

ADDING SWEETENERS TO SOFTWOOD LUMBER: THE WTO-NAFTA “SPAGHETTI BOWL” IS COOKING

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With the Doha round in trouble, the so-called “spaghetti bowl” of multilateral trade rules and proliferating regional trade deals is, once again, prominently on the radar screen of the international trade community. Perfect examples of this image are the longstanding US-Canada softwood lumber and US-Mexico sweetener disputes. Both trade spats, extensively litigated in NAFTA and the WTO, are close to reaching a climax. Fueling the suspense is that the WTO and NAFTA may reach different results.

1. The spaghetti bowl of WTO and NAFTA proceedings

On 15 November 2005, a WTO panel *accepted* a US finding that Canadian imports of softwood lumber threaten to cause material injury to US competitors.² Earlier this year, however, on 10 August 2005, a NAFTA Extraordinary Challenge Committee confirmed an earlier (Chapter 19) NAFTA panel conclusion that the evidence on record does *not* support a finding of threat of material injury.³ With NAFTA finding in favor of Canada (that is, *no* threat of material injury, hence *no* US right to either antidumping or countervailing duties), and the WTO finding in favor of the United States, what is next? Can the United States maintain its extra duties on Canadian lumber (currently averaging 20.15 %) or must the duties be withdrawn and/or repaid? If the latter, must the United

¹ Duke University School of Law and Member of the Editorial Board. The cut-off date for this contribution is 6 December 2005. This contribution draws on my earlier ASIL Insight, *The U.S.-Canada Softwood Lumber Dispute Reaches a Climax*, 30 November 2005, available at <http://www.asil.org/insights/2005/11/insights051129.html>.

² Panel Report on *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada, Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/RW, circulated on 15 November 2005.

³ Opinion and Order of the Extraordinary Challenge Committee, *In the Matter of Certain Softwood Lumber Products from Canada*, Secretariat File No. ECC-2004-1904-01USA, 10 August 2005 (hereafter ECC Opinion).

States refund the full, or only part of, the amount of what so far adds up to over US \$4.2 billion?

Additional proceedings are pending, not on injury, but on whether Canada is dumping or subsidizing lumber in the first place. The US determination of *subsidy* has been condemned five times by a NAFTA Chapter 19 panel⁴ and three times by the WTO, most recently in an Appellate Body report of 5 December 2005.⁵ Implementing the latest NAFTA ruling on subsidization, the United States, on 22 November 2005, reduced its determination of subsidy from an original 19 % to a 0.8 % *de minimis* level.⁶ The US determination of *dumping*, in turn, has been the subject of three negative NAFTA Chapter 19 rulings⁷ and one negative WTO Appellate Body report.⁸ US re-determinations, which continue to find dumping (in some cases at higher levels than beforehand), are currently under review in both fora.

Similarly, for more than 5 years now, the United States has blocked the selection of panelists on a NAFTA (Chapter 20) panel to examine the legality of US quotas on Mexican cane sugar under a sugar-specific NAFTA annex.⁹ In contrast, when Mexico imposed anti-dumping duties against US imports of high-fructose corn syrup (an

⁴ Most recently: Decision of the Panel on the Fourth Remand Determination, *In the Matter of Certain Softwood Lumber Products from Canada, Final Affirmative Countervailing Duty Determination*, File USA-CDA-2002-1904-03, 5 October 2005.

⁵ Appellate Body report on *United States — Final Countervailing Duty Determination With Respect To Certain Softwood Lumber from Canada, Recourse by Canada to Article 21.5 of the DSU*, WT/DS257/AB/RW, circulated on 5 December 2005. Besides the original Appellate Body report in this dispute finding against the United States, another WTO panel has also condemned the US *preliminary* determination of subsidy (Panel Report on *United States - Preliminary Determinations With Respect To Certain Softwood Lumber From Canada*, WT/DS236/R, adopted on 1 November 2002). Note that under NAFTA Chapter 19, only final (not preliminary) antidumping and countervailing determinations can be challenged (NAFTA Article 1904). This may partly explain why Canada decided to bring this case (also to the WTO, as this was the only available forum at the time the United States made its *preliminary* determination.

⁶ *U.S. Finally Determines Canadian Softwood Not Subsidized: One Step Toward Resolution*, International Trade Canada, Press Release No. 230, 22 November 2005, available at <http://www.dfait-maeci.gc.ca>.

⁷ Most recently: Decision of the Panel following Remand, *In the Matter of Certain Softwood Lumber Products from Canada, Final Affirmative Antidumping Determination*, File USA-CDA-2002-1904-02, 9 June 2005.

⁸ Appellate Body Report on *United States - Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted on 31 August 2004.

⁹ NAFTA Annex 704.2, Appendix B entitled Trade in Sugar. See Rodolfo Cruz Miramontes, *The NAFTA and The So-called Parallel Letters*, Mexican Law Review (2005:3) available at <http://www.juridicas.unam.mx/publica/rev/mlawr/cont/3/arc/arc3.htm>.

alternative sweetener predominantly produced in the United States), a WTO panel swiftly condemned the Mexican duties.¹⁰ More importantly, when Mexico responded, in 2002, with an extra 20 % tax on soft drinks using sweeteners other than cane sugar, the United States promptly obtained a WTO panel. Notwithstanding Mexican arguments that the broader sweetener dispute -- that is, both the US quotas and the Mexican tax in response -- ought to be decided under NAFTA or that, in the alternative, the WTO should accept the tax as a valid countermeasure to induce US compliance with NAFTA, on 7 October 2005, a WTO panel found the tax to be discriminatory in violation of GATT.¹¹ With the United States allegedly violating NAFTA (through sugar quotas and/or blocking the establishment of a panel roster¹²) and, in response, Mexico violating the WTO, what is next? Must Mexico withdraw the discriminatory tax or can it rely on NAFTA (or general international law on countermeasures) to keep it in place?

