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NAFTA's Procedural Narrow-Mindedness: The Panel Review of Antidumping and Countervailing Duty Determinations under Chapter Nineteen

Ángel Oquendo
University of Connecticut School of Law

NAFTA'S PROCEDURAL NARROW-MINDEDNESS: THE PANEL REVIEW OF ANTIDUMPING AND COUNTERVAILING DUTY DETERMINATIONS UNDER CHAPTER NINETEEN

*by Angel R. Oquendo**

I. INTRODUCTION

The North American Free Trade Agreement (the "Agreement" or "NAFTA") entered into force in January 1994.[1] The Agreement, which

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* Associate Professor of Law, University of Connecticut School of Law; A.B., Ph.D. (Philosophy), Harvard University; J.D., Yale University. I would like to thank Al Cullison, Detlef Leenen, and Ruperto Patiño Manffer, for their most helpful insights on these issues.

The author accepts responsibility for the substantive accuracy of citations to non-English sources. Translations are the author's unless otherwise noted.

1. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 296, 605

constitutes an extension of the Free Trade Agreement between the United States and Canada (the "U.S.-Canada Free-Trade Agreement"),[2] will undoubtedly have an impact beyond trade. It will intensify, to an almost unimaginable degree, the social, political, and economic contacts between the United States, Canada, and Mexico.

At the moment, there is some debate as to whether, and if so how, other Latin American countries should join the free trade group. Chile seems to be already on its way. Argentina, Brazil, and Columbia have expressed strong interest. It is, to be sure, uncertain whether an extension of the Agreement is at all likely in light of the political climate that has developed, particularly in the United States, following this year's financial crisis in Mexico. A more fundamental question, however, is whether an extension would be in the interest of current and potential members.

My skepticism regarding any such expansion is based not on economic, but rather, on legal grounds. The Agreement seems to have failed sufficiently to take into account the special legal identity of Mexico. The process leading to the Agreement did not take the form of a conversation on bridging the legal distance between the parties, but rather that of an imposition of legal conformity on the weakest party. Mexico not only had to Americanize its legal system,[3] but also had to accept a pre-fabricated legal superstructure based almost entirely on U.S. law. A hasty incorporation of other Latin American countries would probably thrust a similar fate upon them.

But this article does not dwell extensively on the broad question whether the Agreement should incorporate additional Latin American countries, nor does it attempt to show that the U.S. perspective pervades the Agreement as a whole. The article focuses exclusively on the procedural apparatus that the Article imposes on the legal systems of the parties, specifically in the area of antidumping and countervailing duties. It argues that the dispute resolution mechanisms to review such duties are almost completely derived from U.S. civil procedure.

The article then points out that a different conception of civil procedure prevails in Mexico. This conception seems to be rooted in the civil law tradition and accordingly resembles that of other civil law jurisdictions, particularly that of Germany. The comparison with the German

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[hereinafter NAFTA].

2. United States-Canada Free-Trade Agreement, Dec. 22, 1987-Jan. 2, 1988, U.S.-Can., 27 I.L.M. 293 [hereinafter U.S.-Canada Free-Trade Agreement].

3. *See* Stephen Zamora, *The Americanization of Mexican Law: Non Trade Issues in the North American Free Trade Agreement*, 24 LAW & POL'Y INT'L BUS. 391 (1993).

procedural picture, which has often been studied and regarded as a model in the United States, is meant to facilitate the understanding and appreciation of the Mexican picture. The article ultimately suggests that the discussion on dispute resolution in the context of the Agreement would have been more enlightened if it had taken the Mexican conception of procedure into account. The possibility being contemplated is not, however, that of patching some of the best elements of the Mexican procedural picture onto the existing review procedure, but rather that of coherently imagining a new procedure inspired in part by the Mexican perspective.

In the same breath, the article concedes that the underlying political and economic circumstances precluded any such possibility. Given its commanding upper hand, the United States did not come to the process in order to engage in dialogue, but instead to impose conditions. It is unlikely that the Mexican government, even if it had been committed to its legal identity, would have been able to alter this attitude.

In its concluding section, the article also ventures a few general observations with respect to the central topic of this conference, i.e., the expansion of the North American Free Trade Agreement. Mexico's experience should perhaps be a lesson to other Latin American countries. They would be well advised to continue strengthening the free trade agreements that already exist among themselves before trying to join the North American block. They could thus develop their own dispute resolution mechanism as well as their own vision of commercial consolidation. They could then be in a position further down the road to approach the North American countries as solid and independently defined trading groups, rather than as individual, struggling nations.

II. MEXICO IN THE NAFTA NEGOTIATIONS

The Mexican government came to the NAFTA bargaining table in a position of weakness. It was under considerable pressure, both internal and external, to strike a deal. Internally, the Mexican government needed desperately to legitimize itself in the face of growing challenges by the opposition and increasing popular dissatisfaction with the sacrifices exacted for the prospect of free trade. Externally, it realized that the nation had to brace itself for the fierce international competition unleashed by the culmination of the cold war. Mexico felt it would fall behind hopelessly if it failed to find new partners and markets.

Under these circumstances, it is not surprising that the Mexican negotiating strategy was characterized by a shy reluctance to make demands and an uncontrolled willingness to make concessions. The Mexi-

can government made no serious attempt to protect Mexico's culture, sovereignty, and private industry. It repeatedly gave in to the claims of foreign capital, the United States government, as well as unions and environmental groups from the north.

The conciliatory stance of the Mexican government undeniably did the nation much good. By listening to the critical (though often hypocritical) voices from abroad, it opened up a rich discussion on workers' rights, the environment, democracy, and even social justice. This debate, much as it may now be tearing the country apart, was long overdue. The price of many years of forced silence on these issues had been much too high.

It seems just as clear, however, that Mexico was substantially harmed in the process of negotiating NAFTA. In its eagerness to embrace the ways of its wealthy trading partner, the government abandoned many of Mexico's own economic and legal institutions. No consideration was given the possibility that these institutions might be more conducive to well-being and justice, at least in light of Mexico's circumstances, than those being imported. The government, moreover, appeared to be operating under the assumption that the Mexican experience had nothing to contribute to the process of creating an integrated North American market of goods and services. Mexico's interests as well as its self-esteem suffered. The process was not one of coordination or harmonization of institutions but rather one of assimilation.

Of course, the Mexican government is not entirely to blame. Its position could perhaps be best described by invoking words Jean-Paul Sartre used in a different context: "Half victims, half accomplices, like everybody else."[4] Mexico's negotiating partners gave the Mexican government no choice. They offered what was being served and had no interest in suggestions. If Mexico had spoken up in favor of Mexicanizing the Agreement, it would have been shown the door right away.

Canada and the United States signed a Free Trade Agreement in 1988.[5] The government of Canada seemed not to regard the inclusion of Mexico as a priority. It certainly would have objected to allowing the Mexican government to change the rules of the game. The United States government, for its part, was inclined to bring Mexico aboard but knew it would face strong domestic opposition. The United States was convinced that if it permitted the government of Mexico to impose conditions, it

4. Simone de Beauvoir, 2 LE DEUXIÈME SEXE 5 (epigraph) (1949) (quoting Jean-Paul Sartre).
5. U.S.-Canada Free-Trade Agreement, *supra* note 2.

would not be able to generate sufficient support for the Agreement.

The two dominant parties, particularly the United States, would undoubtedly harden their bargaining posture when faced with a subsequent application of any other Latin American nation to join the free trade group. In light of the difficulties the Mexican economy has encountered of late, the United States would probably be very skeptical about enlarging the free trade zone. Any Latin American government vying to sit at the negotiating table would likely give up any hope of transforming the Agreement and be willing to assimilate.

This article focuses on the impact of the Agreement on Mexican law, rather than on its economy. Mexico belongs to a different legal tradition than the United States. As a civil law jurisdiction, Mexico has a legal system that in many ways is closer to that of continental Europe than to that of the United States. Within the civil law tradition, of course, the Mexican legal system is most directly related to the legal systems of other Latin American countries. Further, on the basis of Mexico's own peculiar history, the legal system in some respects has developed its own personality, distinct even from other Latin American jurisdictions. At any rate, from the perspective of U.S. law, the Mexican legal reality is a world apart.

In preparation for the Agreement, Mexico made significant changes in its substantive and procedural laws in the areas of environmental protection, agrarian regulation, intellectual property, economic competition, international trade, and foreign investment.[6] Additionally, the Agreement itself imposes on Mexico a legal superstructure affecting all of these areas, as well as government procurement, administrative law, dispute resolution, telecommunications, and immigration.[7] The Mexican regime apparently failed to consider adequately the impact to the distinct Mexican legal persona when it acquiesced to this radical change in substantive and procedural law.

The main concern of this article is the procedural superstructure that the Agreement imposes on the parties' legal systems, particularly in the areas of antidumping and countervailing duties. It is in these areas that the Agreement elaborates a very detailed procedure.

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6. *See* David H. Badiola, *Summary of Recent Legislative and Administrative Developments in Mexico*, 2 U.S.-MEX. L.J. 65, 65 (1994).

7. NAFTA, *supra* note 1, pmbl., art. 102, chs. 11-16.

III. PANEL REVIEW UNDER NAFTA ARTICLE 1904

Under the general definition in Article VI of the General Agreement on Tariffs and Trade (GATT), dumping takes place when a foreign product is sold at a price lower than that charged in the exporting country.[8] The GATT also requires that injury to domestic producers be proven.[9] State officials often impose antidumping duties on products after determining that they have been dumped in their jurisdiction. Countervailing duties are used against subsidized foreign products.[10] In theory, the point of both kinds of duties is to eliminate the foreign product's unfair advantage in the market, i.e., the extent to which the price of the product has been artificially reduced. "Thus, an anti-dumping duty brings the price of the merchandise to the price at which it is sold in the exporting country's market—or a countervailing duty is applied [to balance] the subsidy granted to the product."[11]

The North American Free Trade Agreement allows the parties—as well as private persons through those parties—the option of foregoing judicial appeal in the local courts and challenging final determinations through binational panels.[12] This option was a feature of the earlier U.S.-Canada Free-Trade Agreement.[13] The Mexican government struggled avidly (against the skepticism of the north) to incorporate the panel review system into NAFTA; most certainly, Mexico was concerned that antidumping and countervailing duties provisions might be used by its northern neighbors as a non-tariff barrier to trade.[14] This eagerness probably explains why the Mexican authorities accepted the original system as it was, instead of bargaining for significant changes.

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8. General Agreement on Tariffs and Trade, Oct. 30, 1947, art. VI § 1(a), 61 Stat. A3, A23 [hereinafter GATT]. In the absence of a comparable domestic price in the exporting country, dumping is taken to consist in selling the foreign product in the importing country below the price charged for the product in a third country or below the cost of production "plus a reasonable addition for selling cost and profit." *Id.* art. VI § 1(b).

9. *Id.* art. VI § 6(a).

10. *See id.* art. VI § 3.

11. Víctor C. García Moreno & César E. Hernández Ochoa, *Neoprotectionism and Dispute Resolution Panels as Defense Mechanisms Against Unfair Trade Practices: A Focus on Mexico*, *in* 1 TOWARD SEAMLESS BORDERS: MAKING FREE TRADE WORK IN THE AMERICAS 692, 699 (Boris Kozolchyk ed., 1993).

12. NAFTA, *supra* note 1, art. 1904, § 1.

13. *See* United States-Canada Free-Trade Agreement Implementation Act of 1988, Sept. 28, 1988, 102 Stat. 1851, art. IV.

14. *See* García Moreno & Hernández Ochoa, *supra* note 11. The authors see a neoprotectionist trend in the use of antidumping and countervailing duty determinations as non-tariff trade barriers.

