have long understood that domestic courts might draw on them.”). Lowenfeld observes that “it seems that the collective decision-making of the panels results in less variation from one panel to another than, for instance, from one judge to another in the Court of International Trade.” Lowenfeld, *supra* note 229.

have not only praised the panelists generally, but specifically the opinions the panelists have produced.²⁵²

On the fourth issue, i.e., the conception of the appeal, the comparative approach would recommend the incorporation of the civil law method. The court would review final determinations de novo. Since the judges would be experts and most of the evidence would be documental, there would be little justification for deferring to the investigating authority. Further, the court would better fulfill its mission, which is to curb the use of antidumping and countervailing duties as trade barriers, if it were able to arrive at its own, independent assessment of the evidence. The present system allows the investigating authority to impose unjustified duties as long as there is no abuse of discretion. The proposed change would depend on an amendment to the Agreement in order to provide for de novo review of final determinations, irrespective of what the standard of review of the domestic courts.

252. Burke & Walsh, for instance, contend that: "A review of the decisions issued by the panels makes it apparent that, in most cases, the panels have conscientiously attempted to address all of the issues placed before them. The decisions issued by the panels are often voluminous and often contain thorough discussions of the legal issues which have been presented to the panel. It may be that some benefit is derived from the fact that issues are reviewed, in the first instance, by a panel rather than by a single individual. It may also be that the practice experience of the panel members and their interest in the area of international trade law serves panel members well. Several commentators have noted the high quality of panel decisions." Burke & Walsh, *supra* note 30, at 533. (citing Judith H. Bello et al., *U.S. Trade Law and Policy Series No. 18: Midterm Report on Binational Dispute Settlement Under the United States-Canada Free-Trade Agreements*, 25 INT'L LAWYER 489, 516 (1991); Lowenfield, *supra* note 229; Moyer, *supra* note 45, at 722. ("CFTA Chapter 19 panels, on the whole, have demonstrated a high degree of conscientiousness and professionalism. Counsel appearing before Chapter 19 panels routinely face panelists who are exceptionally well prepared. Panel decisions frequently include detailed analyses of the relevant law of the importing Party and careful discussions of the facts. Opinions typically reflect a diligent effort on the part of the panelists to apply the law fairly and correctly. Indeed, some of the most thoughtful discussions of difficult issues to appear anywhere—for example, specificity—are found in opinions of CFTA binational panels.") (footnote omitted) ("CFTA Chapter 19 panels have, on the whole, performed impressively. Panel members have exhibited high levels of preparedness, expertise, and conscientiousness. The quality of panel opinions has also generally been high. And panels have demonstrated an ability to avoid resolving contentious issues along national lines. These accomplishments reflect well on both the panelists and those who administer the panel process."); Greenberg, *Chapter 19 of the U.S.-Canada Free Trade Agreement and the North American Free Trade Agreement: Implications for the Court of International Trade*, 25 LAW & POL'Y INT'L BUS. 37, 42 (1993) ("panelists approach their task seriously, cautiously, and with a respect for the pronouncements of the courts"); Lowenfield, *supra* note 229. ("In both [Chapter 18 and 19] procedures, the panelists have been thoughtful; their opinions have been thorough and articulate, and their conclusions on the whole persuasive.").

This modification might seem too controversial inasmuch as a key compromise during the Article 1904 negotiations was that the panels would apply the same substantive law, including standard of review, as the replaced domestic courts. In fact, an oft-heard criticism of the panels is that in some cases they allegedly fail to adhere faithfully to the domestic standards of review, particularly that of the United States. Critics have contended that, because of their different legal background, Canadian and especially Mexican panelists do not and cannot apply the U.S. standard of review as a United States judge would.²⁵³ To the extent that they believe that jurists are incapable of administering correctly a foreign standard of review, however, these objectors should welcome, not resist, an attempt to do away with the variable standard. They ought to support the adoption of a uniform *de novo* standard of review. Decision makers experienced in different legal systems would have to decide cases as a matter of first impression and their divergent views on the appropriate level of appellate scrutiny would play no role. Furthermore, the comparative reform could classify the new standard of review as "procedure" so as to preserve the claim that the international decision maker applied the same substantive law as the domestic courts.²⁵⁴

On a separate but related issue, the comparative project would suggest modifying the Rules to permit the decision maker to follow the Mexican model of appellate review and consider additional evidence under certain circumstances. Under the existing procedure, if the panel determines that more evidence is necessary, it has to remand the case so that the investigating authority may admit the new evidence and reconsider the original determination.²⁵⁵ This process is cumbersome and therefore inconsistent with the procedure's central aspiration to reasonable

253. Deyling, for instance, argues that the U.S. legal principles, including the standard of review, "may be especially difficult for foreign panelists to apply. At least two members of every panel are either Canadian or Mexican, and there is no guarantee that they will understand United States trade law. Particularly with respect to Mexico, contrasts between the civil-law and common-law approaches to cases may complicate a panel's mission to be a mirror image of the [Court of International Trade] in a particular case." Deyling, *supra* note 20, at 356.

254. The statement that "a panel must operate precisely as would the court it replaces" has to be limited to substantive issues. 139 *Cong. Rec.* S16,105 (daily ed. Nov. 18, 1993)(statement of Sen. Moynihan). If panels were really expected to function procedurally as domestic courts it would make no sense to define a special procedure for the panels in the Agreement and in the accompanying rules. Of course, the whole substance/procedure dichotomy "is more problematic" than usually assumed. Cover, O. Fiss, & J. Resnick, *Procedure* 177 (1988).

255. The rules do not provide for the consideration of additional evidence. The panel has to remand pursuant to NAFTA art. 1904 ¶ 8 so that the investigating authority may consider further evidence.

speed. Moreover, in these cases much of the evidence is documental and the decision maker may consider it without much procedural complication. An expert tribunal could examine even non-documental evidence relatively efficiently in a flexible hearing, in the tradition of the civil law.

All these factors militate in favor of amending the procedural guidelines more broadly to grant the decision maker the prerogative of reversing and entering a new determination in all cases. Some analysts have criticized as unnecessarily dilatory the requirement that the panel remand all cases in which it disagrees with the investigating authority.²⁵⁶ The comparatively transformed procedure should grant the decision maker the option of, on the one hand, fashioning a new determination based on its own understanding of the law and facts or, on the other hand, remanding the case to the investigating authority whenever deemed appropriate. This type of setup would strike a reasonable balance between the civil law and the common law styles.

Finally, the new procedure would stay clear of the civil law tradition's approach to litigation costs. Potential complainants with a genuine claim would be less inclined, especially if they had limited funds, to request review because they would know that they would have to pay their opponent's expenses if the decision maker did not agree with them. To prevent frivolous suits it would suffice to have a rule imposing the costs on the party filing such a suit. From the comparative perspective, it therefore makes sense to keep Rule 32 providing that each party shall pay its own participation costs.²⁵⁷

VII. THE CRITICAL PERSPECTIVE

The comparative perspective thus yields numerous insights on how to create a new international procedural picture as well as how to change an existing one. The comparative approach consists of studying various existing procedural pictures and then coherently working select elements from those pictures into a new procedural picture adapted to the particular international context involved. This approach, on the one hand, focuses on

256. See, e.g., Moyer, *supra* note 39, at 12 ("Delays in finally resolving Chapter 19 cases have resulted not so much from panels failing to meet prescribed deadlines, but from the remand process."). "Delays through one or more remands," Moyer explains, "may be traceable in part to the fact that article 1904 empowers panels only 'to uphold a final determination, or remand it for action not inconsistent with the panel's decision.' This formulation stops short of expressly authorizing panels to reverse agency determinations, even where a panel finds an agency's action clearly to be legally erroneous or unsupported by substantial record evidence." *Id.* at 13 (footnote omitted).

