Mi casa es tu casa?

The limits of inter-systemic dispute resolution

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Abstract

The 'new NAFTA' agreement between Canada, Mexico and the United States maintained the previous system for binational panel judicial review. This system provides for ad hoc tribunals composed of three panelists from one country and two from the other. The tribunal reviews the antidumping and countervailing duty determinations of domestic government agencies. In US-Mexico disputes, this hybrid system brings together mainly Spanish and English speaking lawyers from the civil law and the common law to solve domestic legal disputes applying domestic law. These binational panels raise issues regarding potential bicultural, bilingual and bijural (mis)understandings in a globalized world. However, there is little literature regarding the comparative law challenges for international panelists when dealing with foreign legal institutions and ideas. Do differences in language, legal traditions, and legal cultures imply limits on the effectiveness of inter-systemic dispute resolution? We will analyze all of the decisions of binational NAFTA panels in US-Mexico disputes regarding Mexican antidumping and countervailing duty determinations and the profiles of the panelists involved in these disputes. This fascinating case study puts to the test in a practical way whether one can actually comprehend the 'other'. To what extent can a common law, English-speaking lawyer understand and apply the law of Mexico, expressed in Spanish and rooted in a distinct legal culture?

I. Introduction

The Canada-US Free Trade Agreement (CUSFTA) created a system for binational panel judicial review of antidumping and countervailing duty determinations of domestic government agencies. This system replaced judicial review in the domestic courts. Chapter 19 provides for ad hoc tribunals composed of three panelists from one country and two from the other in a dispute. In the case of Canada and the United States, both countries

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have laws in English and a common law system. (Although Canada's laws are also available in French and private law in Quebec is from the civil law tradition, trade remedy laws are federal).

The North American Free Trade Agreement (NAFTA) extended the Chapter 19 system of judicial review to include Mexico.[1] In the case of Mexico, laws are in Spanish, the legal system is a civil law system, and Mexican law has distinctive features, such as the concept of *Amparo*. *Amparo* applies to the Mexican equivalent of judicial review of administrative action, among other matters. The extension of this system to Mexico transplanted the common law concept of judicial review into the Mexican legal system, albeit via the application of the applicable standard of review in Mexican law.[2] The extension to Mexico of this system of common law judicial review has not been a smooth process.[3] After NAFTA, this system was not implemented in any other free trade agreements.

NAFTA Chapter 19 was a key issue in the NAFTA renegotiation that produced the USMCA.[4] The United States wanted to eliminate this dispute settlement mechanism, having been the target of 43 of the 71 matters brought before Chapter 19 panels.[5] However, Chapter

[1] For a good discussion of the issues arising in Mexican Chapter 19 cases during the first five years of NAFTA, see Kenneth J. Pippin, An Examination of the Developments in Chapter 19 Antidumping Decisions Under the North American Free Trade Agreement (NAFTA): The Implications and Suggestions for Reform for the Next Century Based on the Experience of NAFTA After the First Five Years, 21 Mich. J. Int'l L. 101 (1999). Available at: http://repository.law.umich.edu/mjil/vol21/iss1/3.

[2] McRae and Siwiec, ibid, provided a concise description of the issue, at 367-368:
'The adaptation of the Chapter 19 process to the situation of Mexico, a civil law jurisdiction, posed some challenges. Binational panel review draws on common law notions of judicial review of administrative action and a parallel in Mexican law had to be found for setting the standard of review. Article 238 of the Mexican Federal Fiscal Code (FFC) was chosen as providing an appropriate standard, although this gave rise to some difficulties when it came to be applied. …Article 238 was originally created as a standard for all administrative determinations in tax matters. As a result, binational panels had trouble identifying a specific standard to be applied to AD/CVD determinations.'

[3] J.C. Thomas & Sergio López Ayllón, 'NAFTA Dispute Settlement and Mexico: Interpreting Treaties and Reconciling Common and Civil Law Systems in a Free Trade Area' (1995) Can Y.B. Int'l L. 75; David A. Gantz, 'Resolution of Trade Disputes under NAFTA's Chapter 19: The Lessons of Extending the Binational Panel Process to Mexico' (1998) 29 Law & Pol'y Int'l Bus. 297; Gabriel Cavazos Villanueva & Luis F. Martinez Serna, 'Private Parties in the NAFTA Dispute Settlement Mechanisms: The Mexican Experience' (2003) 77 Tul. L. Rev. 1017; David A. Gantz, 'Addressing Dispute Resolution Institutions in a NAFTA Renegotiation', James A. Baker III Institute for Public Policy of Rice University 2018 https://scholarship.rice.edu/bitstream/handle/1911/102738/mex-pub-nafta-040218.pdf?sequence=1.

[4] Ciuriak, Dan, NAFTA Chapter 19 Revisited: Red Line or Bargaining Chip? (September 2, 2018). Available at SSRN: https://ssrn.com/abstract=3243113 or http://dx.doi.org/10.2139/ssrn.3243113; Scott Sinclair, Saving NAFTA Chapter 19, 2018, policyalternatives.ca; Hugo Perezcano Diaz, Peeling NAFTA Layers: Twenty Years After, CIGI Papers No. 68, Centre for International Governance Innovation, MAY 21, 2015, https://www.cigionline.org/publications/peeling-nafta-layers-twenty-years-after.

[5] USTR, Summary of Objectives for the NAFTA Renegotiation, 17 Jul. 2017, https://ustr.gov/sites/default/files/files/Press/Releases/NAFTAObjectives.pdf (1 Dec. 2017); Riyaz Dattu, Taylor Schappert, Gajan Sathananthan, *The Trump administration takes aim at Chapter 19 of NAFTA*, 6 Apr. 2017, https://www.osler.com/en/resources/cross-border/2017/international-trade-brief-trump-administration-ta (accessed 17 Nov. 2017).

10 of the United States-Mexico-Canada Agreement (USMCA) continues the application of this international judicial review system to all three parties to the agreement.[6]

Chapter 19 is unique to NAFTA. It originated in CUSFTA as a substitute for a lack of agreement on substantive rules on trade remedy laws. There were three reasons that Canada wanted to replace judicial review by the US judiciary with binational panel review: (1) with no appeals and time limits, it would provide speedier resolution of trade remedy disputes; (2) the panelists would have greater expertise than judges in a highly technical area of law, resulting in less deference to government investigating agencies; and (3) binational panels would have less bias against foreign companies than domestic courts. Initially, there was resistance on the part of the US judiciary to having foreign lawyers interpreting and applying US law, particularly with the expansion of Chapter 19 to include Mexico under NAFTA.[7] Mexico agreed to give up on Chapter 19, but Canada insisted on keeping it in place.[8] In the end, this strategy allowed negotiations to progress to a successful conclusion, one that preserves Chapter 19 for all parties (now USMCA Chapter 10).

Opinions vary on how well the system has worked.[9] Some argued that this system was no longer necessary, because domestic judicial review of trade remedy measures has improved in the United States, and Chapter 19 suffers from defects, such as a shortage of expert panelists.[10] However, it has played a key role in Canada-United States disputes over Canadian softwood lumber exports, and permits duties to be refunded when Canada succeeds in overturning US antidumping and countervailing duties, something that the WTO dispute settlement system does not provide.

This article will analyze the extent to which differences in language, legal traditions, and legal cultures imply limits on the effectiveness of inter-systemic dispute resolution. What

[6] https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/united-states-mexico.

[7] See Extraordinary Challenge Committee, United States-Canada Free Trade Agreement, *Certain Softwood Lumber Products from Canada*, USA-CDA-1994-1904-01ECC, 3 August 1994, Dissenting Opinion of Malcolm Wilkey, 90, and critique of Mexican participation in NAFTA Chapter 19, 69–70, https://www.nafta-sec-alena.org/Home/Dispute-Settlement/Decisions-and-Reports (1 Oct. 2017).

[8] For a more detailed analysis of the negotiation, from a Mexican perspective, see Amrita Bahri, Monica Lugo, "Trumping Capacity Gap with Negotiation Strategies: The Mexican USMCA Negotiation Experience", 23(1) Journal of International Economic Law (2020) (forthcoming).

[9] DN Adams, Back to Basics: The Predestined Failure of NAFTA Chapter 19 and Its Lessons for the Design of International Trade Regimes, 22 Emory Int'l L. Rev. 205 (2008); P Macrory, NAFTA Chapter 19: A Successful Experiment in International Trade Dispute Resolution, C.D. Howe Institute Commentary No. 168, September 2002 , C.D. Howe Institute, https://www.cdhowe.org/sites/default/files/attachments/research_papers/mixed/commentary_168.pdf; McRae, Donald and John Siwiec. 2010. 'NAFTA Dispute Settlement: Success or Failure?' In América del Norte en el Siglo XXI, edited by Arturo Oropeza García, 363–88. Mexico City: Corporación Industrial Gráfica.

[10] Jorge Miranda, Whither NAFTA? (Part VII: Why Chapter Nineteen is not Worth the Three Amigos Becoming the Two Amigos), Regulating for Globalization, http://regulatingforglobalization.com/2018/09/13/whither-nafta-part-vii-chapter-nineteen-not-worth-three-amigos-becoming-two-amigos/.

are the key linguistic and common/civil law differences in this regard? Has the binational panel system been able to reconcile different conceptions of standards of review? However, it is beyond the scope of this article to delve into the mechanics of the Chapter 19 dispute settlement systems in any detail. Moreover, our objective in this paper is not to resolve the problems with the Chapter 19 system, but rather to identify a subset of issues raised by the binational, bilingual and bijural nature of this system so that they can become the subject of further research in the Chapter 19 system and in other systems that face similar issues.[11]

This is the first article to analyze these issues systematically in the context of NAFTA Chapter 19.[12] This fascinating case study puts to test in a very practical way whether one can really understand the 'other': can a foreign lawyer understand and apply the general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigating authority?[13] For instance, can a US lawyer interpret the *código fiscal de la federación* as a Mexican lawyer would do? Are the common law rules of statutory construction functionally equivalent to the interpretative rules of the civil law?