The procedure for binational panel review of final antidumping and countervailing duty determinations is set forth generally in Article 1904 of the Agreement. Pursuant to Article 1904, the parties adopted the NAFTA Article 1904 Panel Rules to specify the details of this procedure.[15] 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.[16] 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.[17] "A panel may, [moreover,] adopt its own internal procedures . . . for routine administrative matters," as long as those procedures are not inconsistent with the 1904 Panel Rules.[18]

The binational panel review is supposed to "replace judicial review of final antidumping and countervailing duty determinations"[19] upon the request of any involved NAFTA parties. Once any of these parties properly chooses the path of binational panel review, the domestic judicial review option is eliminated.[20] A panel decision can be overturned only by the panel itself on a motion for re-examination[21] or by an extraordinary challenge committee if the panel is guilty of gross misconduct, of fundamental procedural error, or of exceeding its authority.[22]

The panel must decide whether the determination "was in accordance with the antidumping or countervailing duty law of the importing Party,"[23] 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."[24] The panel review, hence, is substantively equivalent to ordinary judicial review. What varies is the identity of the decisionmaker and the applicable procedural law.

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15. North American Free Trade Agreement: Rules for Article 1904 Binational Panel Reviews, 59 Fed. Reg. 8686 [hereinafter 1904 Panel Rules].

16. *Id.* Rule 2.

17. *Id.*

18. *Id.* Rule 17.

19. NAFTA, *supra* note 1, art. 1904, ¶ 1. *See also* 1904 Panel Rules pmbl.

20. NAFTA, *supra* note 1, art. 1904, ¶ 11.

21. 1904 Panel Rules, *supra* note 15, Rules 75-76.

22. NAFTA, *supra* note 1, art. 1904, ¶ 13.

23. *Id.* ¶ 2.

24. *Id.*

One of the main objectives in creating the binational review option was to augment the speed of appealing final antidumping and countervailing duty determinations. The Agreement as well as the panel rules set 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."[25] Figure 1 provides an overview of the different stages and time frame of the procedure.

The panel review commences as soon as one of the involved NAFTA parties requests a binational panel.[26] Article 1911 defines "involved Party" as "(a) the importing Party; or (b) a Party whose goods are the subject of the final determination."[27] Paragraph five of Article 1904, in turn, provides that an involved party may "on its own initiative . . . request review of a final determination by a panel."[28] The secretary for a party's section of the Secretariat typically makes the request on behalf of the party. The Secretariat, which is divided into three national sections each headed by a secretary, was established by the Free Trade Commission to assist the Commission in the implementation and elaboration of the North American Free Trade Agreement.[29] United States law, for instance, proclaims: "In the case of a final determination of a competent investigating authority, requests by the United States for binational panel review of such determination under Article 1904 shall be made by the United States Secretary."[30]

In most cases, however, the initiative will probably be taken by the individual entitled to judicial review of a final antidumping and countervailing duty determination. The individual cannot make the request directly but rather must go through one of the NAFTA parties, since Paragraph 2 of Article 1904 empowers only an "involved Party" to "request a panel review."[31] Yet, Paragraph 5 obligates an involved party, "on request of a person who would otherwise be entitled under the law of the importing Party to commence domestic procedures for judicial review of a final

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25. *Id.* ¶ 14.

26. *See* 1904 Panel Rules, *supra* note 15, Rule 6 ("A panel review commences on the day on which a first Request for Panel Review is filed.").

27. NAFTA, *supra* note 1, art. 1911 (definitions section defines "involved Party").

28. *Id.* art. 1904, ¶ 5.

29. *Id.* art. 2002, ¶¶ 1-2. The Free Trade Commission, which is also a creature of the Agreement, is "comprised of cabinet-level representatives of the Parties" or the designees of those representatives. *Id.* art. 2001, ¶ 1.

30. 19 U.S.C. § 3434(b) (1994).

31. NAFTA, *supra* note 1, art. 1904, ¶ 2.

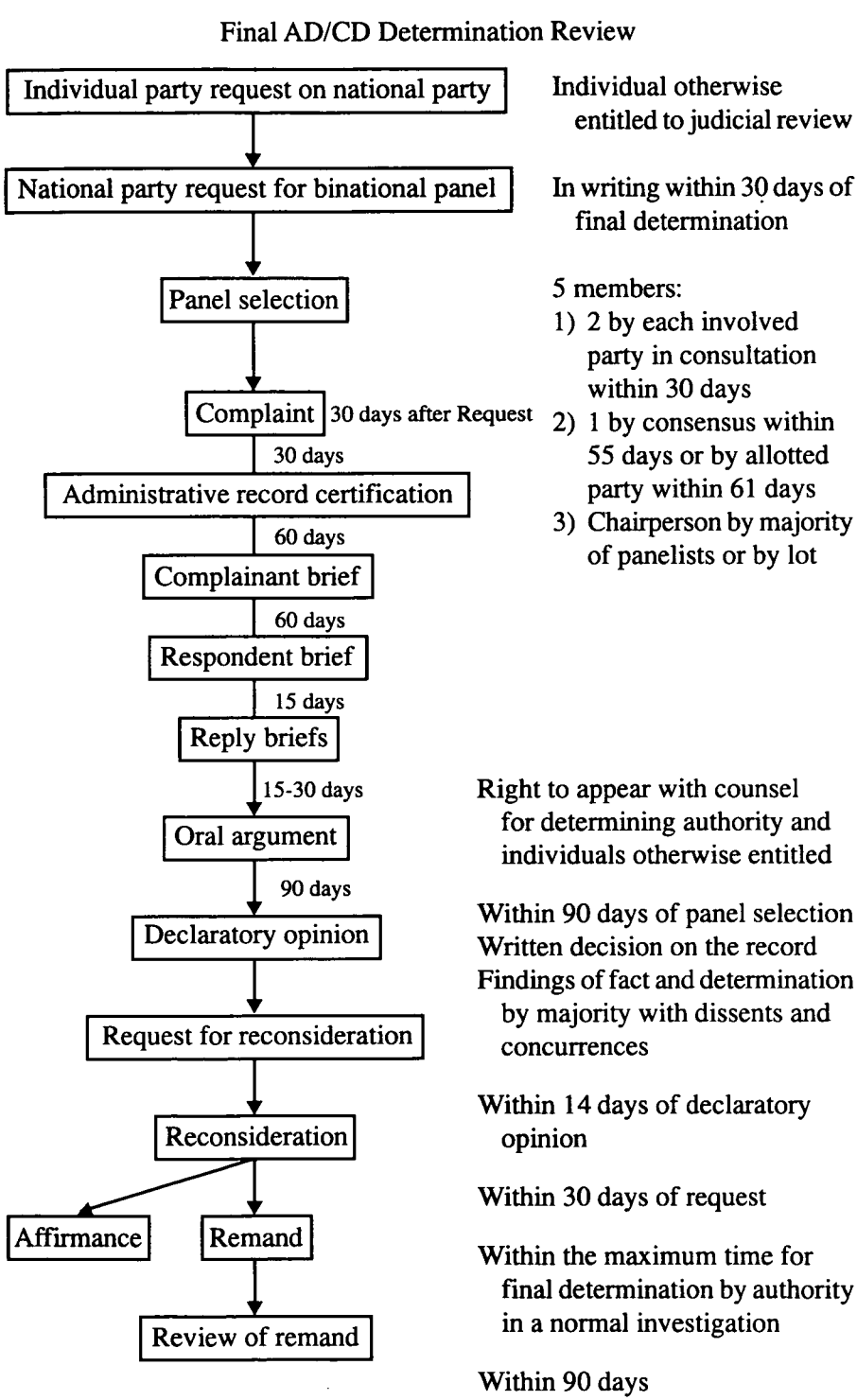

Figure 1: AD/CD Determination Review

determination, [to] request such review."[32] The government, in other words, does not have the option of refusing to place a request for a panel review of the final determination when asked by an individual entitled to judicial review.

The usual procedure would be for the individual to approach the section of the Secretariat in the country in which the determination took place. The responsible secretary (i.e., the secretary of the section of the Secretariat "located in the country in which the final determination under review was made")[33] would then, as required by the panel rules, "forthwith forward a copy of the Request to the other involved Secretary"[34] (i.e., of the section of Secretariat set up by the exporting country challenging the determination). The responsible secretary's act of forwarding the individual's request would count officially as the request for panel review, and as such serve as point of reference for the deadlines for the subsequent stages of the panel proceeding.[35] The responsible secretary must also serve all persons on the service list, which enumerates the persons involved in the prior proceedings,[36] and announce the request in the official publications of the countries involved.[37]

It would, nonetheless, be perfectly consistent with the Agreement for the individual to petition the other involved secretary because the Agreement, as already noted, requires one of the involved parties to make a request on behalf of an individual entitled to review. The other involved secretary would then be the one required to forward the request to her counterpart. In addition, she would have to serve individuals on the service list and make sure the request is printed in the official publications. This approach is contrary to the panel rules but more in harmony with the Agreement.[38]

The request must "be made in writing . . . within 30 days following

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32. *Id.* ¶ 5.

33. 1904 Panel Rules, *supra* note 15, Rule 3 (definitions and interpretation of "responsible Secretariat" and "responsible Secretary").

34. *Id.* Rule 35(1)(a).

35. United States law deems the receipt of the individual's petition by the United States Secretary, ipso facto, "a request for binational panel review within the meaning of Article 1904." 19 U.S.C. § 3434(c) (1994). This runs counter to the Agreement, which, as noted, requires an involved NAFTA party to make a request on the other involved party. The request takes place, within the meaning of Article 1904, when the United States Secretary channels the request to the other involved party, not when she receives the request from the individual.

36. 1904 Panel Rules, *supra* note 15, Rule 3 (definitions and interpretation of "service list").

37. *Id.* Rules 35(1) & (2).

38. The only change in the rules needed for this purpose would be to substitute the words "an involved Secretary" for "the responsible Secretary" in 1904 Panel Rules 35(1) & (2).

the date of publication of the final determination."[39] The request must include the heading required of all pleadings[40] and detailed information for the identification of the final determination sought to be reviewed.[41] In addition, the request must be filed with the responsible secretary of the section of the Secretariat in the country where the final determination took place.[42]

The request sets the panel selection process in motion. The members are usually drawn from a roster instituted by the three NAFTA parties, which is supposed to "include judges or former judges to the fullest extent practicable" and "at least 75 candidates"—at least twenty-five selected by each party.[43] The individuals listed are expected to "be of good character . . . [and show] reliability, sound judgment and general familiarity with international trade law."[44] They must "be citizens of Canada, Mexico or the United States," but may neither be affiliated with nor take instructions from the government of any of these countries.[45]

The panel consists of five members, with a majority of "lawyers in good standing."[46] Each involved NAFTA party in consultation with the other party names two members as panelists within thirty days of the request.[47] Each has "the right to exercise four peremptory challenges, to be exercised simultaneously and in confidence, disqualifying from appointment to the panel up to four candidates proposed by the other involved Party."[48] "Peremptory challenges and the selection of alternative

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39. NAFTA, *supra* note 1, art. 1904, ¶ 4.

> In the case of final determinations that are not published in the official journal of the importing Party, the importing Party shall immediately notify the other involved Party of such final determination where it involves goods from the other involved Party, and the other involved Party may request a panel within 30 days of receipt of such notice.

Id.

40. 1904 Panel Rules, *supra* note 15, Rule 55(1). The heading includes the title of the panel review, a descriptive title of the pleading, the name of the pleader, as well as the name, address, telephone number, and signature of counsel. Rule 55(2) contains specific information on the format of the pleadings. *Id.* Rule 55(2). Rule 55(3) requires pleadings to be signed by counsel for the participant or, in the absence of counsel, by the participant herself. *Id.* Rule 55(3).