257. 1904 Panel R. 32.

those features with respect to which the contemplated pictures diverge, carefully selecting whatever is most appropriate for the given context and rationally integrating the diverse elements into a new picture. On the other hand, the comparatively transformed procedure just takes over the features shared by the existing pictures, either as they are or adjusted to the relevant international circumstances.

The critical perspective, in contrast, calls into question those elements that the reference pictures have in common. The main targets usually are the more fundamental levels of procedure. The critical approach typically operates within that common procedural structure which defines a picture's inner logic, interprets the context, and organizes the various procedural elements. An approach that limited itself to the more superficial levels of procedure would hardly deserve the name "critical". The critical enterprise identifies reference pictures' shared assumptions and challenges their validity. It proposes alternative premises and thus ends up imagining a radically different procedure.

It is crucial to resist the temptation to say simply that the critical perspective focuses on the foundation while the comparative perspective deals with the details of procedural pictures. For one, there are no definite criteria to demarcate those aspects of a procedural picture that are part of its foundation from those that constitute mere details. More importantly, the comparative perspective becomes interesting on matters of substance as well as procedure to the extent that it goes beyond details.²⁵⁸ The assertion that the critical perspective focuses on a procedural picture's more abstract or fundamental aspects, hence, does not establish an exclusive domain for that perspective.

The best way to understand the critical approach is by visualizing how it would unfold in a concrete scenario, such as the one at the heart of this article. I will first challenge critically the premise that the sole end of procedure generally, and of international procedure specifically, is to resolve individual disputes. I will propose that international procedure strives, more significantly, to reconfigure international spaces, that is, to transform the manner in which international actors interact. Thereafter, I will critically examine the idea that procedure's exclusive aim is to advance particular ends. I will advance a reflexive conception,

258. For instance, Mary Anne Glendon's comparative work on divorce and abortion law in Western Europe and the United States is illuminating precisely because she explains the divergence in foundational terms. She tries to show that these two legal systems come apart in their underlying philosophical conception of human rights. A comparative approach to international human rights would be especially enlightening if it offered guidance on how to choose among these alternative paradigms or on how to move to a diverse but unified international paradigm.

according to which procedure also pays attention to the relations promoted internally among procedural actors.

The critique starts with one of the central premises shared by both the common law and civil law procedural pictures, i.e., the notion that the end of procedure is to resolve disputes.²⁵⁹ Both the common law and civil law legal systems organize procedure around the "dispute-resolution model".²⁶⁰ In this model, procedure seeks to settle individual controversies between the parties following a given set of substantive legal principles.²⁶¹ Procedural institutions must accordingly facilitate the resolution of these (prototypically individual) disputes.²⁶² The common law

259. The civil law tradition has been thought to offer in itself an alternative to the dispute resolution model. Because that tradition offers a procedure that is less adversarial, where the decision maker is more involved, one might be tempted to assert that procedure in the civil law tradition is more in tune with the structural reform and the international reconfiguration paradigms, both discussed *infra*. Yet, such a statement about the civil law tradition would be based more on a romantic illusion than on a realistic understanding. The civil law tradition, procedurally, is just as obsessed with dispute resolution as its common law counterpart, if not more. The civil law tradition, as it has developed since the advent of modernity, sets private law, that is the dispute between individuals, at its very center. The civil code is supposed to be the model for all other areas of law; hence the denomination the "civil law" tradition. And the ideology of that civil code is the freedom of the individual; individuals freely choose (by contract) the obligations that bind them and the legal system merely enforces the duties previously recognized. Within this paradigm, the aim of procedure is to settle disputes between individuals. "The ultimate end of procedure," Mexican proceduralist Carlos Arellano García declares unequivocally, "is the solution of the controversy or controversies submitted." García, *supra* note 197, at 13. See also JOSÉ BECERRA BAUTISTA, *EL PROCESO CIVIL EN MÉXICO* 1 (1986) ("The normal end of procedure is to obtain a binding sentence that resolves a controversy among the parties regarding substantive rights.") What the civil law tradition does offer is ideas that, transformed, may advance ends other than dispute resolution. Its conception of procedural structure and of the role of the decision maker are examples. But the common law can fulfill this function as well. The common law categories such as the class action or the injunction may also help in the move away from the dispute resolution model.

260. Fiss, *The Forms of Justice*, *supra* note 142, at 17. See also Owen M. Fiss, *The Social and Political Foundations of Adjudication*, in *PROCEDURE* 219, 220 (R.M. Cover, O.M. Fiss, & J. Resnick eds. (1988) [hereinafter Fiss, *Social and Political Foundations*]; Chayes, *Public Law Litigation*, *supra* note 136, at 4.) ("In the classical model, litigation is viewed as a mode of dispute settlement."); Chayes, *Role of the Judge*, *supra* note 131, at 1282. ("In our received tradition, the lawsuit is a vehicle for settling disputes between private parties about private rights.").

261. Fiss observes that "the dispute-resolution model. . . is triadic and highly individualistic: a lawsuit is visualized—with the help of the icon of justice holding the scales of justice—as a conflict between two individuals, one called plaintiff and the other defendant, with a third standing between the two parties, as a passive umpire, to observe and decide who is right, who is wrong, and to declare that the right be done." Fiss, *The Forms of Justice*, *supra* note 142, at 17.

262. "The [dispute-resolution model's] world is composed exclusively of individuals. . . . The party structure of the dispute resolution lawsuit reflects this individualistic bias: one neighbor is pitted against another while the judge stands between them as a passive umpire." Fiss, *The Social and Political Foundations*; See also Chayes, *supra* note 260, at 221.

and the Mexican civil law procedural pictures, though thoroughly at odds with each other in many respects, converge on the same ultimate goal: the settlement of individual disputes. The common law approach structures procedure around a rather formal proceeding, relies on a long pleading and discovery stage to prepare that hearing, assigns the parties an active role relative to the judge, and allows only a limited appeal. Mexican civil law procedure turns on a series of flexible hearings, provides for only a minimal and not clearly demarcated pleading and discovery phase, requires much more procedural engagement from judges than from the parties, and permits a somewhat broader appeal. Yet, both procedural pictures assume that their aim is to resolve determinate controversies. Each relies on a very idiosyncratic set of procedural devices to realize that objective.

Owen M. Fiss submits that modern law has given rise to a new kind of litigation, which does not fit the dispute resolution model well.²⁶³ This development is associated with historical emergence of the welfare state in western industrial societies.²⁶⁴ The cases Fiss has in mind normally involve the massive institutions generated by the welfare state.²⁶⁵ The goal of procedure then becomes to make possible the reformation of these institutions.²⁶⁶ Oftentimes plaintiffs represent larger societal interests

263. According to Fiss, "Adjudication is the social process by which judges give meaning to our public values." Fiss, *supra* note 142, at 2. See also Fiss, *supra* note 260, at 219 Fiss maintains that "within recent decades a new form of constitutional adjudication has emerged." *Id.* See also Chayes, *supra* note 131, at 1282. ("We are witnessing the emergence of a new model of civil litigation and, I believe, our traditional conception of adjudication and the assumptions upon which it is based provide an increasingly unhelpful, indeed misleading framework for assessing either the workability or the legitimacy of the roles of judge and court within this model.")