At times it is not possible to discern the answers to these questions from a reading of a panel decisions. In some cases the questions could be different, such as whether there is something missing in the panel's reasoning. For example, there might be no discussion or definition of the applicable standard of review or, in the case of a review of the decision of the Mexican investigating authority (IA), of the rules of *amparo*, but merely a generic discussion of the absence of evidence or explanation on the part of the IA that would be sufficient to sustain its conclusions.[14]

Moreover, it is not clear who writes the panel decisions. For some, the NAFTA Secretariat publishes a 'courtesy translation' into English, which suggests that the original decision is written in Spanish. Is it written by a Mexican panelist or a Mexican panelist's assistant? If the practice is for a national to write the decision, and then for the others to just agree or disagree (as is the practice in many domestic appellate courts), perhaps using a courtesy translation, then is it truly a binational and bijural or bilingual panel? Is it even possible to be truly bilingual and bijural?

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[11] For example, the Canadian Federal Court of Appeal faces similar issues. Mr. Justice Richard Boivin,, "Bijural, bisystemic, bilingual courts: A view from inside the Canadian Federal Court of Appeal", Seminar Paper presented at ITAM, 11 October 2019.

[12] Other studies analyze similar issues in different contexts. For an analysis of the role of sex in judging, see CL Boyd, L Epstein, AD Martin, Untangling the causal effects of sex on judging - American journal of political science (2010), https://onlinelibrary.wiley.com/doi/full/10.1111/j.1540-5907.2010.00437.x. Regarding barriers stemming from different training backgrounds, see Stefan Machura, Interaction between lay assessors and professional judges in German mixed courts, 72 Revue internationale de droit pénal 451-479 (2001).

[13] NAFTA, Article 1904.2

[14] Final Decision, Review of the Final Determination of the Antidumping Investigation on Imports of High Fructose Corn Syrup, Originating from the United States of America, Case MEX-USA-98-1904-01, Courtesy Translation.

At first glance, the Chapter 19 system appears to be a rather curious, hybrid tribunal and an odd choice of mechanism to review politically sensitive and economically important decisions of government agencies, particularly when the panels are composed of Mexican lawyers, on the one hand, and Canadian or US lawyers, on the other. However, this Canadian invention looks less odd in a Canadian context. The final court of appeal for the Quebec civil law system is the Supreme Court of Canada (SCC), which is made up of three civil law judges from Quebec and six common law judges from English Canada. Thus, similar to the case of Chapter 19, it is possible for the majority of judges deciding a case on the French-language civil code of Quebec to be Anglophones from the common law tradition.[15] In this regard, for some of the cases of the SCC, there is a similar hybridization of languages and legal traditions taking place to that which occurs in Chapter 19 cases involving Mexico.

In the context of cultural globalization, regional economic interdependence and bijural trade agreements between nations, how should lawyers tackle foreign legal ideas? One possibility can be the functional approach of comparative law. According to functionalists, different legal institutions around the globe can achieve similar functions.[16] Different legal systems usually solve universal social problems through different rules, concepts or institutions.[17] In its most extreme version, the functionalist does not need to prove similarities among legal systems, but rather to 'presume'[18]. When it appears that there are no similarities, the functionalist must try harder and reformulate the inquiry to find them.

In contrast, comparative legal studies question functionalism for its obsession with 'sameness' and its ignorance of linguistic, legal, and cultural differences.[19] There can be transcultural communication to understand differences and identify similarities, but this approach requires an approximation with the ideal of cultural immersion.[20] That is, it requires, as Vivian Curran puts it: 'increased acquaintance with foreign legal cultures'[21], such as the fluency in the foreign language, to assess differences from within the legal

[15]On the civil/common law interaction in Canada, see Poirier, Donald. "La Common Law En Francais: Outil D'Assimilation ou de Prise en Charge." Revue de la Common Law en Francais, vol. 1, no. 2, 1997, pp. 215-246; Glenn, H. Patrick. "Commensurabilite - Et Traduisibilite." Revue de la Common Law en Francais, vol. 3, no. 1, 2000, pp. 53-66; Legrand, Pierre. "Breves Reflexions sur L'Utopie Unitaire en Droit." Revue de la Common Law en Francais, vol. 3, no. 1, 2000, pp. 111-126.

[16] Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2008) 339.

[17] Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Tony Weir trans, Clarendon Press, 3rd ed, 1998). 36

[18] Konrad Zweigert, 'Des solutions identiques par des voies différentes' [5] (1966) 18(1) *Revue internationale de droit comparé* 5. 6, 17.

[19] For one introduction and a possible solution to the debate between functional and cultural approaches, see James Gordley, 'Comparison, Law, and Culture: A Response to Pierre Legrand' [133] (2017) 65(1) *The American Journal of Comparative Law* 133.

[20] Vivian G. Curran, 'Comparative Law and Language' in Mathias Reimann and Reinhard Zimermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2008) 675-707 [trans of: *2006*].

[21] Vivian G. Curran, 'Cultural Immersion, Difference and Categories in US Comparative Law' [43] (1998) 46(1) *American Journal of Comparative Law* 43. 91

culture. Others argue that it requires understanding legal traditions as a set of rooted historical attitudes towards the law in a given society.[22] However, even with culturally-sensitive approaches, perfect acquaintance with the foreign legal system is unachievable.

Binational panels may draw upon each of these approaches, but they also face distinct challenges. The functional approach seems to be at the heart of the institutional design of the panel. Ultimately, binational panels serve as the functional equivalent of the domestic court and must apply the same domestic standard of review as a domestic court would to the interpretation and application of domestic laws.[23] However, it is unclear to what extent foreign panelists are familiar with the domestic practice of the other country. Moreover, it is unclear to what extent they use the comparative methodology to find equivalents for the foreign legal concepts in their own legal system. Members of the panels may be acquainted with the foreign legal culture and language thanks to legal practice or foreign postgraduate degrees. Nevertheless, it is uncertain how symmetrical and exhaustive this cultural rapprochement between nations is. Do the Canadian and American lawyers have experience in practice or study in Mexico to the same extent that the Mexican lawyers have experience in practice or study in Canada or the United States? How deep must such practice or study experience need to be to overcome unconscious linguistic, cultural and systemic biases?

We argue that binational panels face a threefold challenge. First, they face a *linguistic barrier*. Words are difficult to translate, and their translation may increase the abstraction of certain concepts. Think, for instance, of the untranslatability of 'anti-dumping' to Spanish. Moreover, the subjective selection of potential translations also involves political judgments and ideological decisions.[24] In turn, these translation decisions may influence the outcome of cases.[25] Language is not only a way to communicate but a determining factor in shaping our worldview that even influences our cognitive processes.[26]

Second, panels face a *legal culture barrier*. The acquaintance with a particular legal tradition is part of 'tacit knowledge.'[27] Familiarity with legal culture influences how lawyers conceive, understand, apply and critique legal institutions. Lawyers deploy, consciously or not, what we call *legal shortcuts* that allow them to perform legal activities in their own language, culture and system with a higher degree of efficiency than a foreign lawyer.

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[22] John Henry Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition* (Stanford University Press, 3rd ed, 2007). 2.

[23] NAFTA Articles 1904.3 and 1911. However, according to Art. 1904.8, Panels are only empowered to uphold or remand an agency decision, not to declare the nullity of the decision as domestic courts would. See, below section V,

[24] Simone Glanert, *De la traductibilité du Droit* (Dalloz, 2011). 229

[25] Bradly J. Condon, 'Lost in Transalation: Plurilingual Interpretation of WTO Law' [191] (2010) 1(1) *Journal of International Dispute Settlement* 191.

[26] See, eg, Lera Boroditsky and Alice Gaby, Remembrances of Times East: Absolute Spatial Representations of Time in an Australian Aboriginal Community, Psychological Science, 2010, 21(11) 1635 –1639.

[27] Pierre Legrand, 'Comparative Legal Studies and the Matter of Authenticity' [365] (2006) 1(2) *Journal of Comparative Law* 365. 377

Third, as a consequence of the first two obstacles, panels face a *professional shortage barrier*. Panels require lawyers to be experts in international trade law and trade remedies, but also to speak, or at least to understand a foreign language, and to master foreign rules, principles, tests, concepts and doctrines. Some individuals may meet this demanding profile, but our research shows that the list of panelists does not always reflect these needs. The next part of this article will address these three issues in turn, before we ask to what extent our typology of issues represents problems of design or problems of implementation.[28]

II. Linguistic barriers

Language and cultural identity are inextricably intertwined.[29] The language structure may itself influence the development of the law.[30] For example, the primary languages of international law influence its development.[31] Moreover, there will always be errors and problems that arise in the drafting and translation processes.[32] Translators seek to use consistent terminology over time. However, languages evolve over time and the terminology that dispute settlement panels choose may differ from past usage.[33] Differences among the texts of laws, court decisions, and panel decisions may lead to confusion if, for example, Spanish-speaking lawyers prepare legal arguments based on the Spanish text of the laws (and the Spanish translations of panel reports), while their counterparts prepare theirs in English. Indeed, failure to consider linguistic differences as a possible source of a dispute can represent an obstacle to resolving a dispute through negotiation.[34]

Linguistic barriers are nothing new for the law and the issues that they raise in trade remedy disputes between Mexico and the United States should be relatively manageable.

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[28] We thank Juan González Bertomeu for this suggestion.

[29] This is recognized under international human rights law. See Denise Gilman, A 'Bilingual' Approach to Language Rights: How Dialogue Between US and International Human Rights Law May Improve the Language Rights Framework, 24 Harv. Hum. Rts. J. 1 (2011).

[30] Max Loubser, Linguistic Factors into the Mix: The South African Experience of Language and the Law, 78 Tul. L. Rev. 105, 107-08 (2003).

[31] Colin B. Picker, International Law's Mixed Heritage: A Common/Civil Law Jurisdiction, 41 Vand. J. Transnat'l L. 1083, 1124 and Cesare P.R. Romano, The Americanization of International Litigation, 19 Ohio St. J. on Disp. Resol. 89, 115-16 (2003).

[32] We thank Alejandro Jara for this observation.

[33] For example, when the WTO legal texts were drafted and translated, the term 'implementación' was not used to translate the term 'implementation' from English. However, this translation is now accepted in Spanish.

[34] This occurred in a dispute between the Soviet Union and the United States, in which there was a discrepancy between the English and Russian texts regarding the right of innocent passage in Article 22 of the United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, UN Doc. A/CONF.62/122 (1982) 21 ILM 1261 (1982). See Aceves, W. J. (1996). Ambiguities in Plurilingual Treaties: A Case Study of Article 22 of the 1982 Law of the Sea Convention. Ocean Development and International Law Journal 27, 187-233 at 204.