41. *Id.* Rule 34(2)(b) (requiring title, investigating authority, file number, and citation).

42. *Id.* Rule 34(d).

43. NAFTA, *supra* note 1, annex 1901.2, ¶ 1.

44. *Id.*

45. *Id.*

46. *Id.* ¶ 2.

47. *Id.*

48. *Id.*

panelists [are supposed to occur] within 45 days of the request for the panel."[49] If either of the involved NAFTA parties fails to make an appointment within thirty days or to select an alternate for a peremptorily stricken candidate within forty-five days, one of that party's candidates on the roster must be chosen by lot immediately thereafter to take the slot.[50]

Within fifty-five days the parties are expected to agree on the fifth panel member.[51] In the absence of consensus, one of the parties, chosen by lot, will make the final appointment from the roster ("excluding candidates eliminated by peremptory challenges") within 61 days of the request.[52] The chairperson of the panel will be one of the lawyers on the panel elected by a majority of the panelists, or by lot if none of the contenders obtains majority support.[53] Upon completion of the selection of the panel, the responsible secretary must notify the participants as well as the other involved secretary of the names of the panelists.[54]

Within thirty days after the request, the interested person (i.e., the person who would otherwise be entitled to judicial review) must file a complaint.[55] The due date for the complaint thus coincides with that for the appointment of the first four panel members. The final appointment, in turn, can take place up to 31 days after the deadline for the complaint.

The 1904 Panel Rules require the interested person to file "proof of

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49. *Id.*

50. *Id.*

51. *Id.* ¶ 3.

52. *Id.*

53. *Id.* ¶ 4.

54. Panel Rules, *supra* note 15, Rule 42. The NAFTA parties have committed themselves to a code of conduct for the panelists. NAFTA, *supra* note 1, art. 1909. Panelists may be removed for violating that code but only if the involved NAFTA parties agree. *Id.* annex 1901.2, ¶ 6; *see also* 1904 Panel Rules, *supra* note 15, Rule 43. The party who appointed a removed panelist presumably chooses a replacement in consultation with the other party. If a panelist selected by consensus is removed, the parties should try to agree on a replacement. If they cannot agree, one of the parties, chosen by lot, should select a replacement from the roster. A similar replacement procedure should be followed when a panelist becomes unable to perform her duties. In cases of disqualification as well as of inability, the panel is "suspended pending the selection of a substitute panelist." NAFTA, *supra* note 1, annex 1901.2, ¶ 9; *see also* 1904 Panel Rules, *supra* note 15, Rule 81.

Each panelist is required to apply for protective order under U.S. law or a disclosure undertaking under Canadian or Mexican law in order to access business proprietary or privileged information relevant to the case. NAFTA, *supra* note 1, annex 1901.2, ¶ 7. Panelists will be sanctioned for breaching the terms of the protective order or disclosure undertaking but are otherwise "immune from suit and legal process relating to acts performed by them in their official capacity." *Id.* annex 1901.2, ¶¶ 8 & 12. During their tenure, panelists may engage in other business that does not interfere with the performance of their duties but "may not appear as counsel before another panel." *Id.* annex 1901.2, ¶¶ 10-11.

55. NAFTA, *supra* note 1, art. 1904, ¶ 14(a); 1904 Panel Rules, *supra* note 15, Rule 35.

service on the investigating authority and on all persons on the service list" along with the complaint.[56] The complaint must detail "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."[57] The complaint must also state why the complainant has standing to file.[58] It must specify, in other words, that the complainant is the person who would normally be entitled to judicial review under the laws of the country where the final antidumping or countervailing duty determination was made.[59] The rules also regulate the amendment of the complaint. An amended complaint may be filed up to forty days after the request.[60] Thereafter the complainant may amend only if she obtains leave of the panel and if she files the amended complaint no later than one hundred days after the request.[61]

Within forty-five days of the request, the investigating authority and any person asking to participate must file a notice of appearance.[62] The notice must declare whether the appearance is in support of, in opposition to, or partly in support of and partly in opposition to, the allegations of the complaint.[63] The authority must set forth any admissions made to the allegations set forth in the complaint.[64] The soliciting individual must defend her right to participate in the proceeding.[65]

Within forty-five and sixty days of the request, i.e., "within 15 days after the expiration of the time period fixed for filing a Notice of Appearance," the investigating authority must file nine copies of its final determination, two copies of the administrative record, and two copies of an index for record (including proof of service of the index on all participants).[66] Chapter 19 of NAFTA defines the administrative record, in the absence of an agreement by the NAFTA parties, as follows:

> (a) all documentary or other information presented to or obtained by the competent investigating authority in the course of

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56. 1904 Panel Rules, *supra* note 15, Rule 39(1).
57. 1904 Panel Rules, *supra* note 15, Rule 39(2)(b).
58. *Id.* Rule 39(2)(c).
59. *See id.* Rule 39(3).
60. *Id.* Rule 39(4).
61. *Id.* Rule 39(5).
62. *Id.* Rule 40(1).
63. *Id.* Rule 40(1)(d).
64. *Id.* Rule 40(1)(c).
65. *Id.* Rule 40(1)(b).
66. *Id.* Rule 41(1); *see also* NAFTA, *supra* note 1, art. 1904, ¶ 14(b).

> the administrative proceeding, including any governmental memoranda pertaining to the case, and including any record of *ex parte* meetings as may be required to be kept; (b) a copy of the final determination of the competent investigating authority, including reasons for the determination; (c) all transcripts or records of conferences or hearings before the competent investigating authority, and (d) all notices published in the official journal of the importing Party in connection with the administrative proceeding.[67]

Proprietary information must be under seal and privileged, or government information may be filed only with consent of the investigating authority.[68]

The complainant and her supporters must file a brief within sixty days after the expiration of the deadline to submit the administrative record, i.e., no later than 120 days after the request.[69] The brief must set forth "grounds and arguments supporting allegations of the Complaint."[70] The respondent, as well as others aligned with the respondent's allegations, must file a brief "setting forth grounds and arguments opposing allegations of [the] Complaint" up to sixty days thereafter, i.e., within 180 days of the request.[71] The complainant's side may file rebuttal briefs replying to the respondents' briefs no later than fifteen days after the deadline for the respondents' brief, i.e., up to 195 days after the initial request for panel review.[72] Within ten days of the deadline for any of these briefs, the participants must file an "appendix containing authorities cited."[73] A participant may join others in a single brief or adopt parts of their briefs in her own.[74]

If the complainant fails to file a brief or motion for extension of time, the panel may—on its own motion or the defendant's motion—"issue an order to show cause why the panel review should not be dis-

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67. NAFTA, *supra* note 1, art. 1911 (defining "administrative record").

68. 1904 Panel Rules, *supra* note 15, Rules 41(3)-(5).

69. *Id.* Rule 57(1); *see also* NAFTA, *supra* note 1, art. 1904, ¶ 14(c).

70. 1904 Panel Rules, *supra* note 15, Rule 57(1).

71. *Id.* Rule 57(2); *see also* NAFTA, *supra* note 1, art. 1904, ¶ 14(d).

72. 1904 Panel Rules, *supra* note 15, Rule 57(3); *see also* NAFTA, *supra* note 1, art. 1904, ¶ 14(e).

73. 1904 Panel Rules, *supra* note 15, Rule 57(4). Each party must include specific information in their various appendices, and "all participants who file briefs" bear equally the "costs for compiling the appendix." *Id.* Rule 60.

74. *Id.* Rule 57(5).

missed."[75] If the complainant fails to show good cause, the panel must dismiss the review.[76] If the investigating authority does not file a brief, the panel may go ahead and issue its decision, apparently without an oral hearing.[77]

Rule 59 offers detailed guidance on the content of the briefs. Briefs must be divided into five parts: (1) Table of Contents and Authorities; (2) Statement of the Case; (3) Statement of the Issues; (4) Argument; and (5) Relief.[78] The statement of the case in the complainant's brief must "contain a concise statement of the relevant facts."[79] In the respondent's brief, this second part must "contain a concise statement of the position of the investigating authority or the participant with respect to the statement of facts set out in the briefs" on the complainant's side.[80] The argument part for either side consists "of the argument setting out concisely the points of law relating to the issues."[81]

Motions must "be made by Notice of Motion in writing . . . unless the circumstances make it unnecessary or impracticable," and must be served on all participants.[82] They must "be accompanied by a proposed order of the panel."[83] In addition, Rule 61 requires each notice of motion to include the following:

> (a) the title of the panel review, the Secretariat file number for that panel review and a brief descriptive title indicating the purpose of the motion; (b) a statement of the precise relief requested; (c) a statement of the grounds to be argued, including a reference to any rule, point of law or legal authority to be relied on, together with a concise argument in support of the motion; and (d) where necessary, references to evidence in the administrative record identified by page and, where practicable, by line.[84]

A participant may file a response to the motion within ten days, unless the panel decides otherwise.[85] The pendency of a motion, however, does

75. *Id.* Rule 58(2).
76. *Id.* Rule 58(3).
77. *Id.* Rule 58(4).
78. *Id.* Rule 59.
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.* Rules 61(1) & (2).
83. *Id.* Rule 61(2).
84. *Id.* Rule 61(3).
85. *Id.* Rule 62. The rules make distinctions between motions for extension of time and those for

not alter the time frame of the panel review.[86] The panel may dispose of the motion based on the pleadings or hear oral argument before deciding.[87]

In response to a motion for dismissal, the panel may order the dismissal of the review and thus put an end to the entire proceeding.[88] If all participants join or consent to a motion for termination, the panel review must be terminated.[89] The panelists are thus automatically discharged, regardless of their opinions of the merits of the case.

The panel may hold a pre-hearing conference.[90] The purpose of the conference would 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."[91] Following the conference, the panel must issue an order setting out its rulings in connection with the conference.[92]

The main event during the panel review is the hearing of oral argument. The hearing must commence no later than thirty days after the deadline for reply briefs, i.e., before the 225th day after the filing of the request for panel review.[93] The hearing, like the pre-hearing conference, takes place at the office for the section of the Secretariat in the country where the final determination occurred, or at any other location designated by the responsible secretary.[94] The responsible secretary must notify all the participants "of the date, time and place for the oral argument."[95]

Unless the panel orders otherwise, the hearing will adhere to the following time frame: first the panel will hear the complainant and her supporters; then the investigating authority and other opponents of the complainant will follow; finally, the panel may, at its discretion, allow the complainants and their supporters an argument in reply.[96]

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re-examination. First, a participant must respond to a motion for extension of time within seven days. *Id.* Rule 20(2). Second, unless the panel orders otherwise, no response is allowed to a motion for re-examination of the panel's decision. *Id.* Rule 76(5).

86. *Id.* Rule 61(4).
87. *Id.* Rules 63(1) & (2).
88. *Id.* Rule 71(1).
89. *Id.* Rule 71(2).
90. *Id.* Rule 66(1).
91. *Id.* Rule 66(3).
92. *Id.* Rule 66(5).
93. *Id.* Rule 67(1); *see also* NAFTA, *supra* note 1, art. 1904, ¶ 14(f).
94. 1904 Panel Rules, *supra* note 15, Rule 65.
95. *Id.* Rule 67(1).
96. *Id.* Rule 67(2).