264. "Twentieth century America, particularly in the decades following the New Deal and World War II, has seen the emergence of a different kind of state altogether; the state has become an active participant in our social life, supplying essential services and otherwise structuring the very terms of our existence. . . . The emergence and legitimation of the activist state in the 1960s parallels the emergence and legitimation of this new form of litigation that I have called structural reform." Fiss, *supra* note 260, at 226. See also Chayes, *supra* note 131, at 1284.

265. The litigation is about the "reconstruction of a prison, . . . a school system, a welfare agency, a hospital, or any bureaucracy." Fiss, *supra* note 142, at 41. "School desegregation, employment discrimination, and prisoners' or inmates' rights cases," Abram Chayes explains, "come readily to mind as avatars of this new form of litigation." Chayes, *supra* note 131, at 1284. Chayes warns that "it would be a mistake to suppose that it is confined to these areas. Antitrust, securities fraud and other aspects of the conduct of corporate business, bankruptcy and reorganizations, union governance, consumer fraud, housing discrimination, electoral reapportionment, environmental management—cases in all these fields display in varying degrees the features of public law litigation." *Id.*

266. "This new form of adjudication is largely defined by two characteristics. The first is the awareness that the basic threat to our constitutional values is posed not by individuals, but by the operations of large-scale organizations, the bureaucracies of the modern state. Secondly, this new mode of litigation reflects the realiza-

and defendants are the institutions.²⁶⁷ Plaintiffs seek not the settlement of a specific controversy they have with the defendant, but rather a transformation of the defendant.²⁶⁸ For instance, a group of inmates in a maximum security prison may charge that the conditions of their incarceration are inhuman.²⁶⁹ The court's objective is not simply to decide whether the defendant committed a wrong against the plaintiffs calling for compensation under the existing law.²⁷⁰ Instead, the question is whether the way in which the challenged institution operates violates basic human rights and, if so, how to change that mode of operation so that those rights will be protected.²⁷¹ Fiss calls this alternative paradigm the "structural reform" model.²⁷²

When the end of procedure is to process the resolution of disputes, procedural institutions function intermittently or sporadically.²⁷³ They come in only occasionally, when a dispute

tion that, unless the organizations that threaten these values are restructured, these threats to constitutional values cannot and will not be eliminated." Fiss, *supra* note 260, at 219.

267. "In structural reform, the unity implicit in the concept of party disintegrates. . . and the exclusively individualistic perspective shifts to one that includes social groups and institutional advocates." Fiss, *supra* note 142, at 19. See also Fiss, *supra* note 260, at 221. "The class suit," which reflects to the new procedural model, "is a reflection of our growing awareness that a host of important public and private interactions—perhaps the most important in defining the conditions and opportunities of life for most people—are conducted on a routine or bureaucratized basis and can no longer be visualized as bilateral transactions between private individuals. From another angle, the class action responds to the proliferation of more or less well-organized groups in our society and the tendency to perceive interests as group interests. . . ." Chayes, *supra* note 131, at 1282.

268. "The structural suit is one in which a judge, confronting a state bureaucracy over values of constitutional dimension, undertakes to restructure the organization to eliminate a threat to those values posed by the present institutional arrangements." Fiss, *supra* note 142, at 2. "The remedial task requires the restructuring of the organization, a complex and difficult task wholly alien to the dispute resolution model." Fiss, *supra* note 260, at 221.

269. See *e.g.*, *Holt v. Sarver*, 309 F.Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F. 2d 304 (8th Cir. 1971) (cited in Fiss, *supra* note 142, at 41).

270. "Looking at the matter from the defendant side, it should also be noted that structural reform involves a shift away from the concept of a wrongdoer, understood in any individualistic sense; the function of the lawsuit is not to punish or judge the conduct of some individuals, but to eliminate threats to constitutional values." Fiss, *supra* note 260, at 221.

271. "The court is thus able to think in wholly prospective terms and to place the burden of the remedy on an institution that could not rightly be considered a "wrongdoer," even in a metaphoric sense, but is the one most capable of safeguarding the values in question." *Id.* at 221.

272. Fiss, *supra* note 142, at 2. See also Fiss, *supra* note 260, at 219. Abram Chayes terms "the emerging model 'public law litigation.'" Chayes, *supra* note 128, at 1284. See also Chayes, *supra* note 139, at 4.

273. "The focus in the dispute-resolution model is the incident, the transaction or occurrence, and the remedial phase is largely episodic." Fiss, *supra* note 142, at 27.

arises.²⁷⁴ When there is no dispute or the court has decided the case, individuals are on their own; procedure retreats.²⁷⁵ If the goal of procedure is to process structural reform, however, procedural institutions are constantly on call. They get involved in cases for indefinite periods of time.²⁷⁶ The determination of whether and how reform should take place requires long and intense procedural engagement. The implementation of reform is usually even more demanding on the procedural institutions.²⁷⁷ These institutions have to provide for periodic review and revision of the course of the reform.²⁷⁸

This structural reform model is part of what I have referred to as a counter picture of procedure. It focuses on a manner of conducting and thinking of procedure that is at odds with the ordinary manner. It may eventually transform or replace certain elements of the dominant procedural picture. Fiss's contention is that this alteration or substitution has already started to take place, particularly in the United States.²⁷⁹ Indeed, a counter picture may only challenge and ultimately replace an existing picture in which it already has roots. Otherwise, its alien nature would render it both unappealing and inaccessible to actors trained in the predominant picture. This means that the actual conception and practice of procedure must contain features that contravene the prevailing picture and that point to the counterpicture. The formulation of the counterpicture may bring further changes to the conception and practice of procedure up

274. "As suggested by the concept of a 'dispute' itself, the story assumes that the subject of adjudication is an abnormal event that disrupts an otherwise satisfactory world. It also suggests that the function of adjudication is to restore the status quo." Fiss, *supra* note 260, at 222.

275. "The goal of dispute resolution is to set things back to normal; the remedy is short and discreet since it simply undertakes to reestablish the world which existed before the dispute." Fiss, *id.* at 219.

276. Fiss argues that "the goal of this new mode of litigation is to create a *new* status quo, one that will be more nearly in accord with our constitutional ideals. The restructuring of a prison or school system cannot be understood as an attempt to return to a world that existed prior to some dispute; it represents an attempt to construct a new social reality. the remedy may have to last almost as long as the social reality it attempts to create." *Id.* at 222-23.

277. "The remedial phase in structural litigation. . . involves a long, continuous relationship between the judge and the institution; it is concerned not with the enforcement of a remedy already given, but with the giving and shaping of the remedy itself." Fiss, *supra* note 142, at 27.

278. "Once an ongoing remedial regime is established, the same procedure may be repeated in connection with the implementation and enforcement of the decree. Compliance problems may be brought to the court for resolution and, if necessary, further mediation." Chayes, *supra* note 131, at 1301.