Compare the Mexico-United States situation to that of the European Union (EU); the EU objective is to produce the same legal effect in 23 languages.[35] However, discrepancies do arise. Sometimes the source of the discrepancy is the drafting in the original language and sometimes it is the translation process.

Substantive differences in translated legal texts in can be categorized as follows: (1) simple errors; (2) difficulty of translating ambiguous terms; (3) harmonization problems (phrases that are identical across different legal documents in one language differ in another); and (4) different placement of terms in the different languages, which creates ambiguity.

The category of simple errors is not as simple as its name implies. For example, there has been some discussion regarding the correct translation of 'should' and 'shall' in Spanish, among both negotiators and translators. 'Should' can be translated in Spanish as 'deberá' or 'debería'. In the WTO legal texts, translators chose to translate 'should' as 'deberá', rather than 'debería'. This choice was made because 'should' is generally connotes a positive, though non-obligatory, term in English. In Spanish, 'debería' has a negative connotation, in the sense that it does not matter whether the action is taken and implies permission to do opposite. For example, if one says, 'I really should not eat that second piece of cake', the speaker likely will do so. In Spanish, 'deberá' has a more positive connotation that more closely reflects the manner in which 'should' is used in the legal texts. In English, 'should' is generally not mandatory, whereas 'shall' generally is mandatory. However, Article 11 of the WTO Dispute Settlement Understanding provides that a panel 'should make objective assessment of the matter before it', which has been interpreted as a mandatory due process provision.[36] Thus, in this context, 'should' means 'shall'. The French text uses '*devrait*' and the Spanish text uses '*deberá*', which both mean 'should'. In this example, there is no error in translation. Rather, the issue came to light as a result of subsequent interpretations of this provision in WTO disputes, which considered that such a due process provision must be mandatory by its very nature.

Other problems may arise as the result of the ongoing evolution of trade law and the ongoing evolution of the working languages. These other problems include: (1) generic terms that are susceptible to evolutionary interpretation; (2) terms that have special meaning in accordance with VCLT Article 31(4); (3) false cognates (words that appear similar but that have a different meaning in different languages, such as 'doctrine' in common law and '*doctrina*' in Spanish and other civil law countries. The former refers to judicial opinions,[37] whereas the later relates to the academic work of researchers;[38] (4) words in the original language that have no equivalent in the other languages (such as

[35] See the EU Joint Practical Guide, Guideline 5. The complete set of guidelines is available at http://eur-lex.europa.eu/en/techleg/index.htm.

[36] Appellate Body Report, EC – Poultry, para. 133, Appellate Body Report, Chile – Price Band System, para. 173, Appellate Body Report, Thailand – Cigarettes (Phillipines), para. 147.

[37] Emerson H. Tiller and Frank B. Cross, 'What is Legal Doctrine?' (2006) 100(1) *Northwestern University Law Review* 517.

[38] See, eg. Jaen Dabin, *Doctrina general del Estado* (Hector González Uribe and Jesús Toral Moreno trans, UNAM, 2003) [trans of: *Doctrine générale de L'État. Eléments de philosophie politique*.]

liability/responsibility); (5) the need to use the terms used in old laws and precedents to express the same idea in new laws.

In this challenging scenario of bilingual and pluricultural systems, 'jurislingustics' is an emerging interdisciplinary field. Originally developed as the study of the technical vocabulary of the law within a single language, [39] it has expanded to cover also the translation of law, particularly in jurisdictions with several official languages, such as Canada.[40] In 2018, the second edition of the worldwide colloquium on jurislinguistics was held in Seville, Spain. Legal translation headed the list of selected topics.[41]

Jurislinguistics is an essentially practical discipline that develops tools to assist lawyers and linguistics experts in an interlinguistic word. Among these tools, the *Centre de traduction et de terminologie juridiques* (CTTJ) of Moncton University has developed the 'juriterm'. This tool is a 'comprehensive data bank for English-French terminology of the Common Law.'[42]. Another is tool is the *Juridictionnaire*, a 'a compendium of the difficulties and expressions in French legal language' that may help in 'solving problems associated with the distinctive nature of legal language, the co-existence and interaction of two systems of law, the influence of common law on Canadian public law and its language, and the anglicization not only of vocabulary, but also of syntax and style.'[43]

While jurisliguistics aims to achieve a cross-cultural understanding of domestic law, especially between nationals of the same country, it is uncertain whether the binational panels are aware of the need and usefulness of these tools. The challenge for US-Canada-Mexico bodies is even more serious because Spanish adds another layer of complexity compared to that existing in Canada. Moreover, there are also differences between the Mexican civil law culture and other civil law cultures in North-America, namely Louisiana or Quebec. Our research of Chapter 19 decisions regarding Mexican trade remedy cases revealed no awareness of jurislinguistics in the binational panels.

In addition, differences in language usage among countries that use different terminology in the same language can be a source of debate regarding the correct choice of terminology. These 'intra-linguistic differences'[44] also can lead to the use of different terms to express the same idea in different parts of translated texts, if the task of

[39] Gérard Cornu, *Linguistique juridique* (Montchrestien, 1990).
[40] See, Guide fédéral de jurilinguistique législative française (JLF). Available at https://www.justice.gc.ca/fra/pr-rp/sjc-csj/redact-legis/juril/index.html
[41] https://www.jurilinguistica.com
[42] http://www.cttj.ca/?page_id=1000. Accessible here: http://www.juriterm.ca.
Other interlingistic legal centers in Canada can be found here:
http://www.btb.termiumplus.gc.ca/tpv2guides/guides/favart/indexfra.html?lang=fra&lettr=indx_autr8G8LU1W84qNM&page=9LdxzmQigKuk.html
[43] https://www.btb.termiumplus.gc.ca/tpv2guides/guides/juridi/index-eng.html?lang=eng; see **J**uan Jiménez Salcedo, Bijuridismo, bilingüismo y terminología jurídica en francés: el caso canadiense, 18 Anales de Filología Francesa, (2010) 301 at 308-309.
[44] Fernando Prieto Ramos, 'El traductor como redactor de instrumentos jurídicos: el caso de los tratados internacionales', 15 Journal of Specialised Translation 200 (January 2011).

translating a text is distributed among different translators and there is no editing process to harmonize usage across texts. In the context of NAFTA Chapter 19 panels, this means that a Spanish-speaking lawyer from the United States could have less of an advantage than one might anticipate, if her Spanish is not Mexican Spanish.

On occasions, a literal translation from English to Spanish denotes an entirely different legal institution. Take for instance the notion of 'nuisance' cited in *Bovine Beef and Eatable Offal*[45] . In the common law, nuisance refers to a private law liability. By contrast, in Mexican public law, a 'nuisance' (*acto de molestia*) refers to the state action that affects individual rights without a final deprivation. This bijural distinction carried practical consequences. The importing company argued that the mere requirement from an authority that lacked legal power was a nuisance in itself that must be declared void, without the need of proving any further damage.[46] By contrast, the agency and the majority of the panel took a more harm-oriented (and perhaps common law) approach by placing the onus on the company.[47] While a panelist can infer that there is a distinct meaning from context, it is uncertain to what extent they are lost in translation.

Even identical terms that may share the same etymological root may mean different things. Doctrine derives from Latin *doctrina,* but in the common law, it means the collection of judicial decisions while in the civil law it refers to the scholarly work of academics.[48] This distinction not only suggests the different role that judges and professors play in each tradition, but may have an impact on how decisions are made constrained or influenced by distinct theories of legal sources.

The courtesy translation of the panel decision in Urea from USA and Russia is a rich source of mistranslations. This wealth of errors raises questions regarding the extent to which a poorly done translation could hamper the ability of English speakers to comprehend the details of the reasons for the decision and to what extent that matters (i.e. if they agree with the decision and the explanation provided for that decision by the Mexican panelist(s) that writes the decision). The translation is not that well done, as the following examples demonstrate. It refers to concept of standing in 'our legal systems' (the use of the plural could be a typo, but is misleading nonetheless, since it implies that the concept of standing is shared across legal systems). Another garbled translation is 'hypothetic dispense of the countervailing duty'. Rather crucially, the translators keep translating '*cuota compensatoria*' as countervailing duty, but it should be antidumping duty in English.[49] A final example is:

[45] MEX-USA-00-1904-02, May 2007.
[46] Ibid, 10.
[47] Ibid, 11-16.
[48] Emerson H. Tiller and Frank B. Cross, 'What is Legal Doctrine?' (2006) 100(1) *Northwestern University Law Review* 517. ; John Henry Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition* (Stanford University Press, 3rd ed, 2007). 56-57.
[49] Later courtesy translations corrected this error. See for example DECISION AND ORDER OF THE PANEL IN CONNECTION WITH THE DETERMINATION ON REMAND SUBMITTED BY THE INVESTIGATING AUTHORITY OF THE REVIEW OF THE FINAL DETERMINATION OF THE ANTIDUMPING INVESTIGATION ON IMPORTS OF

> 'So far, the Panel has discussed the several claims of the participants in connection with the Determination on Remand, including the relevant *replication* by the investigating authority. However, specifically in the case of the objections rose in regard to the determination of antidumping duties, insofar as they do not apply nor are imposed if the condition of reinitiating production is not met –as provided for in the Determination on Remand–, it would be obviously pointless and legally ineffective for this Panel to make any decision whatsoever with respect to claims which are now *mute.'*[50]

This translation provides illustrative examples of translation errors (mute instead of moot), a false cognate: (replication for the Spanish '*réplica*' or counter argument), and an example of an intralinguistic difference causing a mistranslation into English (Mexican law refers to *cuota compensatoria* as an all-inclusive term for countervailing duties and antidumping duties, whereas other Spanish-speaking countries use separate terms, as do the authentic Spanish legal texts of the WTO). When the case involves antidumping duties and the translation refers to countervailing duties, it is a serious translation error.

The linguistic barrier may not be the outcome of mere bona fide mistakes, but bilingual panelists may take advantage of the linguistic asymmetry. The translator enjoys a margin of maneuver that other persons cannot critically assess unless they are familiar with the language. For instance, in the Review of Final Determination of Antidumping Duties imposed to imports of Ethylene Glycol Monobutyl Ether from the USA,[51] the Panel invoked a Mexican jurisprudential thesis about the burden of proof of injuries in 'constitutional controversies'.[52] However, 'constitutional controversies' is another false cognate. In Mexican constitutional law, constitutional controversies are a special procedure to solve conflicts regarding federalism or separation of powers between two state actors, not a dispute between private actors and a state agency. Moreover, once a panelist or lawyer understands the technical meaning of this term, she may distinguish the precedent and point to other precedents that contradict the position of the Panel.[53] In this way, inadequate translations undermines a lawyer's capacity to effectively argue the case.