Counsel of record will conduct oral argument, unless the participant is appearing pro se.[97] The oral argument must be "limited to the issues in dispute."[98] If proprietary or privileged information is going to be discussed, the oral proceedings must be conducted in camera, in the presence of only the person presenting the information, the investigating authority's officials and attorneys, and persons granted access to the information, including the panelists.[99]

Within ninety days of the hearing of oral argument, i.e., no later than 315 days after the original request of review, the panel must issue its decision.[100] "Decisions of the panel shall be by majority vote and based on the votes of all members of the panel. The panel shall issue a written decision with reasons, together with any dissenting or concurring opinions of the panelists."[101] The panel must either uphold the final determination, or remand it for action not inconsistent with the decision.[102]

The responsible secretary must, at the behest of the panel, order notice of every panel decision "published in the official publications of the involved Parties."[103] In addition, the responsible secretary must publish a "Notice of Final Panel Action" following an order dismissing a panel review or affirming a determination on remand.[104] A "Notice of Completion of Panel Review," in turn, must be published as soon as time to request an extraordinary challenge has elapsed or upon termination of the extraordinary challenge proceeding.[105]

A participant may, within ten days of the panel's decision, file a motion for re-examination "for the purpose of correcting an accidental oversight, inaccuracy or omission."[106] In addition to identifying "the oversight, inaccuracy or omission with respect to which the request is made," the motion must describe "the relief requested" and state, "if ascertainable, . . . whether other participants consent to the motion."[107] The panel rules limit the grounds upon which the motion may be based to

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97. *Id.* Rule 67(4).
98. *Id.* Rule 67(5).
99. *Id.* Rule 69.
100. NAFTA, *supra* note 1, art. 1904, ¶ 8.
101. NAFTA, *supra* note 1, annex 1901.2, ¶ 5; *see also* 1904 Panel Rules, *supra* note 15, Rule 72 ("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.").
102. NAFTA, *supra* note 1, art. 1904, ¶ 8.
103. 1904 Panel Rules, *supra* note 15, Rule 70.
104. *Id.* Rule 77(1).
105. *Id.* Rules 78 & 79.
106. *Id.* Rule 76(1).
107. *Id.*

the following: "(a) that the decision does not accord with the reasons therefor; or (b) that some matter has been accidentally overlooked, stated inaccurately or omitted by the panel."[108] The rules, moreover, proscribe oral argument on a motion for re-examination and allow for no response, unless the panel orders otherwise.[109] Within seven days of the filing of the motion, the panel must either rule on the motion or identify further action to be taken.[110]

When remanding a case, the panel must set a deadline for a new determination by the investigating authority.[111] The investigating authority must thereupon take action consistent with the panel's decision. The panel rules call on the investigating authority to file "with the responsible Secretariat a Determination on Remand within the time specified by the panel."[112] It must also file the supplementary remand record, if any, within five days.[113] A participant who wants to challenge the determination on remand must file a written submission within twenty days of the filing of the supplementary remand record (or of the determination on remand if there is no supplement).[114] The investigating authority and its supporters must file their responses to the challengers' written submission within twenty days of the deadline for that submission.[115] If there are no written submissions in opposition to the determination on remand, the panel must, within ten days of the deadline for the submission, affirm the determination.[116] If there are written submissions, the panel must decide no later than ninety days after the arrival of the determination on remand.[117]

IV. A PROCEDURE TAKEN FROM THE 1988 U.S.-CANADA FREE-TRADE AGREEMENT

The procedure for reviewing final antidumping and countervailing duty determinations was assembled while the free trade effort concerned only the United States and Canada. Not surprisingly, the procedure takes the perspective of, and focuses on, the interests of those two countries.

108. *Id.* Rule 76(2).
109. *Id.* Rules 76(4) & (5).
110. *Id.* Rule 76(6).
111. *Id.* Rules 73(1) & 74.
112. *Id.* Rule 73(1).
113. *Id.* Rule 73(2)(a).
114. *Id.* Rules 73(2)(b) & (3)(a).
115. *Id.* Rule 73(3)(b).
116. *Id.* Rule 73(5).
117. *Id.* Rule 73(6).

For instance, the rules allow the use of English or French when a panel reviews a determination made in Canada: "[e]ither English or French may be used by any person or panelist in any document or oral proceeding."[118] Moreover, 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.[119]

There is as much of a need to accommodate the Spanish language as the French. Virtually all of Mexico's over ninety million inhabitants speak Spanish, and extremely few speak fluent English. Yet, there is no provision whatsoever for the use of the Spanish language in the proceedings to review determinations made in Mexico.

The absence of a specific provision for the use of the Spanish language in panel reviews of Mexican final determinations is most probably a consequence of the fact that the panel rules were essentially copied from those previously designed for the United States-Canada Free-Trade Agreement. Those original rules, for obvious reasons, did not have to take into account the peculiarities of Mexican proceedings. In all likelihood, the drafters of the new set of rules did not give enough thought to the extent to which the rules had to be modified to be applicable to Mexican proceedings.

Moreover, Canadian law protects 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 both 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."[120] 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 accommodate Francophones in Canadian panel review proceedings. Rule 2 declares that procedural questions not covered by the rules

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118. *Id.* Rule 29.

119. *Id.* Rules 30 & 31. The complaint as well as all notices of appearance 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." *Id.* Rules 39(2)(d) & 40(1)(e); *see id.* Forms 3-4.

120. Official Languages Act, R.S.C, c.0-2, s.1.

may be resolved by analogy to the rules.[121] In fact, the wisest approach would be to make space for the use of English, Spanish, and French in all panel review proceedings.

The language issue is not in itself crucial. It acquires transcendence as a symptom of a larger problem with the panel review procedure and with the agreement as a whole. As a latecomer to the North American free trade game, and as the weakest party sitting at the bargaining table, Mexico was never allowed to contribute in a meaningful way to the process that produced the Agreement. It was presented a contract of adhesion and told to sign if interested. The 1904 panel review procedure as a whole—just like the treatment of language in the procedure—is part of this phenomenon. It completely disregards the Mexican viewpoint and priorities.

V. THE REPRODUCTION OF U.S. PROCEDURAL DETAILS

The panel review procedure is, in fact, a creature of U.S. law. The United States had already imposed its legal structure in the earlier free trade negotiations with Canada. If the influence of the Canadian government on procedure was minimal, that of the Mexican regime was nonexistent. Mexico not only became involved in the negotiations later than Canada, but also came into the process in a much weaker bargaining position.

In addition, the legal system of Mexico is in many respects further removed from U.S. law than that of Canada. Canada shares a common law background as well as a history of intellectual, cultural, and institutional cooperation with the United States. Mexico, in contrast, has civil law roots and its relation with its northern neighbor has often been characterized by conflict, mistrust, and distance. Insofar as it is based on U.S. procedural law, NAFTA's procedural component is more disruptive to the legal system of Mexico than to that of Canada.

The extent to which the 1904 Panel Rules bear the imprint of U.S. law cannot be exaggerated. The organization of the rules calls to mind 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 on "parties" has no equivalent in the panel rules, which simply refer to the law of the jurisdiction in which the final determination was made to define the party-configuration.[122]

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121. 1904 Panel Rules, *supra* note 15, Rule 2.

122. In addition to the involved NAFTA parties and the investigating authority, the participants in

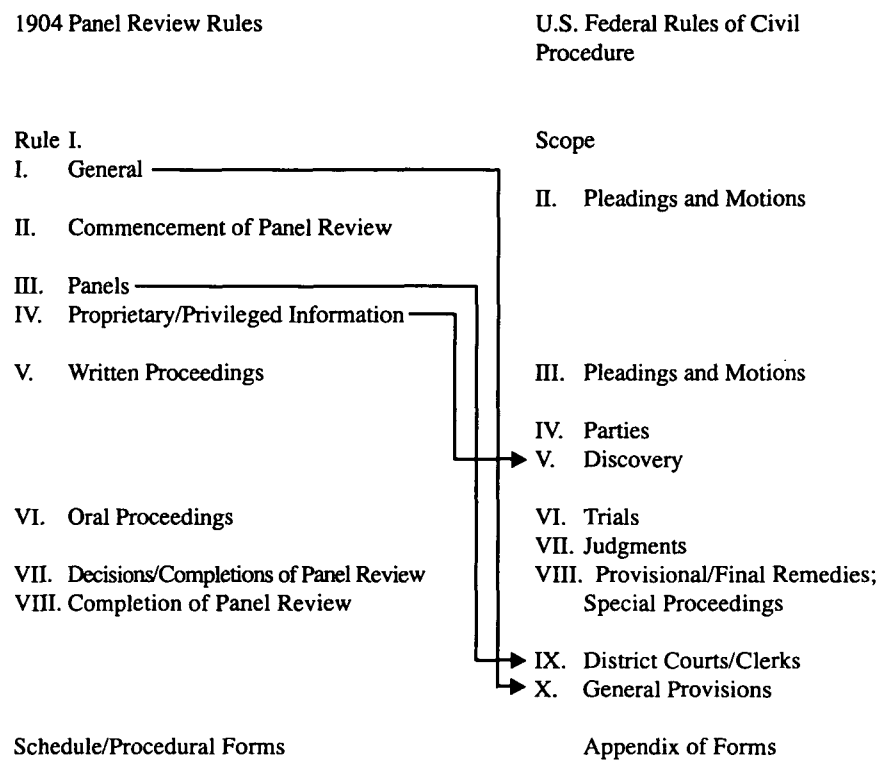

Figure 2: 1904 Panel Rules and U.S. Federal Rules of Civil Procedure

Beyond a general structure, the 1904 Panel Rules duplicate—often word by 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 an initial pleading phase derived from federal trial practice and a second phase of briefs and oral argument based on federal appellate practice. The extent to which they duplicate the Federal Rules is astonishing.

Rule 2 of the 1904 Panel Rules, for example, enunciates: "The pur-

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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." *Id.* Rule 3 (definitions and interpretation of "participant" and "interested person").

pose of these rules is to secure the just, speedy and inexpensive review of final determinations. . . ."[123] This language has clearly been borrowed 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."[124] 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 inconsistent with these rules."[125] 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."[126] Further, 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 go on to explain the conditions for extending a time period.[127]

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.[128] More important, the content of the pleadings in both procedural schemes is quite similar. The complaint and the responsive pleading mainly consist of a statement of the person's claim and demand for relief,[129] while motions essentially include a statement of the

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123. *Id.* Rule 2.

124. FED. R. CIV. P. 1.

125. *Id.* Rule 83; FED. R. APP. P. 47.

126. 1904 Panel Rules, *supra* note 15, Rule 17(1).

127. 1904 Panel Rules, *supra* note 15, Rules 19 & 20; FED. R. CIV. P. 6; FED. R. APP. P. 26.

128. *Compare* 1904 Panel Rules, *supra* note 15, Rule 55(3) ("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.").

129. *Compare* 1904 Panel Rules, *supra* note 15, Rule 39(2) ("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 id.* Rule 40(1) (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,

supporting grounds and the proposed order.[130]

The briefs allowed in panel reviews, in turn, are the same as those used in federal appellate procedure. There is a brief by the petitioner, a brief by the respondent, and a reply brief by the petitioner.[131] Like the Rules of Appellate Procedure, the Panel Rules also provide for amicus curiae briefs, though in more limited circumstances.[132]

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.[133] The brief of the appellant in federal appellate proceedings must have five identical headings.[134] Both sets of rules also coincide in mandating that briefs include an appendix of authorities referred to.[135] They also contain almost identical provisions on joint briefs; Panel Rule 57(5), on the one hand, reads: "[a]ny number of participants may join in a single brief and any participant may adopt by reference any part of the brief of another participant."[136] Rule of Appellate Procedure 28(i), on the other hand, 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."[137]

The prehearing conference in panel review is hard to distinguish from that in federal appeals. 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

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and a demand for the relief the pleader seeks.").