279. Fiss argues that "within recent decades a new form of constitutional adjudication has emerged. . . , which [he] calls 'structural reform'." Fiss, *supra* note 260, at 219.

to the point at which the counterpicture becomes dominant and supersedes the original picture.

It is no surprise that international legal procedure, under the influence of the dominant national pictures, has embraced dispute resolution as its end. Actually, the procedural dimension of international treaties presents itself, as a matter of course, as a *dispute settlement* procedure.²⁸⁰ International legal procedure has embarked on this procedural route in part following the lead of national procedure but also for reasons of its own. In the international context, there is a very limited legal procedural infrastructure with no reliable enforcement mechanisms. International actors characteristically agree to set up procedural devices for certain cases or kinds of cases. Because the principal international actors, i.e., the states, are extremely wary of diluting their claim to sovereignty in any way, they severely restrict the authority of the ad hoc procedural institutions thus established. Under these circumstances, it is no wonder that these institutions' aim is normally the resolution of sporadic disputes between two parties. Contemplating a more involved or radical purpose appears to be out of the question.

However, reducing the ends of procedure to dispute resolution is even more problematic in the international than in the national context. International legal procedure normally must reconfigure international spaces, not just settle individual controversies. That is, procedure has to intervene in a given international area and alter the premises of interaction among all the actors involved, e.g., states, state agencies or departments, state officials, private associations (such as corporations or unions), individuals, and groups of individuals. International legal procedure must also transform the institutional or behavioral structures of these actors in order to effect a permanent change in the way in which the actors relate to each other. This entire process of reconfiguring an international space inevitably brings about a drastic alteration in the understanding and application of operative norms such as state sovereignty, individual rights, commercial fairness, and transnational justice.

A new international legal procedure usually comes to existence following a shift in the expectations associated with a particular international space. For instance, the prevalent approach to abductions in transnational child custody cases—characterized by uncertainty, arbitrariness, and delay—might give rise to deep frustration and eventually lead to a call for a new procedure in

280. See, e.g., NAFTA, ch. 19 ("Review and Dispute Settlement in Antidumping and Countervailing Duty Matters") & ch. 20 ("Institutional Arrangements and Dispute Settlement Procedures").

order to bring fairness and stability to this international space.²⁸¹ Nation states must ultimately push through the novel international procedure but, more often than not, other actors, such as multinational corporations, unions, consumer groups, environmental associations, human rights activists, or even private individuals, lobby the states to act. In my example, women's groups might take the initiative in pressuring the states. At any rate, it is dissatisfaction with the current configuration of an international space that normally leads to the establishment of international procedure. When the interests in conflict with the mode of procedural interaction in a specific international context reach a critical mass, a new legal procedure is born. The enacted procedure displaces the standard operating procedure. Beyond merely changing the applicable rules, this procedure must transform international conventions and institutions, as well as the actors that operate within them.

A legal procedure bent exclusively on dispute resolution will not be up to the task. It will only allow for a superficial and temporary settlement of legal claims and will be unable to carry out the reconfiguration of international space. The premises of interaction will remain unaltered. In other words, there will be essentially no change in the international context, i.e., the international institutions and conventions, within which international actors interact. International procedure will affect the pertinent actors as an outside, almost arbitrary, force. It will move these international figures not to transform their institutional and behavioral structure but only to build mechanisms either to escape or to cope with the intermittent and externally-focused sanctions.

Even in those cases that seem best to fit the dispute resolution model, the model distorts many cardinal aspects. Cases concerning antidumping duty determinations, for instance, appear to be just narrow disputes between a domestic competitor and a foreign (alleged) dumper. Nevertheless, these cases inevitably have additional layers of complexity. The domestic producer is actually claiming that the inner dynamics of the alleged dumper—usually a foreign corporation or group of corporations—make it possible and beneficial to dump. The specific contention might

281. See Patricia M. Hoff, *Conference de La Haye de droit international prive. Actes et documents de la Quatorzieme session (1980). Book III-Child abduction*, 78 AM. J. INT'L L. 723 (1984) (book review) ("In October 1980, the Hague Conference on Private International Law adopted the Convention on the Civil Aspects of International Child Abduction. . . . Reflecting a worldwide concern about the harmful effects on children of unilateral, nonconsensual disruptions in their custody, the Convention is designed to secure the prompt return of children who have been wrongfully removed to, or retained in, Contracting States, and to facilitate the exercise of visitation rights across international borders.").

be that the alleged dumper has a monopolistic advantage at home that enables it to take the temporary loss associated with dumping. A further argument might be that the alleged dumper's method of production and organization allows it to preserve the unduly gained market advantage even after it stops dumping. A domestic investigating authority imposes an antidumping duty, which may be internationally reviewable. The antidumping duty's ultimate aim is not to penalize a discrete act of overpricing but rather to restructure the dumper, or at least its pricing structure. Insofar as they empower investigating agencies to impose duties indefinitely and they provide for periodic review of the duties,²⁸² existing procedures implicitly recognize this goal. Procedure thus remains active until the dumper alters its pricing structure.

There are other features of antidumping cases, beyond the organizational complexity of the parties and the ongoing nature of the violation, that render the dispute resolution model inadequate. Dumping becomes an international law issue only to the extent that it affects interests over and above those of the parties. Dumping is not simply conduct engaged in by the dumper to the detriment of a particular domestic producer. A dumping violation typically pits a group of foreign producers along with a foreign government against the local government and producers. This is because the alleged dumper's conduct supposedly injures the local economy and the general welfare of the importing country's people. The foreign state has an interest because the duty not only affects one of the state's constituents but also might function as a non-tariff barrier to trade. Dumping would be of no interest to international law if it did not have these broader, public international dimensions.

International antidumping procedures intervene in this highly complex international space, which encompasses a wide range of interests. Within that international space, foreign corporations export goods and services produced in a foreign country to the domestic country, in which consumers purchase the exports and local producers see their competitive position threatened. The importing government, yielding to the pressure

282. "It was generally agreed that anti-dumping duties should remain in place only so long as they were genuinely necessary to counteract dumping which was causing or threatening material injury to a domestic industry. In this connexion it was noted that any country imposing a duty would naturally be free to review it and the Group agreed that it might well be desirable for it to do so from time to time in the light of information at its disposal. It was further agreed that it should be open to exporters of the product concerned, if they considered that they had the necessary evidence, to request the importing country to carry out a review of the facts." "1959 Report of the Group of Experts on Anti-dumping and Countervailing Duties" 8S/151-52, para. 23.

of forces associated with local production (e.g., local corporations, unions) against the claims of interests aligned with the foreign exporters (e.g., consumer groups, local distributors, or even foreign governments), unleashes its legal apparatus to impose antidumping duties.

The international legal procedure seeks to reconfigure this intricate international space so that local governments and companies do not use antidumping duties arbitrarily to hinder free trade. In the reconfigured international space dumping would still constitute an unfair trade practice.²⁸³ Governments could use their laws and their instrumentalities to thwart foreign corporations violating this principle of commercial fairness. They could thus stop foreign companies from using a large reserve of accumulated profits, an extraordinary capacity to absorb losses for a long period of time, or a monopolistic advantage at home or elsewhere to undersell and ultimately undermine domestic companies. At the same time, less competitive local producers would find it difficult to coerce their government into deploying its antidumping apparatus to harass and ward off foreign competitors. Local consumers would have access to cheaper and better products. Domestic distributors of foreign products would be on an equal footing with distributors of domestic products.