This asymmetrical relation regarding language and rules of grammar also may impede efficient communication among panelists. For instance, in the case Imports of Carbon Steel from the US,[54] panelists discussed the Spanish and English versions of Article 5.10 of the Antidumping Agreement, which state:

UREA,ORIGINATING IN THE UNITED STATES OF AMERICA AND THE RUSIAN FEDERATION MEX-USA-00-1904-01, January 2004.

[50] Urea, MEX-USA-00-1904-01, January 2004, para. 20. (italics added)

[51] MEX-USA,2012-1904-02-

[52] Full Court, 166990, Thesis P./J. 64/2009, p. 1461, July 2009 (Mexico).

[53] See, eg. Full Court, 177048, Thesis P./J. 135/2005, p. 2062, October 2005 (Mexico).

[54] MEX-USA-2005-1904-01.

> Salvo en circunstancias excepcionales, las investigaciones *deberán* haber concluido dentro de un año, u en todo caso en un plazo de 18 meses, contados a partir de su iniciación. (emphasis added)
>
> Investigations shall, except in special circumstances, be concluded within one year, and in no case more than 18 months, after their initiation'.

According to the majority (3 Mexicans and one American) the Spanish version was more lenient.[55] Because the Spanish version starts with 'exceptional circumstances' they suggested it may be a factor in providing deference and flexibility for the investigating authority to carry out the investigation in a longer period of time. However, Dale P. Tursi, an American of Italian parents, dissented on temporal grammatical distinctions. He observed that the majority disregarded that '*deberán*' was a future-indicative expression, not the more relaxed future-conditional suggested by the majority. While all the panelists agreed that the investigating authority failed to issue the determination on time, the distinct approaches did influence the majority, who considered the defect harmless.

III. Legal culture barrier

Arguably, the purpose of having Chapter 19 panels review the interpretation and application of domestic subsidies and dumping laws is to bridge the gap in legal cultures and ensure that decisions are based on objective legal reasoning, not politics. Indeed, such binational supervision of the interpretation and application of domestic subsidies and dumping laws appears to be an effective means of bridging differences in the legal cultures. With the creation of the WTO, the NAFTA countries agreed to common rules governing subsidies and dumping laws. The Chapter 19 system helps to ensure the uniform interpretation and application of this regime in the integrated NAFTA market. To truly know where we stand with respect to the creation of a single market, we need to understand the differences in our legal systems and legal cultures.

Buscaglia argues that a market is really a legal concept rather than an economic one.[56] Different rights and obligations and different legal systems act as obstacles to the creation of a single market. The creation of a single market, therefore, requires some level of harmonization of legal systems. Thus, if a group of countries wishes to create a single market, the group must choose a single set of laws to govern their commercial relations. In theory, this is what Canada, Mexico, and the United States have done with the NAFTA. Even if we choose to harmonize our domestic commercial laws, and thereby create a uniform legal system, differences in legal cultures will continue to produce differences in interpretation and application of the same laws. Transplanting laws from one culture to another will not work if the differences in the two legal climates are markedly different. If harmonization or transplants are unrealistic options, we must find other ways to link our laws together.

[55] Ibid, at 55.

[56] Edward Buscaglia, Legal, Economic and Statistical Analysis of Latin American Legal Integration, Address to the Congress of the Americas, Puebla, Mexico (Feb. 27, 1997).

On the surface, Canada, Mexico, and the United States have agreed to the same set of rules in the NAFTA. However, those rules are translated into three different languages, implemented as domestic law in at least two different legal systems, administered by different domestic institutional bodies, and interpreted through different cultural lenses. At the end of this process, it is difficult to see how the end product in one legal culture could be the same as in the others. In short, we are not really playing by the same rules, because we interpret and apply those rules in distinct ways. So, how do we bridge the gap between our legal cultures?

In order to bridge the gaps between our legal cultures, we must first define the concept of legal culture. The concept of culture has been defined by a variety of scholars of sociology, cross-cultural communication, and international management. Kluckholn described culture as 'patterned ways of thinking, feeling and reacting, acquired and transmitted mainly by symbols, constituting the distinctive achievements of human groups, including their embodiments in artifacts.'[57] With respect to law, a powerful symbol that comes to mind is the image of Justice, wearing a blindfold and balancing scales. Hofstede defined culture as 'the collective programming of the mind which distinguishes the members of one human group from another.'[58] School books, through which children acquire a common vision of their nation's history, are an example of a powerful tool that is used for such programming. Walls conceived of 'cultural value systems (as evolving) out of the need to reconcile often conflicting demands that are inherent in the human situation.'[59] This latter definition coincides with the legal historian's view that law represents a profound expression of a society's cultural values.[60] Tung defines culture as 'an evolving set of shared beliefs, values, attitudes, and logical processes which provide cognitive maps for people within a given societal group to perceive, think, reason, act, react, and interact.'[61] Thus, culture, like law, evolves over time. A society's cultural values influence the way laws are interpreted and applied. Thus, applying the foregoing definitions to law, legal culture may be defined as an evolving set of shared beliefs, values, attitudes, and logical processes through which people within a given society perceive and react to legal rules. In other words, legal culture refers to patterns of interpretation and behavioral routines regarding law.

In the report of the Extraordinary Challenge Committee (ECC), United States-Canada Free Trade Agreement, Certain Softwood Lumber Products from Canada, the spirited dissent of Judge Malcolm Wilkey sets out several concerns regarding potential frictions between legal systems in Chapter 19 judicial review.[62] Judge Wilkey expressed concern that misapplying the standard of review, which would be grounds for the ECC to overturn the

[57] Clyde Kluckholn, The Study of Culture, in THE POUCY SCIENCES, D. Lerner & H.D. Lasswell eds., (1951) at 86.
[58] Geert Hofstede, Culture's Consequences 21 (1984).
[59] Jan Walls, Communicating in Japan, Issues, The Asia Pacific Foundation of Canada, (Fall 1987), at 4.
[60] José Luis Soberanes Fernández, Historia del Sistema Jurídico Mexicano (Mexico: UNAM, 1990), 9.
[61] Rosalie L. Tung, International Organizational Behavior, Virtual OB 490 (1995).
[62] Extraordinary Challenge Committee, United States-Canada Free Trade Agreement, Certain Softwood Lumber Products from Canada, Wilkey Dissent, supra, n 3.

panel decision, was a likely outcome of having foreign lawyers providing judicial review of US agency action in trade remedy cases. He noted the importance of legislative history in US statutory interpretation, in contrast to its minor role in Canadian and English law. He criticized the Canadians for ignoring relevant Senate and House Committee reports in this regard.[63] In particular, Judge Wilkey complained that the panel had not shown sufficient deference to US agencies, and that this was an example of misapplication of the standard of review, which requires greater deference by US courts. He criticized the five panelists for being experts in trade law, rather than experts in the field of judicial review of agency action, which meant that they do not have adequate familiarity with the standards of judicial review under United States law, particularly in the case of the Canadian members. In his view, the Binational Panel is ill-prepared for the role of a generalist judge reviewing the work of an administrative agency, to whose expertise he has been accustomed to giving deference. Moreover, he argued that there is no way to educate such persons on the US standards of judicial review of agency action, particularly the Canadian members.

Judge Wilkey suggested that there are only three ways to become an expert in the matter of judicial review of administrative agency action, over a period of years: (1) arguing cases before a reviewing court; (2) teaching courses in administrative law; or (3) sitting on one of the reviewing courts itself. In addition, since the ECC replaces in the hierarchy a Court of Appeals composed of experts on judicial review of administrative agency action, but is composed of former judges, there is no way for Canadian members of the ECCs to have become immersed in the standards of judicial review of agency action in the United States. Canadian administrative law is different, Canadian review standards are different, and Canadian members necessarily do not have the same familiarity with US standards of review that US members do. They are therefore not qualified to apply US law, in his view.[64]

Judge Wilkey rejected the notion that having the expertise to show less deference could be justified as one of the purposes of having expert binational panels. He criticized the view of fellow ECC member Justice Hart, that the Chapter 19 system of Panels and ECCs may reduce the amount of deference which can be paid to the US agencies and that this was intended. In Wilkey's view, this would violate the agreement that the standard of appellate review in each country would remain the same. In Wilkey's view, this implied that two different bodies of US law, in both substance and procedure, would emerge: one based on Binational Panels and ECCs under the CUSFTA (later NAFTA), and another applied to imports from all other countries, based on a more deferential standard of review in US courts. [65]

Finally, Judge Wilkey predicted that, if this was a problem in judicial review between Canada and the United States, two common law countries with similar legal traditions and antecedents, it would be worse with Mexico becoming a third member of NAFTA. In Judge

[63] Ibid, 47.
[64] Ibid, 64-66.
[65] Ibid, 68-70.

Wilkey's view, Mexico has no legal system or traditions in common with the United States whatsoever, since it is a Civil Law country. In his view:

> Mexico 'has no mechanism and no concept of judicial review of administrative agency action; it has only the much abused and discredited 'amparo', or flat prohibition against an official act being carried out. If Canadians on the Panels and ECCs have failed - as in my judgement here they have - to comprehend the United States standards of judicial review of administrative agency action, what can we expect from lawyers and judges schooled in the Civil Law? [66]

Judge Wilkey's views on Mexican law are rather exaggerated. Indeed, Mexico's use of legislative history as a method of statutory interpretation is arguably closer to the practice of US use legislative history in its legal interpretation than that of Canada's. Moreover, his characterization of the concept of '*amparo*' is plainly wrong. Nevertheless, Judge Wilkey's 1994 dissent raised the kind of concerns that we set out to address in this article, and therefore seems a good starting point for the consideration of the issue of how to address these types of frictions between legal systems.[67]

An alternative to Wilkey's approach is a more culturally-sensitive but still a functionalist one. Dale P. Tursi, the dissenting panelist in *Carbon Steel*, set the outline of this approach. Tursi argued that panelists can and must be acquainted with the foreign law that they interpret. He claimed that members must understand the origins of the panel, a 'functionalist understanding' of the standard of review, the domestic legal framework, and their interaction.[68] According to him, the role of panelists is closer to that of domestic judges rather than arbiters. They must give weight to sources, consider the principles, and even be guided by national constitutions, as national judges would.[69]

However, although Tursi agreed that '*ilegalidades no invalidantes*' (translated as 'not disabling illegalities') was the equivalent to the US notion of 'harmless error', he failed to make explicit his functionalist methodology. As discussed in section II, the issue in *Carbon Steel* was whether the failure to issue a decision on time was or not a harmless error. Indeed, it is intuitively appealing that the omissions or infractions of state agencies that do not cause harm must not trigger the invalidation of the final resolution. However, the relevant question is do common, and civil panelists understand the same by 'harm'? A panelist committed to legal certainty may argue that the agency's delay is a harm in itself to the extent that legal subjects are unable to know their obligations within the time given by the Antidumping Agreement. By contrast, another panelist may argue that such expectation is not a protected interest. Similar to the issue regarding nuisance, the lack of a transparent functionalist methodology that established a common ground between panelists affected the outcome of the case.