130. *Compare* 1904 Panel Rules, *supra* note 15, Rule 61 ("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.").

131. *Compare* 1904 Panel Rules, *supra* note 15, Rule 57(1)-(3) *with* FED. R. APP. P. 28(a)-(c).

132. FED. R. APP. P. 29 permits amicus curiae to file briefs when the parties consent or when the court grants leave. 1904 Panel Rules, *supra* note 15, Rule 57(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."

133. 1904 Panel Rules, *supra* note 15, Rule 59.

134. FED. R. APP. P. 28. In 1991, the FED. R. APP. P. were amended to require an additional heading on subject matter and appellate jurisdiction.

135. *Compare* 1904 Panel Rules, *supra* note 15, Rule 60 *with* FED. R. APP. P. 30.

136. 1904 Panel Rules, *supra* note 15, Rule 57(5).

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

> 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.[138]

In the same vein, prior to its 1994 revision Rule of Appellate Procedure 33 dictated that "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. . . ."[139] Rule of Appellate Procedure 33 defined the purpose of the prehearing conference somewhat more generally than Panel Rule 66, but the conferences in both procedures are clearly supposed to perform the same role in very much the same way.

Finally, the panel review oral hearing is unquestionably modeled 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 appeals. First, the petitioner's side makes its oral argument.[140] Second, the respondents present their side of the argument.[141] And, third, petitioners argue in rebuttal.[142] 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."[143] Making the same point more circuitously, Rule of Appellate Procedure 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.[144]

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

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138. 1904 Panel Rules, *supra* note 15, Rules 66(3) & (5).
139. FED. R. APP. P. 33 (1994). Rule 33 was changed in 1994. *See* FED. R. APP. P. 33 (1995).
140. 1904 Panel Rules, *supra* note 15, Rule 67(2)(a).
141. *Id.* Rule 67(2)(b).
142. *Id.* Rule 67(2)(c).
143. 1904 Panel Rules, *supra* note 15, Rule 67(3).
144. FED. R. APP. P. 34(e).

VI. THE REPRODUCTION OF THE U.S. PROCEDURAL CONCEPTS

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: "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."[145] It is possible that he actually meant Article 1904. At any rate, he could have made exactly the same remarks about Article 1904, as well as about the Panel Rules stemming from that Article. The panel review procedure embodies the conception of procedure characteristic of the common law, particularly as it has developed in the United States.

The 1904 panel review procedure is centered around a single hearing, in which the attorneys present their clients' versions of the facts and interpretations of the law. The concentration of the legal procedure into one event is paradigmatic of the common law tradition. In most common law cases, the 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 sessions spread out throughout the duration of the litigation.[146]

This consolidation of the main litigious activity into a single event has been associated with an increase in formality and even drama. The common law trial must traditionally comport to precise rules to ensure that the factual and legal issues are properly aired—particularly in front of the jury—and to minimize the risk of having to retry the case. The legal actors—especially the attorneys—are accordingly under considerable

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

146. *See* Arthur von Mehren, *The Significance for Procedural Practice and Theory of the Concentrated Trial: Comparative Remarks*, in 2 EUROPÄISCHES RECHTSDENKEN IN GESCHICHTE UND GEGENWART: FESTSCHRIFT FÜR HELMUT COING 361, 364 (N. Horn ed. 1982); John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 863-64 (1985); JOHN MERRYMAN, THE CIVIL LAW TRADITION 112 (2d. ed. 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." Von Mehren, *supra*, at 364-65.

pressure to offer their best performance during this crucial period.[147] As the central episode in a panel review, the oral hearing will always tend to be like the common law trial. As the central episode, it often takes place with rigidity and intensity, often resembling a knightly joust.

The Panel Rules provide for two other kinds of face-to-face encounters between the panelists and the attorneys. However, these meetings are demarcated from and subordinated to the central oral hearing. First, the panel may hear oral argument before ruling on a motion by one of the participants.[148] This gathering is supposed to facilitate decisions on the preliminary or side issue(s) raised in the motion before going into the main issue during the oral hearing. The panel may, secondly, hold a "pre-hearing conference."[149] This gathering is principally aimed at clarifying the issues or the procedure of the oral hearing.[150] The panel review fits well within the U.S. common law tradition not simply because of the number of oral hearings contemplated. The defining feature is the centrality attributed to and formality associated with the main hearing, i.e., the oral argument. The oral argument takes a role in the panel review analogous to that of the trial in civil litigation in the United States.

The 1904 panel review procedure also embraces the classic common law notion of a separate, self-standing, long-winded pleading phase. The common law traditionally viewed such a phase as necessary in order thoroughly to prepare the ground for the classic one-shot trial. In common law jurisdictions, John Merryman explains, "precise formulation of the issues in pleading and pretrial proceedings is seen as necessary preparation for the concentrated event of the trial."[151] 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 all kinds of motions.[152] Of course, in addition to these numerous pleadings, the rules call for various briefs by the participants.[153]

U.S. law has increasingly tended to solve disputes during the pleading phase, or at least during the pre-trial stage. That stage often consists of various rather flexible hearings and written exchanges between the parties. This trend, however, has been uneven. The extent to which cases

147. *See* MERRYMAN, *supra* note 146, at 113.
148. 1904 Panel Rules, *supra* note 15, Rule 63(2).
149. 1904 Panel Rules, *supra* note 15, Rule 66.
150. *Id.* Rule 66(3).
151. MERRYMAN, *supra* note 146, at 113.
152. *See* 1904 Panel Rules, *supra* note 15.
153. *See id.*

are resolved before the trial and the degree of informality of pre-trial proceedings varies, depending on the particular judge and on the kind of case involved; complex litigation is more likely to escape the rigid common law procedural format. The traditional picture of civil procedure, moreover, continues to influence civil proceedings profoundly. Article 1904 panel review proceedings may occasionally depart from that picture, but will never be completely delivered from it.

The idea of assigning a passive role to the panel and allocating ultimate control to the participants in 1904 panel review procedure 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 arguments. The decisionmaker—the court or the jury—is reactive; it chooses among the competing versions of the facts and of the law. It may not object to particular factual or legal interpretations agreed upon by the parties or even to an uncontested termination of the controversy. Similarly, in a panel review proceeding under Article 1904, 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 are set out in the Complaints filed in the panel review; and (b) procedural and substantive defenses raised in the panel review."[154] Panel Rule 35 requires the responsible secretary expressly to underscore this restriction when serving the participants.[155] The panel is precluded from, sua sponte, coming 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 case that has been reversed and remanded returns for a second panel review.[156] 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."[157] The panel must affirm even if it believes that the investigating authority's determination on remand is inconsistent with the panel's earlier decision.

The establishment of a joint panel review under Panel Rule 36 offers

154. 1904 Panel Rules, *supra* note 15, Rule 7.
155. *Id.* Rule 35(1)(c)(iii).
156. *Id.* Rules 73(2)(b) & (3)(a).
157. *Id.* Rule 73(5).

a final 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.[158] Yet, if any of the participants objects, "the motion shall be deemed to be denied and separate panel reviews shall be held."[159] The panel's views on the desirability of a joint review under Rule 36 are irrelevant.

It is crucial to keep in mind that U.S. civil procedure has recently begun evolving from this classical picture of the decisionmaker. Just as most cases are decided at the pretrial level, where there is no all-important, rigid oral event, but rather a series of relatively informal hearings, the U.S. legal system has witnessed the emergence of what Judith Resnick 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, judges are playing a critical role in shaping litigation and influencing results.[160]

The "managerial judge" described by Resnick departs radically from the prototypically disengaged and dispassionate decisionmaker.

The movement toward the managerial judge, like that toward a flexible examination of the case, has been uneven. The extent to which this trend has taken place, even within the U.S. federal system, varies from one judicial chamber (and from one case) to the next. There has been, further, a current flowing against the trend. Jurists have often criticized the informal interaction in the courts as well as the expanded involvement of the judiciary. It is fair to say that, at least in comparison to other systems, the United States legal system continues to be importantly influenced by a picture of procedure characterized by trial-like process and an inactive decisionmaker, and insofar as it reproduces U.S. law, the panel review procedure will similarly have to come to terms with this picture.

The panel review procedure also assimilates the common law prac-

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158. *Id.* Rule 36(1).

159. *Id.* Rule 36(2).

160. Judith Resnick, *Managerial Judges*, 96 HARV. L. REV. 376, 376-77 (1982) (footnotes omitted).

tice of peremptory challenges in the selection of panel members. Each involved party has "the right to exercise four peremptory challenges, to be exercised simultaneously and in confidence, disqualifying from appointment to the panel up to four candidates proposed by the other involved Party."[161] In U.S. civil cases, each party "is entitled to three peremptory challenges" in the selection of a jury.[162] "The use of peremptory challenges is of ancient origin and is given to aid each party's interest in a fair and impartial jury."[163]

In addition, the panel review procedure approaches attorney's fees in a way that is generally consistent with the common law as it has developed in the United States. "In the United States," Merryman points out, "if *A* sues someone, he usually must pay his own lawyer, whether he wins or loses."[164] 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."[165] The panel review procedure thus adopts the so-called "American Rule" not just with respect to attorney's fees, but with respect to all costs. In U.S. federal practice, costs other than attorney's fees tend to be saddled on the losing party.[166]

The panel procedure has been influenced by the U.S. common law conception of not only the civil trial but also the civil appeal. In the United States, Merryman insists, the appeal "is thought of as primarily a method of correcting mistakes of law made by the trial court."[167] Merryman contends that the presence of the jury has contributed decisively to the development of this conception of the civil appeal:

> The use of a jury in civil actions at the common law obviously forestalls review of the factual issues by an appellate court. The jury does not make specific findings of fact; it may, and often does, consider demeanor and other circumstantial factors; it need not justify (i.e., explain) its verdict; and its proceedings are not written. If the appellate court could independently decide factual questions, the jury's role would, in effect, be nullified. As long as there is *some* factual basis in the record to support the jury's

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161. NAFTA, *supra* note 1, annex 1901.2, ¶ 2.

162. 28 U.S.C § 1870 (1994).

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

164. MERRYMAN, *supra* note 146, at 119.

165. 1904 Panel Rules, *supra* note 15, Rule 32.

166. FED. R. CIV. P. 54(d)(1).

167. MERRYMAN, *supra* note 146, at 120.

(or the trial judge's) verdict, the appellate court in a common law jurisdiction will honor it.[168]

The 1904 panel review calls to mind this common law conception of appellate review. It is, first of all, based on the record of the complaints filed and procedural defenses thereto,[169] 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."[170] The panel is, therefore, not viewed as making an independent assessment of the case, but rather as passing on the plausibility of the determination below.[171]

The manner in which the panel announces its decision at the end also evokes the common law method. As discussed, the panel must issue a written opinion supporting its reasoning and decision.[172] Common law systems notoriously are centered around the elaborate opinions of judges, particularly at the appellate level. 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 naturally be available in print, and in addition must lay out the reasoning of the judges so that their content can be generalized and applied to other cases.

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 opinions, which in turn invites dissenting and concurring opinions.

Common law judges do not merely issue decisions but also articulate reasons. A concurring opinion makes sense only in situations where rea-

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168. *Id.*

169. 1904 Panel Rules, *supra* note 15, Rules 7(a) & (b).