The commitment to the dispute resolution model generally has a limiting and distorting effect on international legal procedure. International procedure involves—even more immediately than national procedure—public values and interests. The reconfiguration of international spaces is a paramount aim. The critical perspective introduces a conception of international procedure that incorporates this objective. Even though it challenges international proceduralists' obsession with the goal of dispute resolution, the critical approach does not go on simply to propose a completely extraneous end. It seeks, instead, to articulate a goal that international procedure already contains but has not yet consistently worked through. The critical approach purports to transform international legal procedure by bringing it closer to its own aspirations. In this sense, the critique is internal. The end result is a counterpicture of international procedure.

The critical approach must go beyond challenging the traditional end of procedure, on which the various underlying national pictures and the prevailing international picture explicitly

283. See, e.g., NAFTA, art. 1902, ¶ 2(d)(ii) (“the object and purpose of this Agreement and this Chapter . . . is to establish fair and predictable conditions for the progressive liberalization of trade between the Parties to this Agreement while maintaining effective and fair disciplines on unfair trade practices”).

converge, by merely postulating an alternative end. The main flaw of the dispute resolution model is not the identification of dispute resolution as a procedural objective but rather the postulation of that objective as the sole or paradigmatic aim of procedure. The critical enterprise should not err in the opposite direction by declaring legal reconfiguration the only end of international procedure. Rather it should limit itself to asserting that that end is important, maybe even paradigmatic, while preserving the goal of resolving disputes. The key is to embrace the possibility of an international procedure that advances various objectives simultaneously.

The new procedural picture should consequently include some elements that make possible such a reconfiguration and others that facilitate dispute resolution. An international antidumping procedure should, for instance, allow both the reconfiguration of the space within which states regulate dumping as well as the settling of particular controversies between domestic and foreign producers. When integrating different objectives into a single procedural picture, however, it is essential to assure that the end product is coherent. If too concerned with dispute resolution, for instance, the procedural picture might impede international legal reconfiguration. This need for cohesion calls to mind that which arises when taking the comparative perspective. Just as the procedural elements of various countries must harmonize when integrated into a new international procedural picture, the multiple objectives need to coalesce into a workable procedural agenda.

Building the objective of international legal reconfiguration into a specific procedure systematically would, naturally, lead to significant changes in the understanding and practice of that procedure. The North American Free Trade Agreement's antidumping and countervailing duty determination review procedure would be quite different in its formulation and its application if it were completely true to the aim of reconfiguring the space within which states regulate unfair trading practices. It would ride on a different conception of the nature of the process, of the decision maker's role, and of the party structure.

A legal procedure aimed at international reconfiguration would have a different understanding of the nature of the violation. The violation would consist not simply in a wrong that the foreign producer inflicts upon its domestic counterpart but also in the existence of a situation that does not allow free commerce to flourish. The process that serves to investigate and address the violation, like the violation itself, would be amorphous. In this sense, the international process would resemble its civil law

equivalent²⁸⁴ and demarcate itself from the well-defined common law process. Further, the international process would be, again like the underlying violation, continuous and spread-out, in contrast to the discrete, and short-lived dispute resolution in both common law and civil law systems.²⁸⁵

The investigative process would be flexible, having no pre-determined form. The tribunal would rely on written and oral communications as it deemed most appropriate in light of the circumstances to determine the extent to which the current configuration needs restructuring. The inquest would, additionally, be ongoing. The procedural code would allow the review process would start before a final determination and cover the investigating authority's interlocutory orders whenever waiting any longer would endanger the reconfiguration mission.²⁸⁶ The process would run without interruption through the original imposition of duties and all subsequent administrative reconsiderations.²⁸⁷ All these stages would be part of the same process. That process would actually flow through the totality of cases before the tribunal. The court, aided by its precedential powers, would set out a coherent reconfigurative course throughout the multiplicity of controversies that emerged. By the same token, the process would be drawn-out. It would not be over once the tribunal reviews the initial final determination. The court would remain involved through several administrative rounds. Even after the final round, the process would continue inasmuch as other cases would be not separate from but rather an integral part of that process.

284. Of course, the aim of legal reconfiguration would inform the critically transformed process, while the goal of dispute resolution motivates the civil law process.

285. See Chayes, *supra* note 131, at 1282. ("The lawsuit [in the dispute resolution model] is a self-contained episode. The impact of the judgment is confined to the parties. If plaintiff prevails there is a simple compensatory transfer, usually of money, but occasionally the return of a thing or the performance of a definite act. If defendant prevails, a loss lies where it has fallen. In either case, entry of judgment ends the court's involvement."). See also Chayes, *supra* note 139, at 5.

286. For example, the international court would have jurisdiction if the investigating authority enters an unjustified order compelling the alleged dumper or subsidy recipient to disclose highly confidential trade secrets. If not subject to immediate review, such a decrees would threaten arbitrarily and irreparably to harm even innocent foreign producers and might ultimately dissuade them from standing up to the investigating authority. Of course, the investigating authority might issue a similar order against domestic producers and pressure them to drop potentially legitimate claims. This is precisely the kind of scenarios that the reconfiguration effort seeks to preclude.

287. This change would not call for further amendments to the procedural code beyond the establishment of a permanent tribunal discussed in the previous section.

The remedial process would also be unstructured, continuous, and prolonged.²⁸⁸ The procedural code would authorize the tribunal to draw freely on monetary, injunctive, and declaratory relief to achieve its end. The implementation of the remedy would not be a one-shot deal. If it imposed or endorsed any of these forms of relief, including monetary duties,²⁸⁹ the court would stay engaged, monitor the participants, make adjustments, and eventually withdraw. Obviously, the remedial phase would extend over a long period of time.

Inevitably, the investigative and remedial process would sprawl—amorphously, continuously, and indefinitely—from the space within which administrative agencies impose antidumping and countervailing duties to the broader space within which international trade interaction occurs. Reconfiguring the former space is part of reconfiguring the latter. In other words, only with a rather clear idea of how the new international commercial order should look, is it possible to imagine and construct an appropriate scheme for the regulation of dumping and unfair subsidies. The North American Free Trade Agreement's Chapter 19, which regulates antidumping and countervailing duty matters, explicitly presents itself as an integral part of the Agreement's larger aspiration to reconfigure the space within which North American trade takes place. It declares that:

the object and purpose of this Agreement and this Chapter. . . is to establish fair and predictable conditions for the progressive liberalization of trade between the Parties to this Agreement while maintaining effective and fair disciplines on unfair trade practices. . . .²⁹⁰

Inasmuch as it would have to develop a vision of North American commercial integration anyway, the critically re-imagined Article 1904 decision maker would have jurisdiction over other procedural aspects of the Agreement, such as the interpretation and application of the Agreement, as well as the examination of allegedly inconsistent national measures, under Chapter 20; the entertainment of claims brought by investors under Chapter 11; or the implementation of the side agreements on labor and the environment.

288. Fiss, *supra* note 142, at 27. ("The remedial phase in structural litigation. . . involves a long, continuous relationship between the judge and the institution; it is concerned not with the enforcement of a remedy already given, but with the giving or shaping of the remedy itself.")