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[66] Ibid, 70.

[67] This is an adaptation of Sylvia Ostry's reference to 'systems frictions'. See Sylvia Ostry, Governments and Corporations in a Shrinking World (New York- Council on Foreign Relations, 1990).

[68] MEX-USA-2005-1904-01, above n 54, (Tursi, Dissenting), at 1.

[69] Ibid, 4, 6, 18.

How do panelists know that two concepts are functionally equivalent? What are the differences between both? How much is lost –in cultural terms- by understanding civil law invalidity as common law voidness? What can they learn from each other? Panelists have struggled to develop an explicit methodology for finding and explaining analogous or equivalents legal institutions in foreign countries.

A more culturally sensitive and rigorous methodology is needed. This methodology may be centered on core or overlapping values and goals shared by the countries which can be protected or achieved by different legal institutions across the three jurisdictions. This methodology should be useful to overcome prejudice about foreign law and instead gain a better understanding of domestic and foreign law. We deepen this analysis in section V.

Bijural shock: Different role for prior decisions

One salient example of a legal cultural barrier is the Mexican institution of '*jurisprudencia*'. This term has a very technical meaning and regulation in Mexican Law. Jurisprudence in other civil law jurisdictions may refer either to legal theory, or to line of decisions from superior courts.[70] While Mexican *jurisprudencia* is similar to the second conception, it has a very unique meaning.[71] First of all, it refers to a legislative doctrine of weak binding precedent. Decisions of superior courts are binding for lower courts provided they meet the requirements that the legislator imposes.

There are four ways to produce binding *jurisprudencia*.[72] The first requires five continuous decisions from superior courts, with special majorities, in different sessions, at the Supreme Court or unanimity at the Circuit Courts. The second is an abstract review process where Supreme Court or Circuit Plenary Courts solve conflicts of interpretations between inferior courts, with no need of special majorities. The third is another abstract process in which inferior courts suggest the superior to overrule a binding jurisprudencia. A special majority is needed to abandon the precedent. Fourth, when the Supreme Court acts a Constitutional Court, a single case is binding, provided it has a majority of at least 8 of 11 Justices.[73] Inferior courts are empowered to disregard precedent whenever it fails to meet these requirements.

One of the most peculiar aspects of *jurisprudencia* is the '*tesis*'. These are a kind of official *ratio decidendi* or holdings that the same tribunal that solved the case selects to publish in the official Gazette of the Federal Judiciary.[74] In addition to this interpretative monopoly on implications of the *ratio decidendi* another distinctiveness, the *tesis* is the written

[70] Jorge Mario Magallón Ibarra, *Los sonidos y el silencio de la jurisprudencia mexicana* (UNAM, 2004). 105, 295- 300.
[71] See, José María Serna de la Garza, 'The Concept of Jurisprudencia in Mexican Law' (2009) 2(1) *Mexican Law Review* 131.
[72] Amparo Act, Articles 215-230.
[73] Act that regulates Article 105 of Mexican Constitution. Art 43 and 73.
[74] On 'tesis', see Rodrigo Camarena Gonzalez, 'From Jurisprudence Constante to Stare Decisis: The Migration of The Doctrine of Precedent To Civil Law Constitutionalism' (2016) 7(2) *Transnational Legal Theory* 257. 274-276.

expression 'in abstract terms, of the legal criterion laid down when deciding a case'[75]. In fact, the official Supreme Court Rule that regulates the *tesis*, in a 75-page document, states that these must be so clear that they can be understood without 'resorting to the written opinion'.[76]

Thus, the concept of *jurisprudencia* in general, and of *tesis* in particular, clashes with the predominant approach to common law notions of precedent, the 'hallmark'[77] of the common law. A common lawyer in first-year of law school might struggle to master the task of identifying a *ratio decidendi*, but would find *jurisprudencia* much odder, to say the least.[78] Perhaps she would also find counterintuitive that a Circuit Court could validly disregard four precedents of an unanimous Supreme Court, until it reaches the fifth case. Another unfamiliar aspect is that *tesis* deprives precedents of factual context, which is a key element to understand the reasoning behind the ruling in common law.[79]

A standard Mexican judgment is lengthy and full of references to *tesis*, but panel resolutions do not cite as many *tesis* as the domestic equivalent would. For instance, in a 146-page judgment from the First Chamber specialized on international trade there are thirty *tesis* cited on matters of conflicts of jurisdictions, evidence, procedure and substantive law.[80] By contrast, in *Bovine Beef and Eatable Offal*,[81] the panel authored a judgment of eleven pages and cited only one case. Also, the most recent judgment on *Chicken Legs*,[82] a 150-page decision, only analyses 5 *tesis*.[83] This comparison shows the importance of *tesis* in Mexican law and their relevance for legal interpretation. However, it is unclear how a binational, bicultural, bijural panel deals with this distinctively Mexican institution. Are panel decisions a coherent hybrid of two legal traditions and the product of a respectful cross-cultural dialogue? Or are they a merely linguistic or 'literal' translation?

How do common lawyers read, understand and use the Mexican *tesis* and *jurisprudencia* if they don't read Spanish? Do they trust the Spanish-English translation? The foregoing section has provided examples of how relying on a poor translation into English can lead a panelist down the wrong path.

Moreover, how do common lawyers grasp the use of *jurisprudenci*a? The reasoning process is distinct when using common law precedents. Applying a statutory provision may be similar to apply a Mexican *tesis*, but what about *following* a precedent? The latter

[75] Acuerdo Número 20/2013 Relativo a las reglas para la elaboración, envío y publicación de las tesis que emitan los Órganos del poder judicial de la federación, 12 diciembre 2013 DOF , art. 2 A.
[76] Ibid, art. 4. C.
[77] The Hon. Sir Anthony Mason, 'The Use and Abuse of Precedent' (1988) 4 Australian Bar Review 93, at 93.
[78] See Frederick Schauer, *Thinking Like a Lawyer* (Harvard University Press, 2009). 36- 60.
[79] Arthur L. Goodhart, 'The Ratio Decidendi of a Case' [117] (1959) 22(2) *Modern Law Review* 117.
[80] First Chamber Specialized on International Trade, 64/16-EC1-01-2, Yazmín Alejandra González Arellanes, 1 March 2017,
[81] above, n 45.
[82] MEX-USA-2012-1904-01, April 2017.
[83] Ibid, at 17, 23, 50, 74, 81 and 112.

seems to suggest that the second case adds something to the precedent being followed, increasing its force. It not only applies a general rule to a particular case but continues with its reasoning. Is following a precedent akin to expanding a statutory rule through analogical reasoning or is it a more fact-oriented activity?[84] A common law lawyer also tends to distinguish precedents in order to avoid following their reasoning or conclusions, a form of reasoning that tends not to occur in the Mexican system.

Two early binational panel decisions provide an excellent example of contrasting approaches to the use of precedents when addressing the same legal issue of whether a binational panel has the jurisdiction to annul the decision of the investigating authority.[85] Both reach the same conclusion that a binational panel does not have the power to annul the decision of the investigating authority, because the standard of review is limited to article 238 of the Federal Fiscal Code (FFC), thereby excluding the application of FFC article 239.[86] While the decisions do not indicate the author, they do indicate that the original language of the decision is Spanish (High Fructose Corn Syrup) or English (Flat Coated Steel Products), by indicating whether or not the English version is a courtesy translation. Moreover, the style of legal analysis confirms that the former is authored by a Mexican lawyer and the latter by an American lawyer.

The language in High Fructose Corn Syrup sounds like that of a Mexican law professor. The decision first notes that the Mexican Constitution requires that rules that grant jurisdiction to an authority be strictly applied (Para 286). This is followed by a lengthy explanation regarding the sources of Mexican law, before proceeding to thoroughly analyze the legal basis for the panel's jurisdiction to review the investigating authority's response to a WTO ruling. No cross-cultural legal issues arise explicitly, but there appears to be an implicit reliance on the Mexican lawyer who wrote the decision to get the Mexican law right (which is often the normal course of judicial decision-making, with one writing the decision and others deciding whether to agree, concur or dissent).

The decision in Flat Coated Steel Products reads completely differently from HFCS in style, substance, and approach, including an effort to consult the *amparo* decisions of Mexican courts, very much in the way that a common law lawyer would do. In contrast, in HFCS the focus is on the Mexican Constitution, statutes and the civil code, which looks more like the approach of a civil law lawyer. Before the Flat-coated Steel Products panel addresses the applicability of FFC article 239 (paras 44-48), the panel's approach to prior case law is

[84] But see, Thomas Lundmark and Helen Waller, 'Using Statutes and Cases in Common and Civil Law' [429] (2016) 7(4) *Transnational Legal Theory*. 430, Lundmark and Waller argue that 'reasoning with rules is the same intellectual activity irrespective of the source of the rules'.

[85] Opinion and Order of the Binational Panel, In the matter of Antidumping Investigation of the Government of Mexico into Imports of Flat Coated Steel Products from the United States ('Flat Coated Steel Products'), MEX-USA-1994-1904-01, 09-27-1996, https://www.nafta-sec-alena.org/Home/Dispute-Settlement/Decisions-and-Reports; Final Decision of the Binational Panel, Review of the Final Determination of the Antidumping Investigation Imports of High Fructose Corn Syrup from the United States of America ('High Fructose Corn Syrup' or 'HFCS') MEX-USA-98-1904-01, 08-03-2001, https://www.nafta-sec-alena.org/Home/Dispute-Settlement/Decisions-and-Reports.