170. NAFTA, *supra* note 1, art. 1904, ¶ 8.

171. As discussed above, the panel is required to apply the standard of the court that would otherwise review the case. The panel may accordingly not be required explicitly to give any special deference to the findings of facts of the authority making the antidumping or countervailing duty determination. For instance, Article 28 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, art. 238 (Mex.) [hereinafter C.F.F.]. But not just any determination may be overturned under these circumstances. It must be an "unfair determination." *Id.* So the Mexican Federal Tax Court must in fact defer to incorrect findings of fact of the investigating authority, unless the determination is found to be unfair. *Id.*

172. 1904 Panel Rules, *supra* note 15, Rule 72.

sons are attached to the decision. In addition, a dissenting opinion has more of a point when contrasted with a majority opinion as opposed to 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 is merely registering the fact that she was outvoted.

In sum, the common law legal tradition, particularly as developed in the United States, has thoroughly influenced Article 1904 panel review process. The influence is evident not only in the details of this process but also in the underlying conception of procedure. The process incorporates prototypical pictures of the trial and appellate proceedings—including a peculiar view of the pleading phase, of the role of the decisionmaker, and of the distribution of attorney's fees—along with a corresponding perception of the obligations of concurring and dissenting judges.

Of course, there are counter-pictures at work in the U.S. common law tradition as well, such as that of the informal and spread out pre-trial proceedings and that of 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 counter-pictures. Yet the main pictures will continue to play a key role—determining how legal actors think of and structure procedure. The next section shows that the dominant conception of civil procedure in Mexican law is quite different.

VII. A DIFFERENT CONCEPTION OF PROCEDURE

A U.S. lawyer would feel right at home in any of these panel review proceedings. To a Mexican jurist, however, the procedure would probably seem foreign. In this sense, the Mexican jurist would probably react very much like any other lawyer trained in the civil law tradition. This section focuses on how the Mexican conception of procedure is, in many ways, close to that of other civil law jurisdictions, such as Germany, and fundamentally at odds with the United States common law conception.

Civil procedure under Mexican law 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."[173] Herget and Camil con-

173. JAMES. E. HERGET & JORGE CAMIL, AN INTRODUCTION TO THE MEXICAN LEGAL SYSTEM

tend 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."[174] In a series of rather informal sessions, settlement is encouraged,[175] statements by the parties themselves are heard,[176] evidence is received,[177] and arguments of the lawyers are considered.[178] Civil procedure in Mexico is more episodic and less structured than in common law jurisdictions such as the United States and Canada.

In the debate surrounding the North American Free Trade Agreement, this difference in the Mexican approach to civil procedure—as well as other differences in Mexico's legal and economic institutions—was perceived as a badge of backwardness, sometimes even by the Mexicans themselves. 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 opportunity for generating an evolution within our system to improve Mexican procedures for solving disputes.[179]

Parra puts his finger on the key conceptual divergence between Mexican and U.S. civil procedure. Mexican procedure, unlike U.S. procedure, does

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74-75 (1978).

174. *Id.* at 75.

175. Código de Procedimientos Civiles para el Distrito Federal, art. 272A (Mex.) [hereinafter C.P.C.D.F.].

176. *Id.* art. 389.

177. *Id.* arts. 390-92.

178. *Id.* art. 393.

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

not aim at formally concentrating all litigious activity into a single point in space and time. However, the difference is not necessarily evidence of underdevelopment in Mexico. It rather stems from Mexico's peculiar legal background, as I will argue throughout this section. Improving Mexican procedure perhaps should not be achieved by adopting U.S. 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 system that prevails in the United States. In doing so, Mexico would be well advised to turn to the experience of other civil law jurisdictions, such as Germany.

In its gravitation toward 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.[180]

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 that "[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."[181] The Mexican approach to civil procedure departs from that of the United States not because it is less developed, but because it stems from a different legal tradition.

The German procedural system, which has been put forth as a model for the U.S. system,[182] is also based on a multiplicity of informal hear-

180. MERRYMAN, *supra* note 146, at 112.

181. *Id.* at 113.

182. "[B]y assigning judges rather than lawyers to investigate the facts, the Germans avoid the

ings. In German civil procedure, "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."[183] Thus, "the various oral hearings in the same case form a unity and constitute the basis of the judgment."[184] Oral hearings do not have to follow a particular sequence.[185] What happens from one hearing to the next, as well as what happens within each of those hearings, need not follow an ironclad pattern.

Merryman cautions, however, that "the trend in civil law jurisdictions has been toward greater concentration, with the rate of development varying widely."[186] Germany has certainly been at the forefront of this movement.[187] 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."[188]

> The simplification amendment of 1976 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.[189]

This increase in procedural concentration has been accompanied, in Germany and other civil law jurisdictions, by an evolution toward orality and immediacy.[190] These jurisdictions, in other words, have been relying in-

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most troublesome aspects of our practice." Langbein, *supra* note 146, at 824 (footnote omitted).

183. Id. at 826 (footnote omitted).

184. ROSENBERG ET AL., ZIVILPROZESSRECHT § 81, at 447 (1993).

185. *Id.*

186. MERRYMAN, *supra* note 146, at 112.

187. "Austria and Germany seem to be moving most rapidly in this direction." *Id.*

188. Zivilprozeßordnung [Code of Civil Procedure] § 272 I [hereinafter ZPO].

189. ROSENBERG ET AL., *supra* note 184, § 84, at 452.

190. CARLOS ARELLANO GARCÍA, TEORÍA GENERAL DEL PROCESO 39 (1992) (citing RAFAEL DE PINA, DICCIONARIO DEL DERECHO 68 (1965)). Carlos Arellano García connects the principles of concentration, orality, and immediacy. *Id.* at xx. Merryman, in turn, speaks of "the interrelated criteria of concentration, immediacy, and orality." MERRYMAN, *supra* note 146, 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

creasingly on oral as opposed to written procedural interaction, and on direct contact with the deciding judge throughout the whole case.[191] Civil law courts tend more and more to listen to the parties in open proceedings and less and less to require the parties to deal with the judges' deputies or secretaries, particularly during the examination of the evidence.

Mexico has also experienced this general development. There has been an attempt to concentrate civil proceedings in Mexico, though certainly not to the extent that Germany has. Mexican legal scholar Rafael de Pina has argued "that 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."[192] This shift toward orality is well under way in the Mexican legal system. "This procedural regulation of the oral reception and consideration of the evidence is one of the undeniable achievements of the Code of Civil Procedures for the Federal District."[193] "The oral procedure makes possible an ideal personal and direct communication between the judge, on the one hand, and the parties, witnesses, and experts, on the other hand. This ideal communication is one of the consequential principles of orality."[194] Proponents of these ideas would undoubtedly endorse the following dictum from a German textbook on civil procedure: "Orality is to be held on to under all circumstances. In public administration and in private economic life, difficult negotiations are carried out successfully only in oral discussion."[195]

Finally, immediacy has become one of the central aspirations of Mexican civil procedure. Mexican proceduralist Eduardo Pallares underscores that the principle of immediacy "essentially requires that the judge be in personal contact with the parties in order to receive their evidence, listen to their arguments, interrogate them, etc."[196] Though the practice

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proposals for reform in the law of civil procedure.

Id. at 114.

191. MERRYMAN, *supra* note 146, at 114. Merryman calls attention to the fact that "there is a steady evolution in civil law jurisdictions toward greater immediacy." *Id.*

192. ARELLANO GARCÍA, *supra* note 190, at 39 (1992) (citing RAFAEL DE PINA, DICCIONARIO DEL DERECHO 68 (1965)).

193. RAFAEL DE PINA & JOSÉ CASTILLO LARRAÑAGA, DERECHO PROCESAL CIVIL 390 (1990).

194. *Id.*

195. ROSENBERG ET AL., *supra* note 184, § 80, at 441.

196. ARELLANO GARCÍA, *supra* note 190, at 37 (quoting EDUARDO PALLARES, DICCIONARIO DEL DERECHO PROCESAL CIVIL 595 (1966)).

of having the court's secretary receive the evidence persists to some extent,[197] it runs counter to the provisions of the Federal District's Code of Civil Procedures[198] and has been vehemently rejected by legal scholars.[199]

The civil law tradition's gravitation toward the principles of concentration, orality, and immediacy has brought that tradition, in a sense, closer to the common law world. This approximation, however, is somewhat superficial. Civil law proceedings have preserved a distinct flavor. What goes on during these proceedings sets them apart from the realm of the common law; they are less formal, more open-ended. This distinctiveness is no doubt related to a history in which a dispersed, mediated, and written procedure prevailed. That history gave rise to a particular approach to procedure which has survived to this day. But the persistence of that approach is due to the fact not only that old habits die slowly, but also that the drift toward concentration, immediacy, and orality has not been unequivocal.

In Germany, the call for concentration in the Code of Civil Procedure has certainly not eliminated the differences between German procedure and that of common law systems. Many cases, due to their complexity, cannot be completely resolved during the main hearing. "For cases that do not lend themselves to one-hearing resolution," John Langbein explains, "the 1977 amendments [enacted in 1976] have not altered the episodic character of the procedure."[200]

Langbein insists that even in simpler cases, which are decided in the main hearing, significant procedural differences between the German and

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197. "In the busier courts," Herget and Camil report, "sometimes the judge is not present at [the evidentiary] hearings and the court secretary asks the questions as well as types the answers." HERGET & CAMIL, *supra* note 173, at 75; *see also* ARELLANO GARCÍA, *supra* note 190, at 103.

198. "The hearing must be presided by the judge, as established by Article 58 of the Code of Civil Procedures." ARELLANO GARCÍA, *supra* note 190, at 103; *see* C.P.C.D.F. art. 58.

199. "In this manner," Carlos Arellano García protests, "the basic goal of orality, which should prevail at the hearing and which aims at the immediacy between the parties and the judge so that the formal truth does not fully cover up the real truth, is lost." ARELLANO GARCÍA, *supra* note 190, at 103. Rafael de Pina and José Castillo Larrañaga, for their part, declare:

> The reception and consideration of the evidence in a public hearing requires the inexcusable presence of the judge. This—along with the judge's power to question directly the parties, witnesses, and experts—guarantees that in the course of this whole operation there will be no interferences that might corrupt the role corresponding to the head of the jurisdictional organ on this matter, which constitutes the heart of civil procedure.

DE PINA & CASTILLO LARRAÑAGA, *supra* note 193, at 390.

200. Langbein, *supra* note 146, at 827 n.9.

U.S. common law systems 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."[201] 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."[202] The format of the hearing is kept deliberately loose. As discussed below, judges are given substantial freedom to structure and run the oral hearing as they see fit.

Benjamin Kaplan refers to the distinct character of German civil procedure as the "conference method" of adjudication.[203] John 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."[204]

Mexican civil procedure has also kept its distance vis-à-vis the realm of common law. First, there has been even less of a shift toward concentration in Mexico than in Germany. Second, instead of completely abandoning the written system in favor of the oral system, Mexico (like Germany)[205] has opted for a hybrid regime:

> Our ordinary procedure is hybrid. Despite the theoretical benefits attributed to the exclusively oral procedure and the deficiencies underscored with respect to the written procedure, in 1931 the legislature, well aware of the Mexican reality, sought a middle ground and created a hybrid procedure. It required the judge to be in direct contact with the parties and with third parties during the hearing of the evidence. Yet, it adopted the written form for requests and petitions directed at the judge, so that these would be preserved and thus available for later inspection.[206]

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201. *Id.* at 826-27 n.9; *see* ZPO § 136 III.

202. ZPO § 137 II.

203. Benjamin Kaplan, *Civil Procedure: Reflections on the Comparisons of Systems*, 9 BUFF. L. REV. 409, 410 (1960).

204. Langbein, *supra* note 146, at 831.

205. *See generally* ROSENBERG ET AL., *supra* note 184, § 80, at 441 ("The procedure in our Code of Civil Procedure is oral although the hearing is prepared through written pleadings.").