289. In cases involving monetary duties, the initial assessment may go through several adjustments and eventually to a dissolution, based on the underlying circumstances.

290. NAFTA, art. 1902, ¶ 2(d)(ii).

Conceived broadly along these lines, the process would ultimately rest not on a negative but rather on a positive understanding of commercial integration. That is, it would go beyond removing barriers to commercial integration to actually integrating economies under conditions of fairness and equality. Needless to say, the tribunal would be hard pressed not to take into account the wide economic imbalance between north and south, which is a major obstacle to free and equal trade in the region. To that end, there would at least be some discussion as to whether the procedure should be altered so that, like in the procedure under the General Agreement on Tariffs and Trade,²⁹¹ the decision maker is empowered to take into account the special situation of Mexico as a developing country when deciding cases. The key questions here would be how to make effective use of such power and whether the benefits accrued from granting such an authority to the tribunal would outweigh the costs associated with the inevitable perception of Mexico getting special treatment.

An antidumping and countervailing duty review procedure committed to the aim of international reconfiguration would call for a decision maker more involved than that of the common law procedural picture. It would require an active permanent tribunal along the lines described in the previous section.²⁹² The tribunal would similarly stay on top of the case and push it forward. The ultimate aim would be not simply to resolve an individual dispute, but also to reconfigure a particular international space. Moreover, a reconfigurative procedure would attribute to the decision maker not only the process direction duty but also, under certain circumstances, dispositive power. The civil law tradition defines this as the authority to determine the existence and the scope of the controversy.²⁹³

291. 1994 Uruguay Round Understanding on Dispute Settlement, art. 12, §11 (The panel must take into account the differential and more favorable treatment for developing country Members.).

292. The amorphous, continuous, and drawn-out process previously described would necessitate a permanent tribunal. First, a permanent tribunal would be able to supervise investigating authorities more closely and promptly to step in to review nonfinal decisions. By the time the signatory parties put together a panel it may be too late. Second, the tribunal would be better able to stay with the case throughout various reconsiderations. It is difficult to impanel the same group of persons for the different stages of review in a given case. Third, a permanent court, especially if vested with precedential authority, would be able to review the totality of cases and develop a policy consistent with the reconfiguration effort. More generally, insofar as it commands more prestige and legitimacy, the tribunal would be in a stronger position than a panel to make the controversial decisions associated with in-depth reform.

293. See EDUARDO PALLARES, *DICCIONARIO DE DERECHO PROCESAL CIVIL* 598 (1966); García, *supra* note 195, at 44; 77 ZPB 452.

Common law systems put dispositive and well as process direction prerogatives solely in the hands of the parties.²⁹⁴ Though civil law jurisdictions impose the process direction obligation on the judge, they generally restrict the dispositive power to the parties.²⁹⁵ The parties in both common law and civil law cases initiate the procedure, define the object of the dispute, and may end the process by mutual agreement. Only under extraordinary circumstances—such as when the procedure touches upon momentous public interests—do these legal traditions restrict the application of the dispositive principle.²⁹⁶

The Article 1904 panel review procedure, not surprisingly, fully embodies this dispositive principle. The review is initiated by the signatory parties,²⁹⁷ and ends as soon as all of the participants consent to the termination.²⁹⁸ Moreover, the panel must limit itself to

(a) the allegations of error of fact or law, including challenges to the jurisdiction of the investigating authority, that

294. The following description of the United States procedural system by Owen Fiss reflects the extent to which the U.S. common law tradition assigns both dispositive and process direction powers only to the parties: "In the United States, judges do not initiate or carry forward the judicial process. They depend instead on an outside agency [i.e., the parties] to start as well as to continue the proceedings. It is that agency, not the judges, that conducts the factual investigation, selects and examines the witnesses, drafts the complaint and monitors the execution of the judicial decisions." Owen Fiss, *La teoría política de las acciones de clase*, 1 REVISTA JURÍDICA DE LA UNIVERSIDAD DE PALERMO 5 (1996). Chayes makes the following statement about the dispute settlement model, which inhabits both the common law and the civil law procedural pictures: "The process is *party-initiated* and *party controlled*. The case is organized and the issues defined by exchanges between the parties." Chayes, *supra* note 131, at 1283; *See also* Chayes, *supra* note 141, at 4. The statement is true only of common law dispute resolution.

295. *See* EDUARDO PALLARES, DICCIONARIO DE DERECHO PROCESAL CIVIL 598 (1966) (The dispositive principle establishes that "the exercise of the procedural action—both in its active and passive form—is entrusted to the parties and not to the judge."); García, *supra* note 197, at 44. ("In fact, as the process unfolds—from the beginning until the end of the process—the initiative rests with the parties and not with the adjudicator."). *See also* 77 ZPB 422. (The dispositive principle "means that the parties have free disposal of the disputed matter.").

296. In the civil law tradition, the dispositive principle is reined in in some cases. "These dispositive powers are limited to the extent that the parties should not be materially in charge of the object of controversy, like in matrimony, family, and custody (Kindschaft) matters." 77 ZPB 423. García, similarly, underscores that: "The dispositive principle, which predominates in the Mexican civil process, is not absolute but rather has various exceptions." García, *supra* note 197, at 44-45. As examples, Arellano García mentions the judge's power, *motu proprio*, to examine the procedural capacity of the parties, to clarify the sentence, to impose disciplinary sanctions, to hear evidence. *Id.* Yet, he appears to be confusing the process direction and the dispositive principles. The cases he mentions relate to the process direction (not the dispositive) principle and actually point to the fact that the process direction duty rests with the judge, not the parties.

297. 1904 Panel R. 6.

298. 1904 Panel R. 72.

are set out in the Complaints filed in the panel review; and (b) procedural and substantive defenses raised in the panel review.²⁹⁹

Panel Rule 35 commands the responsible secretary expressly to underscore this restriction when serving the participants.³⁰⁰ The panel may not, *sua sponte*, come up with errors in or justifications for the determination; it may not consider any issue unless raised by the participants. The Panel Rules also assign final control to the participants when a reversed and remanded case returns for a second panel review. Rule 73 establishes that if none of the participants files a written submission challenging the new determination, the panel must "issue an order affirming the investigating authority's Determination on Remand."³⁰¹ The panel must affirm even if it believes that the investigating authority's determination on remand is inconsistent with the its earlier decision.

Even though the initiative to commence a review of antidumping or countervailing duty determinations would remain in the hands of the signatory parties and participants, the critically transformed procedure would require court approval before dismissal. The tribunal would thus be in a position to ascertain whether the dismissal improperly infringes upon the individual, collective, national, and international interests at stake. The decision maker would additionally have the authority to consider allegations and defenses not raised by the participants. Finally, the tribunal would be able to intervene even without the exhortation of the parties in remanded cases, in cases in which an investigating agency reconsiders a determination already reviewed under Article 1904, and in cases of large public international interest. These powers would enable the court to expand its focus beyond the narrow disputes associated with a particular determination. The decision maker would be in a position to concentrate on the whole dumping or subsidy controversy running through various administrative rounds as well as the larger international reconfiguration process.