[86] High Fructose Corn Syrup, ibid, paras. 261-264; Flat Coated Steel Products, ibid, paras. 23, 44-48.

enlightening. The panel distinguishes all tribunal decisions, both in domestic Mexican law and Chapter 19 panels, and thus avoids the type of lengthy discussion of Mexican law found in HFCS. The panel concludes that Mexican *amparo* cases do not provide clear guidance, and that previous Chapter 19 panel decisions provide guidance but are not binding.

The Flat Coated Steel Products panel applies a principle of international law to strictly limit panel jurisdiction (para 23.), in contrast to HFCS case, where the panel used Mexican law for the same end. The Flat-coated Steel Products panel bases their approach on cases on an arbitration panel's jurisdiction, referring to the arbitration agreement, then use NAFTA as the arbitration agreement in this case.[87] This approach permits the author to avoid having to deal with domestic Mexican law, other than to discount its relevance to the issue. Instead, the decision refers to ICJ case law regarding the consent of States (para 25), then notes that treaties are part of Mexican law under the Mexican Constitution (para 28). This justifies a focus on international law. To distinguish domestic case law, the panel states that it is unaware of any tribunal decision interpreting 'administrative determination' in art 238 in the context of a dumping investigation. They then base their decision on the NAFTA text and the text of article 238.

The courtesy translation in the Urea case refers to a 'judicial precedent' in Mexican law (rather conveniently, using the false cognates 'sustained' and 'appreciation' in the process and using 'mute' in place of 'moot'):

> 26. Analogously, the following judicial precedent sustained by the Federal Courts supports this appreciation (what in the 'amparo' field it is known as one of the events of 'change of legal situation'):
>
> > [Judicial Precedent/Authority on ANTIDUMPING DUTIES, PROVISIONAL DETERMINATION IMPOSING ANTIDUMPING DUTIES, INFRINGEMENTS DURING THE PROVISIONAL DETERMINATION ARE IRREPARABLY PERFORMED DUE TO THE CHANGE OF LEGAL SITUATION]
>
> 27. In any event, as mentioned in Section B.3. of this Decision, this claim is now mute due to the reasons expressed in such section. [88]

A similar lack of cross-cultural deliberation, or at least of civil law monopoly in drafting, is found in *Ether.*[89] The judgment starts by stating that state acts must be challenged by the

[87] Indeed, panelists have questioned the nature of Chapter 19 panels, regarding whether they are tribunals or arbitral panels, and whether they are to apply international law or exclusively domestic law. We note that Chapter 19 panels have elements of both, but are clearly distinct from the type of arbitration panels used in international commercial arbitration, for example, even though both take the place of domestic courts in the resolution of disputes. MEX-USA-2005-1904-01, above n 51, (Tursi, Dissenting), at 4, 6, 18.
[88] Urea, MEX-USA-00-1904-01, January 2004, paras. 26-27.

proper 'remedy', namely, 'appeal for reversal' (*recurso de revocación*). However, 'remedy' in the common law is usually understood as the judicial relief to protect a right, not the process to review a decision. Even if a civil law notion like *recurso* is usually translated as 'remedy', both ideas suggest distinct practices. In the common law, 'appeal' is the mechanism that may redress the harm by the remedy of reversal. However, at least in private law, there may be a full array of common law remedies developed by common law courts in a case-by-case approach. In contrast, for the civil lawyer, 'the concept of remedies remains a mystery'.[90] Common law remedies are court orders such as economic damages or injunctions. In contrast, civil law *recursos* are procedures to challenge an administrative or judicial decision. In particular, the *recurso de revocación* is a procedure to be filed before the Ministries of Finance or Economy to reconsider decisions of the executive branch without seeking judicial review before a court. Thus it is unclear whether the common lawyers understood the nature of the *recurso de revocación*. This understanding is presupposed as the functional equivalent standard of review, formed on the one hand, by possible domestic causes of actions, and on the other, by remedies.

The problems of translation in this decision reveal a further challenge for cross-cultural litigation. This decision starts by noting that the petition provided 'valid legal syllogisms'[91] about illegalities. It then proceeds to engage in justification under a very traditional, apparently deductivist approach. After reconstructing each of the arguments as part of a syllogism, the panel infers individual conclusions that 'follow necessarily'[92] 'from the reasons stated above'[93]. Could a common lawyer reject the 'deductivist' drafting style and advocate more a more transparent discursive approach or would such position would be received as an example of cultural-insensitivity or arrogance?[94] In any case, it is difficult to imagine how a unilingual common law lawyer could truly understand the reasoning of a fellow panelist in this context.

IV. Shortage of cross-cultural panelists

Few panelists are experts in both the common and the civil law. Mexican lawyers are acquainted with US law, not so much the other way around. There are also Mexican-Americans who studied law in the US but have interests in their legal 'roots'. Nevertheless, there are worthy exceptions about common lawyers who have studied and published about Latin-American law, such as Morton Pomeranz or Dale Beck Furnish.

We conducted preliminary research on the profiles of 46 out of the 48 panelists from the 15 cases in which Mexico was a responding party. Some of the findings are striking. Regarding their degrees, most of the panelists hold either a JD in the common law (21) or

[89] MEX-USA-2012,1904-02, November 2015.
[90] Helge Dedek, From Norms To Facts: The Realization Of Rights In Common And Civil Private Law, McGill Law Journal ,(2010) 56:1, 1-37, 5.
[91] Supra, n 89, 13.
[92] Ibid, 59
[93] Ibid, 50.
[94] See F, Mitchel, De S. –O. –L'E. Lasser, Judicial Deliberations. A comparative Analysis of Judicial Transparency and Legitimacy, Oxford University Press, 1st published 2004, 2009 ed.

a *licenciatura* in the civil law tradition for Mexicans (24). However, one panelist was an economist (Miranda), and another panelist holds a Bachelor in Science with an MBA in International Finance. While interdisciplinarity in panels is laudable, it is probably harder for laypersons to understand a foreign legal system in a foreign language, than it is for a lawyer to do the same. Moreover, there was no panelist who had both JD and *licenciatura*. Thus, while most of the panelists hold degrees that allowed them to practice law in their countries of origin, practically none was licensed in both. The only exception was Mariano Gomezperalta, a UNAM law graduate who also holds an LLM from Harvard and is licensed to practice in Mexico, federal courts in the US and in the State of New York.[95] None of the American lawyers were qualified to practice law in Mexico. The salient feature is that lawyers trained with undergraduate degrees in both the common law and Mexican civil law are almost non-existent.

However, we must note that several panelists strengthen their credentials with postgraduate degrees.[96] 22 panelists have some kind of master's studies. It is more common for Mexicans to study a postgraduate degree (15) than for Americans (7). Ten panelists studied Comparative Law or International Law degrees or diplomas, and five studied a degree or diploma in the domestic law of the foreign country. Mexicans study in their country or in the US, but it is rather infrequent to find the opposite profile. A worthy exception is Michael W. Gordon, with a JD from Connecticut and a *Maestría en Derecho* from Universidad Iberoamericana.[97] Nevertheless, this leaves us with less than one half of panelists with formal training in both jurisdictions, and with the common lawyer trained in the civil law being almost an eccentricity.

The asymmetry is more evident regarding bilingualism. As a general rule, it is rare to find profiles from American lawyers who are bilingual (English-Spanish). But Furnish, Gantz, Gordon, Hayes, Miranda, Reyna, Santos are worthy exceptions. In fact, Furnish not only co-authored a paper about the Law of Latin American countries from a common law perspective,[98] but also published a book on Mexican Law.[99] Santos, perhaps because his Latino heritage, is trilingual.[100] Reyna, now a judge of the United States Court of Appeals for the Federal Circuit, is another outstanding example. A former president of the Hispanic National Bar Association, founder of the Hispanic Culture Foundation, and even a Ohtli Award recipient (the highest honor bestowed by the Mexican government on the Mexican and Latino community outside of Mexico).[101] Still, six American panelists with explicit

[95] http://www.robertwraypllc.com/mariano-gomezperalta/
[96] We classify the J.D. as an undergraduate law degree, not a postgraduate degree.
[97] https://www.law.ufl.edu/faculty/michael-w-gordon
[98] H. H. A. Cooper and Dale Beck Furnish, Latin America: A Challenge to the Common Lawyer, *Journal of Legal Education, Vol. 21, p. 435, 1969.*
[99] Mexican Law: Readings & Materials in Comparative Law (1st edition, 1976; most recent edition, 2004.
[100] https://www.linkedin.com/in/leonard-santos-0b901540
[101] http://www.cafc.uscourts.gov/judges/jimmie-v-reyna-circuit-judge ; https://www.williamsmullen.com/news/jimmie-v-reyna-receives-highest-recognition-government-mexico ; https://www.gob.mx/ime/acciones-y-programas/reconocimiento-ohtli-instituto-de-los-mexicanos-en-el-exterior

bilingual credentials out of 23 is hardly a representative number. This disproportionateness seems to confirm the assumption that there are American unilingual lawyers who can only hope to trust in translations. By contrast, at least 18 Mexican panelists explicitly have at least bilingual credentials. Of these, Cuadra is a trilingual,[102] Herrera-Cuadra is a polyglot and a specialized translator,[103] and Estrada is also a polyglot, a former director of the International Association of Lawyers and, a proud sponsor of multiculturalism and multilinguism.[104]

In addition, it is more common for Mexicans to carry out other activities that helped them to acquire a reasonable degree of cultural immersion. Silva and Cavazos were expert witnesses in US trials.[105] Blanco was a legal adviser of the North American Environmental Cooperation Commission.[106] Still, it not uncommon for Americans to be visiting scholars at Mexican Universities. Furnish taught in Mexico City and Sonora, Gantz in Costa Rica and Guatemala, and Gordon at the *Escuela Libre de Derecho* in Mexico City, among others. Mexicans also visit foreign or international institutions. Reyes was a visiting research at the WTO in Geneva, Valdés at Cambridge, and Vega at Brown, Duke, Chapel Hill, Austin and Yale.