206. JOSÉ BECERRA BAUTISTA, EL PROCESO CIVIL EN MÉXICO 53 (1986).

The defects of the Mexican written procedure "are defects inherent in the personnel of the courts rather than of the procedure itself."[207] Moving toward an exclusively oral procedure in imitation of the U.S. system, scholars argue, may be a mistake:

> [W]e do not believe that the human vices of those who do not comply with the dispositions in force should lead, in a purely mimetic spirit, to the overthrow a procedural system established on the basis of centuries of experience and to the substitution of that system by another one. The latter may be wonderful for the Saxon race but is unadaptable to our medium.[208]

This vibrant rhetoric drives home the simple fact that Mexico has held on to its civil law conception of procedure, despite the trend toward orality. Finally, even though the law and legal scholars have wholeheartedly embraced the principle of immediacy, that principle has not been fully implemented in practice. This fact tends to reinforce Mexico's place within the civil law tradition.

In sum, civil proceedings in the civil law tradition are evolving toward more concentration and orality (though less than in the common law tradition) on the one hand, and toward complete immediacy on the other. This turn of events may be seen in Mexico as well as in Germany. The civil law procedural system continues to demarcate itself from the common law system because it aspires to less concentration and orality and because in countries such as Mexico its aspiration to full immediacy is often not fulfilled. The inner dynamics of civil procedure in the civil law tradition have, in fact, remained fundamentally distinct. Civil proceedings in civil law countries, particularly in Mexico and Germany, are generally more flexible, informal, and business-like. Civil law systems have stayed relatively close (despite their evolution) in their conception of the civil proceeding. This is so, not only because they have common origins and face similar challenges, but also because there is a significant degree of cross-fertilization in the debate on civil procedure. Individuals who ponder and discuss civil procedure in civil law countries tend to be aware of each other's efforts.[209]

The different kind of civil proceeding in the civil law tradition is

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207. *Id.* at 170.

208. *Id.*

209. Of course, the European standpoint usually dominates this debate. European commentators are more widely read than their non-European counterparts.

bound up with a different understanding of pleading and discovery. In the common law tradition, "pleading is very general, and the issues are defined as the proceeding goes on."[210] This description of the pleading phase applies to Mexican as well as German civil procedure.[211] Discovery plays a less prominent role in the civil law than in the common law tradition. Merryman elucidates this point: "The lack of concentration . . . explains the lesser importance of discovery (advance information about the opponent's witnesses and evidence). . . . Discovery is less necessary because there is little, if any, tactical or strategic advantage to be gained from the element of surprise."[212] Herget and Camil, similarly, connect the insignificance of discovery in Mexico to the lack of concentration and of the element of surprise:

> Since there is no trial in Mexico, there is no need for discovery as such. It is of course possible to obtain an order from the court directed to one of the parties or a third party to produce certain evidence or to testify about something. However, when this is done the evidence so produced simply becomes part of the *expediente*. 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.[213]

In Mexico, like Germany, discovery not only plays a minimal role but also is mostly conducted by the judge.[214]

Though the extent of their involvement in civil procedure has been exaggerated,[215] civil law judges appear to be more engaged than their counterparts in the common law tradition. This is certainly the case in Mexico as well as in Germany.[216] Mexican civil judges are very active

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210. MERRYMAN, *supra* note 146, at 113. Merryman links this approach to pleading with the lack of concentration in the civil law tradition. *Id.*

211. HERGET & CAMIL, *supra* note 173, at 74.

212. MERRYMAN, *supra* note 146, at 113.

213. HERGET & CAMIL, *supra* note 173, at 75.

214. *See* Gary Taylor, *The Mexican Way of Litigation*, NAT'L L.J., June 27, 1994, at A24 ("Aggressive U.S. trial lawyers will be frustrated to learn that Mexican judges conduct pretrial discovery.").

215. MERRYMAN, *supra* note 146, at 114-15.

216. 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. The same could be said about the Mexican system.

throughout the judicial proceeding. They are required to encourage settlement. The Federal District's Code of Civil Procedures provides: "Once the complaint and the plea in reconvention (if any) have been answered, the judge shall immediately set a date and a time for a preliminary and conciliation hearing."[217] During that hearing, upon considering procedural issues, the judge asks the conciliator assigned to the court to seek a conciliation of the parties. "If the parties arrive at an agreement, the judge shall approve it right away, if legal."[218] "If the parties fail to reach an agreement, the hearing shall continue."[219] The code grants the judge "broad powers in conducting the proceeding."[220]

Judges carry their "broad powers" into the evidentiary phase of procedure. They take a leading role, for instance, in the examination of the witnesses.[221] "The judge may, in virtue of his office, broadly interrogate the witnesses with respect to the facts at issue in the evidentiary hearing in order better to ascertain the truth."[222] Only after making this statement does the Code establish that "the parties may also interrogate the witness."[223] 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."[224]

In Mexican procedure, the parties themselves are required personally to make statements, i.e., to provide "confessional evidence."[225] The Federal District's Code of Civil Procedures allows the parties to pose questions to each other during this stage.[226] 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."[227] 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

217. C.P.C.D.F. art. 272A; *see* BECERRA BAUTISTA, *supra* note 206, at 56-57, 172-73.

218. C.P.C.D.F. art. 272A. "The agreement shall have the effect of res judicata." *Id.*

219. *Id.*

220. *Id.*

221. "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 subject in his interrogation. There is no cross examination." HERGET & CAMIL, *supra* note 173, at 75.

222. C.P.C.D.F. art. 392.

223. *Id.*

224. *Id.*

225. *Id.* art. 317.

226. *Id.* arts. 317, 389.

227. *Id.* art. 318.

truth with respect to the disputed issues."[228]

The Code bestows upon judges broad powers in the consideration of all, not just testimonial, evidence. The parties, to be sure, offer the evidence. Yet the judges, in addition to deciding whether the evidence is admissible,[229] must "receive and examine it."[230] Judges have substantial latitude in terms of the kind of evidence they rely on. "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."[231]

Judges also have great discretion in deciding how the evidence will be examined. The judges' broad authority to examine evidence includes the right "personally [to] inspect items of physical evidence including premises."[232]

> 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 hearings, 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.[233]

"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."[234]

At the end of the reception of the evidence the court shall order the parties to make oral arguments—personally or through their attorneys: first the plaintiff and then the defendant."[235] This phase sounds quite similar to the closing arguments in common law trials. Again, the judge is more involved: "The courts shall direct the debate, admonishing the par-

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228. *Id.* art. 366; *see* BECERRA BAUTISTA, *supra* note 206, at 125.

229. C.P.C.D.F. art. 298; *see* BECERRA BAUTISTA, *supra* note 206, at 104.

230. *See* BECERRA BAUTISTA, *supra* note 206, at 106.

231. C.P.C.D.F. art. 278; *see* EDUARDO PALLARES, DERECHO PROCESAL CIVIL 357 (1978); BECERRA BAUTISTA, *supra* note 206, at 100.

232. HERGET & CAMIL, *supra* note 173, at 75.

233. C.P.C.D.F. art. 279; *see* PALLARES, *supra* note 231, at 357; BECERRA BAUTISTA, *supra* note 206, at 98.

234. PALLARES, *supra* note 231, at 357.

235. C.P.C.D.F. art. 393.

ties to concentrate themselves on the disputed issues and to avoid digressions. The courts may interrupt the parties to request explanations and they may interrogate the parties with respect to those issues they deem relevant."[236] Unlike their counterparts in the common law, Mexican judges must, in essence, argue along with the attorneys for the parties.

In its assignment of an active role to the judge, the Mexican regime of civil procedure resembles German procedure. In Germany, the trial court also has broad control over the proceedings:

> The direction of the proceedings is the responsibility of the court in virtue of its office and does not require a motion or a suggestion by the parties. Nor can the parties relieve the court of its duties. The court must dutifully deliberate on those decisions placed within its discretion.[237]

German, like Mexican, judges are required to seek a settlement. In fact, German judges have a continual obligation to promote conciliation throughout the whole proceeding. Section 279 of the Code of Civil Procedure, under the heading "Amicable resolution/Attempt at conciliation," provides:

> I. The court shall in every procedural situation look to an amicable resolution of the legal dispute or of specific issues in dispute. It may refer the parties to a commissioned or requested judge in order to attempt to reach an amicable settlement.
> II. The personal appearance of the parties may be ordered in order to attempt to reach an amicable settlement.[238]

Because German judges are closely in touch with the disputed issues as well as with the parties, they are "strongly positioned to encourage a litigant to abandon a case that is turning out to be weak or hopeless, or to recommend settlement."[239]

In addition to pushing for settlement, German judges have a duty to clarify:

> The chairperson must bring about that the parties manifest themselves completely with respect to all the relevant facts and that they make the pertinent motions; particularly that they supple-

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236. *Id.* art. 395.
237. ROSENBERG ET AL., *supra* note 184, § 79, at 435.
238. ZPO § 279; *see* ROSENBERG ET AL., *supra* note 184, § 79, at 440.
239. Langbein, *supra* note 146, at 832.

> ment insufficient declarations on the asserted facts and describe the evidence. To this end, he shall discuss with the parties, in so far as he is so required, the facts of the case and the issues in dispute from the factual and legal perspective as well as ask questions.[240]

In performing this duty, judges must do more than alert the parties that they are proceeding incorrectly. Judges must also make specific suggestions on how to remedy the defects that have been pointed out.[241]

Judges also have extensive obligations with respect to the preparation of the hearings.[242] When the parties are not represented, judges usually schedule a preliminary hearing to lay the groundwork for future hearings.[243] If there is counsel, the planning for the hearing is normally carried out through pleadings.[244] The Code of Civil Procedure further empowers judges, in preparing each hearing, to:

> 1. [C]all on the parties to supplement or elucidate their preparatory pleadings as well as to present documents or objects suitable to be brought before the court and set a deadline for the explanation of specific issues in need of clarification;
> 2. [R]equest public officials or holders of public office to transmit documents or to furnish official information;
> 3. [O]rder the personal appearance of the parties; [and]
> 4. [S]ummon witnesses, to which the parties have alluded, or experts to the oral hearing as well as enter an order pursuant to § 378 [i.e., to compel a witness to bring records and documents relevant to his or her testimony].[245]

It is, in fact, through these measures that judges are expected to dispose of many cases in one main hearing.[246]

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240. ZPO § 139 I.
241. *See* ROSENBERG ET AL., *supra* note 184, § 79, at 439.
242. ZPO § 273.
243. *See* ROSENBERG ET AL., *supra* note 184, § 106, at 601.
244. ZPO § 129 I.
245. *Id.* § 273 II.
246. Rosenberg, Schwab, and Gottwald note:

> German judges hold the main hearing only after this ample preparation. Thus, the legal dispute is usually resolved during this hearing, at which the evidence is introduced and the judgment is announced (§ 272 I). This goal can be achieved only if the court amply prepares the proceeding and also gets involved thoroughly in the case.

German judges also completely dominate the hearings themselves. The oral hearing starts with a waivable introduction to the case and the disputed issues.[247]

> Since the main hearing is preceded by a preparatory written or oral procedure, in this introduction the court lays out the disputed matters, which from the court's point of view will be relevant to the decision, and identifies, as far as possible, the point of contention, which will be essential for the upcoming hearing.[248]

The Code alludes to the next stage of the main hearing as follows: "The parties present should thus be personally heard."[249] This, of course, calls to mind Mexican civil procedure. German judges, like their Mexican counterparts, may thoroughly interrogate the parties in order to get to the truth of the matter.