A procedure focused primordially on international reconfiguration would approach party structure drastically differently than one concentrating exclusively on dispute resolution. "Litigation [in the dispute settlement model] is organized as a contest between two individuals or at least two unitary interests, diametrically opposed, to be decided on a winner-takes-all basis."³⁰² The existing panel review system has clearly incorporated this

299. 1904 Panel R. 7.

300. 1904 Panel R. 35(1)(c)(iii).

301. 1904 Panel R. 73(5).

302. Chayes, *supra* note 131, at 1282.

“bipolar” party arrangement,³⁰³ on which both the common law and the civil law procedural pictures converge. The Article 1904 procedure envisions a dispute between a complainant and the investigating authority³⁰⁴ and aligns the rest of the participants with one of these two ordinary two participants.³⁰⁵

International antidumping and countervailing duty cases actually involve numerous parties with varying degrees of involvement and interest in the controversy. The signatory parties, i.e., the exporting or the importing country, request the review. The governments of these countries include various subgroups such as the agency making the determination, the secretariat, the ministry of commerce, the ministry of finance, the ministry of foreign relations, and so on. The legislature as well as other groups in the importing or exporting country often also have an interest in the controversy. Foreign exporters, domestic importers, or the domestic producers usually instigate the initiation of the review process. These participants, who along with the investigating authority are the main litigants, are normally large corporations and as such break down into various interest groups or constituencies: the directors, the managers, the shareholders, the employees, the creditors, consumers, and even the members of the community in which the corporations are located. Unions associated with production process as well as consumer groups accordingly have a stake, as well.³⁰⁶

Within a procedure that embraced international reconfiguration as a goal, the notion of participation would consequently be fluid and policentric. In addition to the main parties (if the concept of a main party survived at all) there would be other participants, such as intervenors and friends of the court, with different levels of interest in the case. Written and especially oral proceedings would have to be transformed to accommodate the multiplicity of participants. The procedure would allow class

303. *Id.* See also Chayes, *supra* note 139, at 4.

304. The investigating authority files a notice of appearance and a brief against the complainant's complaint and brief. 1904 Panel R. 39, 40, & 57.

305. Participants may file pleadings and briefs either in support of or in opposition to the complaint. 1904 Panel R. 39, 40, & 57. During oral argument the panel hears first from “the complainant and any participant who filed a brief in support of the allegations set out in a Complaint or partly in support of the allegations set out in a Complaint and partly in opposition to the allegations set out in a Complaint” and then from “the investigating authority and any participant who filed a brief in [complete] opposition to the allegations set out in a Complaint”. 1904 Panel R. 67(2)(a) & (b).

306. See Miramontes, *supra* note 18, at 660-61. (“Although interested third parties may instigate procedure for removal of countervailing duties, consumers, albeit directly affected, are left without recourse under Mexican law. Consumers should have standing in countervailing duties' proceedings. Mexico's Office of Consumer Affairs could function as the representative of consumers.”)(footnote omitted).

participation for large groups, such as consumers or workers or perhaps even the affected local producers.

Changing the party structure in the Article 1904 procedure would require altering the participation provisions. The panel review Rules simply take over the party structure from the national courts otherwise entitled to review final determinations. The expression "interested person", the Rules establish, "means a person who, pursuant to the laws of the country in which a final determination was made, would be entitled to appear and be represented in a judicial review of the final determination."³⁰⁷ Only interested persons may file a complaint or notice of appearance and thus become a "participant."³⁰⁸ The term "person", in turn, encompasses:

(a) an individual, (b) a [NAFTA] Party, (c) an investigating authority, (d) a government of a province, state or other political subdivision of the country of a Party, (e) a department, agency or body of a Party or of a government referred to in paragraph (d), or (e) a partnership, corporation or association.³⁰⁹

The recognition of expansive participation rights as suggested above would demand, first, changing the definition of "interested person" to include any person who has a real interest in the underlying antidumping or countervailing duty determination. Second, the notion of a person would have to reach out to cover groups of persons who desire to appear as a class. Finally, the reconfigurative procedure would not organize participation in pleadings, briefs, and oral argument around two sets of interests. In other words, it would not divide participants into a complainant and a respondent contingent but rather allow a free-floating arrangement.

The critical perspective opens up possibilities beyond that of doing justice to neglected procedural aims. It might lead to the destabilization of the notion that procedure has value only to the extent that it advances particular ends.³¹⁰ A critically transformed international legal procedure would be not only instrumental but also reflexive. It would be outward looking, as well as inward looking. It would, in other words, focus on the legitimacy of both the ends it furthers and the way in which it is constituted. Procedure must not only attain a justified end, but also generate

307. 1904 Panel R. 3 "interested person").

308. *Id.* ("participant").

309. *Id.* ("person").

310. Fiss couches structural reform in instrumental terms. He affirms that "this new mode of litigation raises [the problem of] instrumentalism. Simply stated, the question presented is how to do the job of structural reform, and how to do it well." Fiss, *supra* note 260, at 219-20. See also Fiss, *supra* note 142, at 50. ("The structural remedy must be seen in instrumental terms.").

the right kind of relations among international actors. From the critical perspective, procedure has intrinsic worth; it gives rise, internally, to a set of relations among the participants with value independent any external goal.

The critical project would seek to abolish alienating procedural relationships. Such relationships not only disadvantage but also disempower international actors. From the critical vantage point, international procedure would set up an emancipating relational structure. It would strive to honor the dignity and autonomy of all procedural actors. A critically reassessed procedure would discard disempowering relationships even if they furthered the international reconfiguration effort.

The new procedural picture would, accordingly, have to reorganize radically the relationships among the various international actors. It would heavily emphasize the right of individuals, entities, and groups to assert and realize themselves within the procedure. In this context, the ideas such as granting liberal participatory rights (including class participation) or forcing the national parties to subsidize the representation of those actors lacking sufficient means would become appealing. The elimination of any deference to the investigating authority and the institution of *de novo* review would have to be part of the critical project to purge the procedure of internal relational iniquities. The reconstructed procedure would, in addition to considering new evidence, provide for far-reaching discovery to remedy the imbalance in information among the participants.

A procedure conceived along these lines would require a strong and active decision maker as well as a flexible process. The notion of a permanent tribunal with wide injunctive and proactive powers and the authority to adapt the process to the circumstances at hand would become attractive once more. The members of the tribunal intervening in a particular case would submit detailed opinions defending their positions and would thus base their relationship to each other and to the parties on respect rather than caprice.

As it transcends the instrumental model, the critical approach would also pay close attention to the procedural relationship among the signatory parties. It would point to an international legal procedure in which the countries involved relate to each other fairly and as equals. The procedure would avoid reproducing or reinforcing extra-procedural hegemonies. The decision maker would allocate participatory rights, distribute costs, and provide access to information so as to render the relationship among the pertinent countries emancipating rather than alienating. The critical approach would make sure that the relations of domination, which it seeks to abolish among private par-

ties and between private parties and governmental institutions, do not persist at the intra-governmental level.

A reflexively legitimate international legal procedure would insist upon the equal treatment of the official languages of all signatory parties. Excluding Mexico's language from the procedural universe spanned by the Agreement disempowers not just particular Mexican participants but the Mexican nation as a whole. The critical enterprise would push for the abandonment of this linguistic narrow-mindedness. The critically reformed procedure would treat Spanish as equal to French and English. It would allow participants to use the Spanish language, make translators readily available, and require publication of the tribunal's communications in all three languages.