Table 1: Bilingualism and bijuralism at the Nafta Panels

Undergraduate degree	**Number of panelists**	**Mexican postgrad law degree**	**US postgrad law degree**	**Bilingual (English & Spanish)**	**Bilingual and Bijural.**
Mexico Licenciatura en derecho	24	6 (25%)	10 (41.6%)	17 (70.8%)	10 (41.6%)
USA JD	20	1 (5%)	5 (25%)	4 (20%)	1 (5%)
USA Economics	1	0 (0%)	0 (0%)	1 (100%)	0 (0%)
USA Science	1	0 (0%)	0 0(%)	0 (0%)	0 (0%)

Based on this research, we have developed a preliminary typology of the types of cross-cultural adjudicators that might help to determine the nature of the challenges that they face when working across different languages and legal systems:

a) Experts in the autonomous field of international trade law and remedies;

[102] http://catedraunescodh.unam.mx/catedra/homenaje_hectorcuadra/cv.html
[103] https://mx.linkedin.com/in/eunice-herrera-cuadra-37786b9b
[104] https://elmundodelabogado.com/revista/obituario/item/miguel-i-estrada-samano ; https://claritas.up.edu.mx/2017/03/29/entrevista-con-dr-miguel-estrada-samano/
[105] https://archivos.juridicas.unam.mx/www/bjv/libros/5/2201/14.pdf ; http://apps05.ruv.itesm.mx/portal/promocion/cms/curriculum.jsp?archivo=gcavazos&perfil ; https://fdimoot.org/collegian.php?ID=702
[106] http://bnp.com.mx/html/victor.html

We presume that all of them are experts in this field. However, the profile of panelists like Soberanes is at first sight not ideal.[107] He is a renowned legal historian and human rights expert but his expertise in international trade law is unclear. NAFTA Annex 1901.2 only requires "general familiarity with international trade law", rather than expertise in trade remedy law specifically. However, a central purpose of NAFTA Chapter 19 was to replace judicial review by judges, who would be unlikely to have expertise in trade remedy law, with panelists with expertise in this field, whose expertise would make them more able to question the decisions of investigative authorities. It is difficult to see how a complete absence of expertise in international trade law would enable a panelist to achieve this objective.

b) Insiders in their own legal system and culture (interpretative practices, familiarity with sources and culture);

As non-lawyers, Miranda and Rosch might not have broad expertise in the legal system of their own country. However, Miranda is an economist whose expertise in trade remedy law is deeper than the vast majority of lawyers. The majority of the panelists that we examined would be familiar with their own legal system because of their JD or LLB degrees. However, as we have already noted, that does not guarantee expertise in trade remedy law.

c) Insiders in a foreign system to which they became acquainted;

This is the case of lawyers who have also pursued a diploma or degree in comparative or in the domestic law of a foreign country. Alternatively, a panelist may become acquainted by practicing law abroad. However, as the research shows, this is highly uncommon.

d) Outsiders in a foreign system that they find distant, odd, incomprehensible or even inadequate or primitive.

This is probably the case of unilingual lawyers who also lack a degree of cultural immersion. For instance, there was no online evidence that 13 panelists speak Spanish, although Holbein was the director of the Mexico division of the Department of Commerce.

In addition to our perception of the profiles of panelists, it is important to consider how panelists conceive themselves as decision-makers. For instance, Dale P. Tursi stressed that panelists should not conduct themselves as arbiters. Considering the context of creation of binational panels, he argued that their mission was to overcome the lack of legal harmonization between the three countries by comparative functionalist methodology but sensitive to domestic law.[108] Panelists, according to Tursi, must avoid fact-finding powers of arbitral bodies, and instead they should operate almost as domestic appeal courts.

[107] https://archivos.juridicas.unam.mx/www/bjv/libros/9/4038/29.pdf
[108] MEX-USA-2005-1904-01, above n 54, (Tursi, Dissenting).

V. The paradox of intuitive functionalism for the standard of review.

The application of NAFTA Article 1904 is challenging and puzzling. It states that:

> 'The panel shall apply the standard of review set out in Annex 1911 and the general legal principles *that a court of the importing Party otherwise would apply to a review* of a determination of the competent investigating authority. (italics added).

Interpreted in isolation, Article 1904 is ambiguous.[109] Similarity of standards of review may be interpreted either as likeness of predictable outcomes, or as similarity of reason-giving procedures to arrive to such outcomes. However, section 1904.8 indicates that panels are not empowered to declare the absolute voidness of an agency decision. Moreover, this mechanism replaced domestic judicial review, rejected arbitration, and instead opted for binational panels applying domestic standards of reviews. Therefore, while panels cannot reach outcomes that are identical to those of domestic courts, they must apply the standard of review as domestic courts would by following an analogous procedure and invoking similar reasons.

Thus, how do foreign lawyers get acquainted with domestic law so as to perform the role that a national court would perform? How do US or Canadian lawyers understand, for instance, the principle of definitiveness in Mexican *Amparo?*

Perhaps they intuitively grasp the domestic law and practice by assimilating it with their own law. Common lawyers may understand civil law nullity through the lenses of common law voidness, or simple legal interest in Mexican *Amparo* as the equivalent of harmless error, or manage executive-judiciary relations in Mexico in light of the US doctrine of deference.

However, this usage develops what we call the *intuitive functionalist paradox*. On the one hand, as decision-makers, they ought to justify the methodology to identify similar legal institutions transparently. On the other hand, they may understand and analyze the law intuitively, as something self-evident that does not need explicit justification because they operate automatically after years of legal training.

The challenge of intuitive functionalist is twofold. The first relates to the overall role of the Panel and the scope of its powers as equivalent to a domestic court. For instance, in *Chicken legs*, the panel considered that its role 'keeps some degree of equivalence with the Federal Court of Fiscal and Administrative Justice'. [110] And when prompted to dismiss a petition because a party has started domestic procedure in addition to the binational review, the panel held that 'it cannot be thought that [the Federal Fiscal Court] could deny access to a plaintiff to a nullity procedure when the applicant (ie, complainant) has submitted a constitutional procedure (Amparo) with the corresponding constitutional

[109] We thank Eugenio Velasco for prompting this clarification.
[110] MEX-USA-2012-1904-01, above n 82, at 9.

court'[111] . However, we do not know the methodological path that the panelists followed to ascertain the equivalence between courts and panels, their differences and similarities. It is also unclear how panelists determined that 'it cannot not be thought' that the domestic court could have acted differently. Perhaps the panelists are correct, but they fail to provide a clear and express methodology, perhaps precedent-based, for predicting how a domestic court would act.

What are domestic courts empowered to do? What are the proper remedies that they could order? In order to answer these questions, they must know the relevant domestic legislation, precedents, and even scholarship and practices. However, the role of binational panels is equivalent, but not identical to courts. What are the differences in both roles? A potential interpretation of 1904.8 is that the remedial power of panels is more limited than domestic courts. It states that 'The Panel may uphold a Final Determination, or remand it for action not inconsistent with the panel decision'. Thus, panels are not empowered to declare the absolute voidness of final determinations.[112]

The second layer is the cross-cultural and bijural analysis of specific, functionally equivalent legal ideas. In addition to the equivalence of harmless error previously discussed,[113] in several cases, the panelists equate the common law concept of standing with the civil law of '*legitimación procesal activa*' or juridical interest.[114] If the American panelists use the courtesy translation, they would equate the two concepts, unless corrected by the Mexican panelist who wrote the decision in Spanish. Can the 'binational' panel really be binational if the panelists from one legal system/language rely on the panelists from the other legal system/language in such situations?

In this process, lawyers deploy, usually unconsciously, what we call legal shortcuts. These cognitive shortcuts allow them to perform legal activities in their own language, culture and system with a higher degree of efficiency than a foreign lawyer.

In the Urea case, the Panel rejected the investigating authority's termination of the investigation for 'lack of subject matter' based on the lack of legal standing as plaintiff ('*legitimación procesal activa*') of AGROMEX. The Panel reasoned that the legal institution of legal standing as plaintiff ('*legitimación procesal activa*') may not be applied within administrative proceedings.[115]

Mexican law operates in the background of Mexican lawyers' mind. Consciously or not, they would see common law standing through Mexican law lenses. They may understand it as *legitimatio ad causam* linked to the historical civil law dichotomy between subjective entitlement and objective law. This is almost an analogy with private property where a subject of rights is an exclusive owner of a prerogative bound to another subject a

[111] Ibid.
[112] Ibid, [80]; Carbon Steel, at 51.
[113] See above at 15.
[114] **I**mports of Meat of Swine (Pork), MEX-USA-2006-1904-01, December 2008; Chicken legs; Urea.
[115] Urea, MEX-USA-00-1904-01, January 2004, para. 4.

personal and direct sense.[116] Thus, not every violation of objective law entails a subjective entitlement justiciable at courts. However, if the case were decided today, Mexican lawyers would also have in mind the wider understanding of legitimate interest. This is not a violation of a subjective right but a violation of objective law that indirectly affects individuals, entities or collectivities. That is, it entails a non-exclusive harm as understood in *Amparo* and administrative law in light of recent reforms and as developed by the Mexican Supreme Court.[117] Is there a complete analogy with the US predominant notion of standing?

Similarly, American law colors an American lawyer's perception. They would understand standing at the binational procedure as they conceive it in their domestic courts. They could assume that plaintiffs must prove a recognizable injury, causation and redressability as developed by common law courts, and particularly, the United States Supreme Court[118].

Are Mexican and common lawyers discussing the equivalent function in their respective jurisdictions or are they missing important differences? By contrasting both understandings they may discern whether both institutions are sufficiently equivalent as to count as one in the same. If so, they could discuss if the institutions need to be tailored to the context.

Panelists should make their intuitions about functionally equivalent legal institutions transparent. Bilingual and bijurally trained lawyers may be capable of translating a common law concept into civil law terms. However, before translating it is important to be aware of the differences between legal and cultural contexts and to avoid reductionism.

V. Conclusion

Do the foregoing issues represent a design or an implementation problem? We argue that it is both. It is a design problem, to the extent that the very concept of the binational, bijural panel creates challenges with respect to the translation of legal concepts in a way that a foreign lawyer can fully understand. However, in other respects, it is an implementation problem; choosing better qualified panelists and translators would reduce the degree of problems encountered. However, choosing better qualified panelists and translators will not eliminate issues linguistic issues completely. Even in the WTO, which has perhaps the most highly qualified translators in this field of law, challenges still

[116] See Samuel, Geoffrey, 'Le Droit Subjectif' and English Law ', The Cambridge Law Journal, 1987, Vol.46(2), pp.264-286.