The German Code of Civil Procedure requires that the evidence be considered during the main hearing: "The introduction of the evidence should immediately follow the adversarial hearing."[250] Like in Mexico, the court is very involved. The interrogation of the witnesses (including expert witnesses) is "a primary task of the court."[251] "The judge," in the words of John Langbein, "serves as the examiner-in-chief."[252] Langbein adds: "At the conclusion of his interrogation of each witness, counsel for either party may pose additional questions, but counsel are not prominent as examiners."[253]

German judges, therefore, have considerable power and flexibility when it comes to structuring and running the hearing. They do not have to follow a pre-ordained script, and are urged to proceed as circumstances require. Moreover, there is no specific formula that tells judges when they must bring the proceeding to an end. Instead, they have the authority to

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ROSENBERG ET AL., *supra* note 184, § 106, at 602; *see also* Langbein, *supra* note 146, at 826.

247. ZPO § 278 I ("In the main hearing, the court introduces the state of affairs and the state of the dispute."). Rosenberg, Schwab, and Gottwald point out that the parties may (and often do) waive this introduction. ROSENBERG ET AL., *supra* note 184, § 106, at 602.

248. ROSENBERG ET AL., *supra* note 184, § 106, at 602.

249. ZPO § 278 I. *Cf. id.* § 137 IV ("In a suit by counsel, the parties themselves, not just their attorneys, are to be permitted to speak if they so move."); *see also* ROSENBERG ET AL., *supra* note 184, § 106, at 602.

250. ZPO § 278 II.

251. ROSENBERG ET AL., *supra* note 184, § 79, at 439.

252. Langbein, *supra* note 146, at 828.

253. *Id.*

close to hearing when, in their view, "the issues have been fully discussed."[254]

The distinct understanding of the function of the judge in the civil law tradition hangs together with a particular image of the role of the parties. The parties do not run the show; they are less independent than in common law systems. They, as well as their attorneys, play a crucial (and even adversarial) part, but they confront each other less directly. The court is not supposed to be merely an arena in which they may carry out their battle; it is instead an institution which processes their dispute.

Because the common law regards the parties as independent wills battling to have their way, it makes sense to require each party to pay her own attorney's fees. Each contestant, it could be said, chooses (and pays for) her weapon. In the United States the general rule is that each party bears her own attorney's fees.[255]

"In civil law countries, as in England, the loser usually pays the winner's counsel fees."[256] The civil law tradition does not distinguish between attorney's fees and court costs. It shifts attorneys' fees to the losing party, as part of the costs. Apparently, counsel is seen less as an extension of the parties and more as part of the process. There is a different image of the attorneys as well as of the parties.

In the German legal system, the losing party normally must pay the prevailing party's litigation costs, including attorney's fees: "The losing party must bear the costs of the legal dispute. . . . The legally allowed expenses of the attorney for the prevailing party are to be reimbursed in all cases."[257] The practice in the federal courts in Mexico is similar. "The Federal Code of Civil Procedures follows the criterion of those regimes that impose the payment of costs as a consequence of defeat (Art. 7)."[258] The Federal District's Code of Civil Procedure, however, takes a less clear-cut approach. It generally imposes costs when required by law and when the losing party has proceeded with temerity.[259] 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

254. ZPO § 136.

255. *See* Key Tronic Corp. v. United States, 114 S. Ct. 1960, 1965 (1994) ("[A]ttorney's fees generally are not a recoverable cost of litigation 'absent explicit congressional authorization.'") (citation omitted).

256. MERRYMAN, *supra* note 146, at 119.

257. ZPO § 91 I, II.

258. DE PINA & CASTILLO LARRAÑAGA, *supra* note 193, at 342.

259. C.P.C.D.F. art. 140.

claim clearly without merit, or delays the proceedings unnecessarily.[260] At any rate, it is understood in Mexico that the costs include attorney's fees.[261]

The civil law tradition diverges from the common law tradition in the conception of the appeal as well as in that of the trial.

> In the civil law tradition, the right of appeal includes the right to reconsideration of factual, as well as legal issues. Although the tendency commonly is to rely on the record prepared below as the factual basis for reconsideration of the case, in many jurisdictions the parties have the right to introduce new evidence at the appellate level. The appellate bench is expected to consider all of the evidence itself and to arrive at an independent determination of what the facts are and what their significance is. It is also required to prepare its own fully reasoned opinion, in which it discusses both factual and legal issues.[262]

This account certainly does justice to German civil procedure. "The legal dispute shall be heard all over again by the court of appeals within the limits set by the motions."[263] As John Langbein points out, "No presumption of correctness attaches to the initial judgment."[264]

The treatise by Rosenberg, Schwab, and Gottwald elucidates the nature of the appeal:

> The appeal takes place against the judgments of the trial court (magistrate or district court). The goal is not just the correction of factual and legal mistakes of the lower court. The appeal is also aimed at a completely new decision in the legal dispute

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260. *Id.*

261. *See* DE PINA & CASTILLO LARRAÑAGA, *supra* note 193, at 342 ("The concept of costs comprises . . . attorney's fees."); BECERRA BAUTISTA, *supra* note 206, at 204 (The award of costs "covers . . . the fees of the attorney representing the opposing party."); PALLARES, *supra* note 231, at 180 (The costs "encompass the fees of the attorneys representing the parties.").

262. MERRYMAN, *supra* note 146, at 120.

263. ZPO § 525. The code elsewhere provides:

> The object of the hearing and decision by the court of appeal consists in all the disputed issues that relate to an upheld or a dismissed claim and that (according to the motions) require a hearing or a decision. This is so even if there was no hearing or decision in the first legal round with respect to those disputed issues.

Id. § 537.

264. Langbein, *supra* note 146, at 856.

> through a continuation and a renewal of the hearing and with ius novorum—i.e., the general admissibility of new claims and defenses (§§ 527ff., § 523 with § 282). This, to be sure, has been limited since the amendment of February 13, 1924 and October 27, 1933, as well as the simplification amendment of 1976 . . .[265]

The amendments alluded to reduced the appellate court's liberty to consider new evidence and issues. "The main task in review de novo," John Langbein explains, "is not . . . gathering new evidence, but considering afresh the record and the judgment from below."[266] Langbein makes it clear, however, that "the appellate court can form its own view of the facts, both from the record and, if appropriate, by recalling witnesses or summoning new ones."[267]

In Mexico, even though the concept of the civil appeal does not appear to involve a review de novo of the case,[268] there is no presumption of correctness attached to that judgment. According to Rafael de Pina and José Castillo Larrañaga:

> 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.[269]

Herget and Camil similarly maintain that the court of appeals "makes its own decision on both factual and legal issues."[270] José Becerra Bautista

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265. ROSENBERG ET AL., *supra* note 184, § 134, at 802.

266. Langbein, *supra* note 146, at 857.

267. *Id.* at 828.

268. 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 judicium*. BECERRA BAUTISTA, *supra* note 206, at 590. The appellate suit, he insists,

> is not one in which the same problems considered by the trial court are brought up again with 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 judicando* or *in procedando*, alleged by the petitioning party in the statement of grievances.

Id. at 591.

269. DE PINA & CASTILLO LARRAÑAGA, *supra* note 193, at 358.

270. HERGET & CAMIL, *supra* note 173, at 76.

notes that in exceptional cases, evidence not considered by the trial court may be admitted on appeal.[271] Also in contrast to the common law, the Federal District's Code of Civil Procedures allows the court to affirm, reverse, or modify the judgment from below, but not to remand it.[272]

In the civil law tradition, judges rarely write concurring or dissenting opinions.

> 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.[273]

This general statement could be applied to the Mexican as well as to the German legal system. Of course, as Merryman acknowledges, there is a trend in the civil law tradition toward writing dissents and concurrences in constitutional cases.[274]

VIII. CONCLUSION

It would be incorrect, as well as pointless, to assert categorically that the Mexican civil law approach to procedure is superior to the United States common law approach. Any such assertion would add tribalism instead of insight to the debate. The main aim of this article has been to show that Mexico has a distinct civil procedure, partly because of its civil law heritage. In addition to having a different genealogy and history, that procedure reflects different presuppositions and a different structure.

It is unfortunate that the debate on dispute resolution in the North American Free Trade Agreement, particularly in the area of antidumping and countervailing duties, did not appreciate Mexico's different procedural perspective. It would have been illuminating to attempt to imagine an international procedural structure that drew on different viewpoints. In such a process of imagination, the challenge would have been to stay within the bounds of coherence. There would have been a constant danger of ending up with a tossed salad of discrete procedural mechanisms that

271. BECERRA BAUTISTA, *supra* note 206, at 591.
272. C.P.C.D.F. art. 688.
273. MERRYMAN, *supra* note 146, at 121.
274. *Id.*

did not mesh smoothly or function properly.

It might thus have been possible to come up with an eclectic but reasonable procedure. The procedure could have sought to draw coherently upon the approaches not only of the countries involved, but also of other countries and institutions. Consider the following procedural picture: various flexible and business-like hearings; the dispute regarded not as one between two adversaries but as one between different images of regional integration and interregional justice; and the panel members thoroughly engaged, but required to justify their conclusions, including their concurring and dissenting positions. In this hypothetical scenario, the panelists would be allowed, like in the procedure under the General Agreement on Tariffs and Trade,[275] to take into account the special situation of Mexico as a developing country. Any person or group with a legitimate interest would have the right to become a party and would not be penalized, but rather encouraged, when they brought reasonable claims. Therefore, the costs, including attorneys' fees, would be paid by the three NAFTA parties according to their level of wealth.

It would have been enlightening to have a robust dialogue to imagine a new procedure along these lines. Yet any such discussion was out of the question at the formative stages. The negotiations on the Agreement were more about coercion than about conversation. Mexico had to accept the ways of the North—not just on procedural issues, but on other questions of law as well as on questions of economics—in order to become a member.

Now, a few general comments on the expansion of NAFTA. A fate similar to that of Mexico probably awaits other Latin American countries interested in joining the Agreement individually. They too would have to sacrifice their legal and economic identity. Their best strategy is perhaps to develop and strengthen their own free trade agreements. Further down the road, they may want to give some thought to joining the North American trading block. But they should not do so as individual countries. Instead, they should, as members of Mercosur, Caricom, Mercado Común Centroamericano, Grupo de los Tres, and Grupo Andino, join the North American countries in an attempt multilaterally to develop a new conception of hemispheric integration.

Chile does not yet belong to any of these free trade groups and has already set the process in motion to join the North American trading

275. 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).

block. If successful (which is far from certain), Chile could then try to form an alliance with Mexico in order to build a counterweight to Canada and the United States. Chile and Mexico could strive for the "Latin Americanization" of the Agreement, thus paving the way for a pluralistic hemispheric integration. The prospects of such a strategy, of course, are not particularly bright. The negotiating position of the United States, where the number and power of the NAFTA-skeptics has grown, would in all likelihood be even stronger against a Chile-Mexico alliance than it was against Mexico. As a member of the Agreement, Chile's only option would be to attempt, like Mexico has, to foster its economic relations to other Latin American countries, and to enter bilateral free trade agreements with them. Mexico and Chile would thus have a better chance of resisting complete economic and legal assimilation.

Sidney Weintraub has argued that even from the North American perspective, it makes economic sense to aim at a deliberate and multilateral integration of the western hemisphere.[276] He points out that a quick and bilateral incorporation of other Latin American countries would lead to superficial integration only.[277] He recommends a deepening of the existing Agreement and of the relations between the current members before an expansion is even considered.[278] From the legal point of view, this makes sense; however, an enhancement of the regional free trade pacts between Latin American countries is also essential, both economically and legally. Only thus will they be in a position to protect their legal as well as economic identities.

276. *See* SIDNEY WEINTRAUB, NAFTA: WHAT COMES NEXT? xxi (1994).
277. *Id.* at 82.
278. *Id.*