The critical approach would, moreover, insist that the procedural structure of the North American Free Trade Agreement not systematically exclude the procedural perspectives of any of the countries involved. The international procedure formulated from the critical standpoint would have to open itself up to the Canadian and especially the Mexican procedural perspectives in the manner suggested in the previous section. In addition to facilitating the resolution of disputes under the Agreement and advancing the reconfiguration of the international space within which the Agreement operates, the incorporation of certain features from these neglected perspectives would contribute to the empowerment of Canada and particularly Mexico within the procedural world created.³¹¹

One can hardly exaggerate the extent to which a country is disempowered when it is forced to act within a completely alien procedural system, or when an alien procedural structure is foisted upon its own procedural system. A people expresses its identity or its national spirit through law, including procedural law. Undermining a people's law is tantamount to thwarting that people's identity. Conversely, re-affirming the legal heritage

311. To be sure, Mexican and Canadian law, including procedural law, is itself the result of a process of legal imperialism. In both cases, the indigenous legal traditions were repressed in favor of the law brought along by the European conquerors. (The indigenous legal practices themselves became dominant to a great extent by suppression the law of conquered peoples.) The existing legal culture in Mexico and in Canada descends from this original onslaught. Canada's history of legal colonization also includes the attempt to displace law of French origin with law of English roots. Yet, the pervasiveness of repression in the historical evolution of law should not lead to the complete abdication of the possibility of open and uncoercive legal development. New law—particularly new international law—must seek the latter kind of development. Existing law, which came to life through domination rather than deliberation, need not (and probably cannot) be simply done away with. It must recognize the horrors of its past, as well as those of its present, and try to rectify and to avoid recidivism. Like human beings, law should not aim at moral perfection; it should only seek constant moral improvement.

leads to a reinforcement of the sense of self-worth of a nation. International law, of course, has no obligation to incorporate elements of the legal systems of various nation as a token gesture of inclusion. What international treaties must do is keep an open mind in the face of the multiplicity of legal possibilities that the international community has to offer. International agreements validate nations whenever they take seriously their potential contributions, even if they ultimately reject such contributions.

The critical perspective, in sum, makes way for the possibility of a radical deconstruction and reconstruction of international procedure, generally, and of the Article 1904 procedure, specifically. A critical approach would lead international procedure away from the dispute resolution model and toward the recognition of international legal reconfiguration as a central aim. It would transform the conception of the nature of the process, of the decision maker's role, and of the party structure. More importantly, it would take international procedure beyond the instrumental to a reflexive conception of procedure. International procedure would then become more inward looking and strive internally to create reasonable relationships among the international procedural actors. This critical endeavor would thus set off a debate on the most fundamental premises shared by national and international procedural pictures.

VIII. WHAT IS TO BE DONE?

Needless to say, there was no room for comparative or critical reflection in the negotiations that resulted in the North American Free Trade Agreement. In this sense, the process was typical. International actors forge agreements under pressure, with economic and political muscle steering the course. The challenge is to get the comparative and critical debate started outside the negotiation arena and before the commencement of the actual bargaining. In other words, these issues must first penetrate the present legal consciousness, perhaps through reflective discussion among theorists and practitioners. Thus, the issues might be able to find their way in later, when hammering out the details of international agreements.

There is an additional level of complexity involved here, however. Two kinds of obstacles stand in the way of the introduction of the comparative and the critical perspective in international treaties: impediments of ignorance and impediments of interest. First, international lawyers are often not even aware of the possibility of a different perspective. They are often familiar only with their own national legal picture and see their mission as simply to apply that picture to an international context. In the

rare cases in which they are conversant with various legal pictures, international lawyers invariably fail to integrate elements from the different pictures into a new picture or take a critical posture vis-à-vis shared procedural premises.

Second, international lawyers tend to reproduce their own national procedural pictures because doing so is to the advantage of the interests they represent. International lawyers and their clients are able to secure a competitive edge over their adversary if the game is played by their rules. The lawyers as well as the nations who dominate the international legal system have partly for these reasons excluded the comparative perspective. The dominated side, for its part, has an interest in bringing in the comparative perspective only to reduce the extent of its tactical disadvantage. This side, however, is usually outmaneuvered. Neither side, at any rate, has an interest in embracing the critical approach. Such an approach would force both to make significant adjustments in their standard operating procedure. The side with the upper hand would probably object more vehemently to a critical alteration of the status quo than its counterpart, which has to adapt to a novel legal situation anyway.

The impediments of ignorance and of interest—independently and in conjunction with each other—have contributed to the relative absence of critical or even comparative reflection in international agreements. Scholarly discussions on the merits of bringing the comparative and the critical perspectives to international legal consciousness might help overcome the impediments of ignorance but hardly those of interest. Even if everybody were convinced of the advantages of taking the comparative and critical perspectives, powerful international interests would probably remain adamant against any substantial changes in the prevailing point of view.

The introduction of a new perspective would actually require a transition not just in the theoretical orientation but also in the practical conditions of international treaties. In other words, the new perspective's prospects depend not only on understanding that incorporating such a perspective is fully in tune with what the international treaties are all about, but also on altering the international balance of power. If the negotiations at issue in international agreements took place under circumstances of more equality than at present, there would be a tendency to gravitate towards the comparative perspective. If no nation or group of nations could force its ways into the international treaties, an ideal situation for a comparative approach would emerge. The family of nations would then come to the bargaining table with a multiplicity of legal points of view and strive to develop an

international paradigm that incorporated select elements from these different viewpoints in a congruent manner.

The launching of the comparative perspective would pave the way for the critical perspective. I have already explained how this is so: Once one realizes that there are alternatives with respect to the points on which different legal pictures diverge, one is hard pressed to deny the possibility of alternatives with respect to the points on which the pictures converge. At the practical level, the transformation of international agreements from the comparative perspective creates a situation in which international lawyers and their clients are inevitably going to have to operate in somewhat foreign legal terrain. They might therefore be less hostile to accepting the additional degree of unfamiliarity associated with a critical transformation of international treaties. In other words, there might be economies of scale in the process of coping with the unknown.

These economies of scale, however, would not provide sufficient incentive to embrace the theoretically acclaimed critical perspective on the practical level. Additional impetus might come from a parallel process of critical transformation of national law. That is, if the premises that are challenged from the international critical perspective were already called into question in the context of national law, this might contribute stimulus to the abandonment of those premises.³¹² International actors would be less invested in them, theoretically and practically. The process of thinking and acting away from them would be well in place by the time the international negotiations begin. Ignorance and interest would not be as stacked up against critical reform.

This much too brief discussion suffices to suggest the complexity of instituting the comparative and critical perspective in international agreements. A protracted and intricate metamorphosis in the theoretical and practical underpinnings of international treaties must take place first. A change in the state of legal consciousness will not do, just as an alteration of legal reality will not be enough. The transformation of legal consciousness and that of legal reality must be simultaneous and symbiotic. In this sense, the process must be truly dialectic and perhaps even revolutionary.

312. The critical alteration of national law may be somewhat easier than that of international law. National law does not face as much skepticism and opposition to begin with. National legal institutions are usually more solidly in place and are therefore in a better position to withstand a radical process of transformation than their international counterparts.