[117] See Juan Antonio Cruz Parcero, El concepto de interés legítimo y su relación con los derechos humanos observaciones críticas a Ulises Schmill y Carlos de Silva, Isonomía (39), october 2013,pp_.185-213.

[118] Evan Tsen Lee; Josephine Mason Ellis, The Standing Doctrine's Dirty Little Secret, 107 (1)Northwestern University Law Review. 169 (2012), at 176; *Linda R. S. v. Richard D.*, 410 US 614 (1973); Warth v. Seldin, 422 US 490 (1975); *City of Los Angeles v. Lyons*, 461 US 95 (1983), Allen v. Wright, 468 US 737 (1984), Bennett v. Spear (95-813), 520 US 154 (1997).

arise.[119] Moreover, the WTO Secretariat employs highly qualified and multilingual lawyers to assist dispute settlement panels and the Appellate Body, whereas the NAFTA lacks this kind of Secretariat support for its panels. In this regard, the absence of a permanent, professional team of lawyers to support the work of panels could be viewed as a design flaw, although the manner in which panelists choose their assistants would be an implementation issue. Regarding use of terminology, greater use of definitions could help, as it has in the multilingual context of the European Union.[120]

This paper reconceives the role of panelists as comparatists/practitioners. Panelists do not propose different understandings of shared legal ideas or suggest reforms of domestic law in light of foreign law, as academics would. Moreover, unlike domestic judges, where the use of foreign law is non-mandatory, panelists must be educated in foreign and domestic law. Panelists must solve foreign legal disputes as if there were their own. In a more general sense, this paper is a step towards to the better design of cross-cultural, multilingual and pluri-jural courts and tribunals in the age of globalization and pluriculturalism.

As we have shown, binational panels face a threefold challenge. First, they face a linguistic barrier. Translation of statutes or judgments always implies choices made between potential meanings. These linguistic decisions may affect the outcome of cases. Second, panels face a legal culture barrier. Lawyers deploy, usually unconsciously, what we call legal shortcuts. These cognitive shortcuts allow them to perform legal activities in their own language, culture and system with a higher degree of efficiency than a foreign lawyer. However, panelists fail to make explicit such shortcuts, which impedes the transparent comparison of apparently similar legal ideas. Third, as a consequence of the first two challenges, panels face a professional shortage barrier. Most panelists are acquainted with the common law and speak and read English because of legal practice (in the case of American panelists) or foreign postgraduate degrees (in the case of Mexican panelists). Nevertheless, this familiarity is asymmetrical regarding the civil law and Spanish, where few American lawyers are likely to have much knowledge and experience.

In this way, we have signaled drawbacks in contemporary roles and understandings of binational panels but also identified potential solutions for cross-cultural adjudication. The increasing dialogue and interconnection between different countries and legal traditions can profit from these insights. More cultural immersion is needed among panelists or judges. However complete immersion among lawyers and total convergence between jurisdictions is impossible.

We have empathy for the difficult task that panelists face, based on our own experience writing this paper. It is not easy to express foreign legal concepts in a different language in a way that lawyers from a different legal system can understand, especially when trying to avoid a distortion in the meaning of the concept. In our case, it has proved to be a

[119] Bradly J. Condon, "The concordance of multilingual legal texts at the WTO", 33:6 Journal of Multilingual and Multicultural Development 525-538 (2012).
[120] Ibid.

challenge, even though we both are bilingual and bijural. We can only imagine the challenges that a unilingual and unijural lawyer would face. Perhaps the binational panel system is simply asking too much in this regard. Further exploration of that question remains a fruitful area for further research. Another fruitful line of inquiry for future research could explore how panelists reach interpretative agreements among themselves.

References

Adams, DN. Back to Basics: The Predestined Failure of NAFTA Chapter 19 and Its Lessons for the Design of International Trade Regimes, 22 Emory Int'l L. Rev. 205 (2008).

Camarena Gonzalez, Rodrigo, 'From Jurisprudence Constante to Stare Decisis: The Migration of The Doctrine of Precedent To Civil Law Constitutionalism' (2016) 7(2) *Transnational Legal Theory* 257

Cavazos Villanueva, Gabriel & Luis F. Martinez Serna, 'Private Parties in the NAFTA Dispute Settlement Mechanisms: The Mexican Experience' (2003) 77 Tul. L. Rev. 1017.
Ciuriak, Dan. NAFTA Chapter 19 Revisited: Red Line or Bargaining Chip? (September 2, 2018). Available at SSRN: https://ssrn.com/abstract=3243113 or http://dx.doi.org/10.2139/ssrn.3243113

Condon, Bradly J., 'Lost in Transalation: Plurilingual Interpretation of WTO Law' [191] (2010) 1(1) *Journal of International Dispute Settlement* 191

Cooper, H. H. Furnish, Dale Beck Latin America: A Challenge to the Common Lawyer, *Journal of Legal Education, Vol. 21, p. 435, 1969.*

Cornu, Gérard *Linguistique juridique* (Montchrestien, 1990)

Curran, Vivian G., 'Cultural Immersion, Difference and Categories in US Comparative Law' [43] (1998) 46(1) *American Journal of Comparative Law* 43

Curran, Vivian G., 'Comparative Law and Language' in Mathias Reimann and Reinhard Zimermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2008) 675-707

Cruz Parcero, **J**uan Antonio, El Concepto De Interés Legítimo Y Su Relación Con Los Derechos Humanos Observaciones Críticas A Ulises Schmill Y Carlos De Silva, ISONOMÍA_No.39, octubre 2013,pp_.185-213.

Dabin, Jaen, *Doctrina general del Estado* (Hector González Uribe and Jesús Toral Moreno trans, UNAM, 2003) [trans of: *Doctrine générale de L'État. Eléments de philosophie politique*

De S. –O. –L'E. Lasser, Mitchel, Judicial Deliberations. A comparative Analysis of Judicial Transparency and Legitimacy, Oxford University Press, 1st published 2004, 2009 ed,

Dedek, Helge, From Norms To Facts: The Realization Of Rights In Common And Civil Private Law, McGill Law Journal ,(2010) 56:1, 1-37.

Gantz, David A. 'Resolution of Trade Disputes under NAFTA's Chapter 19: The Lessons of Extending the Binational Panel Process to Mexico' (1998) 29 Law & Pol'y Int'l Bus. 297.

Gantz, David A. 'Addressing Dispute Resolution Institutions in a NAFTA Renegotiation', James A. Baker III Institute for Public Policy of Rice University 2018 https://scholarship.rice.edu/bitstream/handle/1911/102738/mex-pub-nafta-040218.pdf?sequence=1.

Glanert, Simone, *De la traductibilité du Droit* (Dalloz, 2011)

Goodhart, Arthur L., 'The Ratio Decidendi of a Case' [117] (1959) 22(2) *Modern Law Review* 117

Gordley, James, 'Comparison, Law, and Culture: A Response to Pierre Legrand' [133] (2017) 65(1) *The American Journal of Comparative Law* 133

Jiménez Salcedo, **J**uan Bijuridismo, bilingüismo y terminología jurídica en francés: el caso canadiense, 18 *Anales de Filología Francesa*, (2010) 301

Legrand, Pierre. "Breves Reflexions sur L'Utopie Unitaire en Droit." Revue de la Common Law en Francais, vol. 3, no. 1, 2000, pp. 111-126

Legrand, Pierre, 'Comparative Legal Studies and the Matter of Authenticity' [365] (2006) 1(2) *Journal of Comparative Law* 365

Macrory, P. NAFTA Chapter 19: A Successful Experiment in International Trade Dispute Resolution, C.D. Howe Institute Commentary No. 168, September 2002 , C.D. Howe Institute, https://www.cdhowe.org/sites/default/files/attachments/research_papers/mixed/commentary_168.pdf.

McRae, Donald and John Siwiec. 2010. 'NAFTA Dispute Settlement: Success or Failure?' In América del Norte en el Siglo XXI, edited by Arturo Oropeza García, 363–88. Mexico City: Corporación Industrial Gráfica.

Magallón Ibarra, Jorge Mario, *Los sonidos y el silencio de la jurisprudencia mexicana* (UNAM, 2004)

Merryman, John Henry and Rogelio Pérez-Perdomo, *The Civil Law Tradition* (Stanford University Press, 3rd ed, 2007)

Michaels, Ralf, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2008) 339

Perezcano Diaz, Hugo. Peeling NAFTA Layers: Twenty Years After, CIGI Papers No. 68, Centre for International Governance Innovation, MAY 21, 2015, https://www.cigionline.org/publications/peeling-nafta-layers-twenty-years-after.

Pippin, Kenneth J. An Examination of the Developments in Chapter 19 Antidumping Decisions Under the North American Free Trade Agreement (NAFTA): The Implications and Suggestions for Reform for the Next Century Based on the Experience of NAFTA After the First Five Years, 21 Mich. J. Int'l L. 101 (1999). Available at: http://repository.law.umich.edu/mjil/vol21/iss1/3.

Poirier, Donald. "La Common Law En Francais: Outil D'Assimilation ou de Prise en Charge." Revue de la Common Law en Francais, vol. 1, no. 2, 1997, pp. 215-246.

Samuel, Geoffrey, 'Le Droit Subjectif' and English Law , The Cambridge Law Journal, 1987, Vol.46(2), pp.264-286.

Schauer, Frederick, *Thinking Like a Lawyer* (Harvard University Press, 2009)

Sinclair, Scott. Saving NAFTA Chapter 19, 2018, policyalternatives.ca.

Serna de la Garza, José María, 'The Concept of Jurisprudencia in Mexican Law' (2009) 2(1) *Mexican Law Review* 131.

Thomas, J.C. & Sergio López Ayllón, 'NAFTA Dispute Settlement and Mexico: Interpreting Treaties and Reconciling Common and Civil Law Systems in a Free Trade Area' (1995) Can Y.B. Int'l L. 75.

Tiller, Emerson H. and Frank B. Cross, 'What is Legal Doctrine?' (2006) 100(1) *Northwestern University Law Review* 517

Zweigert, Konrad, 'Des solutions identiques par des voies différentes' [5] (1966) 18(1) *Revue internationale de droit comparé* 5

Zweigert, Konrad and Hein Kötz, *An Introduction to Comparative Law* (Tony Weir trans, Clarendon Press, 3rd ed, 1998)