Finally, as if the picture was not yet complex enough, three Canadian lumber companies (Canfor, Tembec and Terminal) have, in their capacities as investors in the United States, invoked the investor-state dispute mechanism of NAFTA Chapter 11. They claim, *inter alia*, that US treatment of Canadian lumber imports is discriminatory and constitutes “indirect expropriation”. Together, they seek a total of US \$540 million in compensation from the US government. Avoiding further risk of inconsistent rulings (this time *within* Chapter 11 of NAFTA), on 7 September 2005, a NAFTA panel consolidated these three requests in one single proceeding.¹³ Similarly, three US sweetener companies (Corn Products International, Archer Daniels and Tate & Lyle) initiated proceedings against

¹⁰ Panel Report on *Mexico – Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, adopted on 24 February 2000 (not appealed). A subsequent Mexican re-determination, confirming anti-dumping duties, was also declared inconsistent by a WTO Panel and then the Appellate Body in 2001 (Appellate Body Report on *Mexico – Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States, Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, adopted on 21 November 2001).

¹¹ Panel Report on *Mexico – Measures on Soft Drinks and Other Beverages*, WT/DS308/R, circulated on 7 October 2005.

¹² Article 2009.1 of NAFTA unambiguously states: “The Parties *shall* establish and maintain a roster of up to 30 individuals who are willing and able to serve as panelists” (italics added). If such roster had been established, Mexico could have relied on NAFTA Article 2009.2(d) in the face of a US refusal to appoint panelists, providing that, in such case, “panelists shall be selected by lot from among the roster members who are citizens of the other disputing Party”.

¹³ Order of the Consolidation Tribunal, *In the Matter of: NAFTA and a Request for Consolidation by the USA of the Claims in Canfor Corporation v. USA and Tembec et al. v. USA and Terminal Forest Products Ltd. V. USA*, 7 September 2005, available at www.naftaclaims.com.

Mexico under NAFTA Chapter 11. They claim, *inter alia*, that the Mexican tax is discriminatory and constitutes “indirect expropriation”. Together, they seek a total of US \$425 million in compensation from the Mexican government. Unlike the lumber cases, however, on 20 May 2005, a NAFTA tribunal refused to consolidate these requests.¹⁴ As a result, two parallel proceedings, by two completely different Chapter 11 tribunals, are now examining the same Mexican tax.

What if these NAFTA Chapter 11 tribunals come out differently, or find one thing and the WTO (or, for that matter, tribunals operating under *other* NAFTA Chapters), another? Indeed, of the 40 notices of arbitration filed under NAFTA Chapter 11, a majority relates to standard trade policies that could have been brought before the WTO (or NAFTA trade chapters).¹⁵ The complex interaction between investment and trade dispute settlement proceedings is only in its infant stage. In environment-related disputes, the situation may be even more complex, through intersections with NAFTA’s side agreement on the environment. This side agreement enables anyone living in any of the three NAFTA countries to petition a factual investigation into whether a NAFTA party is effectively enforcing its own environmental law.¹⁶ At least one investor found it useful to seek such investigation in the context of its NAFTA Chapter 11 dispute.¹⁷

¹⁴ Order of the Consolidation Tribunal, *In the Matter of: NAFTA and a Request for Consolidation by Mexico of the Claims in Corn Products International, Inc. v. Mexico and Archer Daniels Midland Company and Tate and Lyle Ingredients Americas, Inc. v. Mexico*, Case CIADI Nr. Arb(AF)/04/5, 20 May 2005, available at www.naftaclaims.com.

¹⁵ See www.naftaclaims.com (I count the 107 notices of intent filed by members of the Canadian Cattlemen for Fair Trade against the US ban on cattle from Canada as one). For example, of the 14 NAFTA Chapter 11 cases brought between January 1994 and November 2005 against the United States, at least 9 related to cross-border trade in goods.

¹⁶ Articles 14 and 15 of the North American Agreement on Environmental Cooperation (NAAEC). Such investigation does not lead to an award, only a factual record. More recent free trade agreements (FTAs) concluded by the United States include full-fledged state-to-state arbitration proceedings to force parties to implement their own labor and environmental laws, subject to monetary damages (see, for example, Singapore-US FTA, Articles 17, 18 and 20.7). This could theoretically lead to the following odd result: one arbitration panel may condemn a party for failure to enforce its environmental or labor law, whilst another investment tribunal under the same FTA might find that this very same law violates the investment provisions of the FTA. Interestingly, these recent FTAs include a conflict clause stating that “[i]n the event of any inconsistency between this Chapter [on investment] and another Chapter [on, for example, labor or environment], the other Chapter shall prevail to the extent of the inconsistency” (see, for example, US-Singapore FTA, Article 15.3.1).

¹⁷ Secretariat of the Commission for Environmental Cooperation, Determination pursuant to Article 14(3) of the NAAEC, Submitters: *Methanex Corporation & NESTE Canada Inc.*, SEM-99-001 and SEM-00-002, 30 June 2000 (refusing to initiate an investigation). Methanex claimed that California failed to enforce its

2. Untangling the strings

The short term answer to the questions raised above is that both the October WTO panel on sweeteners and the November WTO panel on softwood lumber will be appealed to the WTO Appellate Body. The result of such appeals can then be expected somewhere around March or April of 2006.

The long term answer is more complicated. Although clearly dealing with the same broader dispute on lumber or sweeteners, the different rulings out of NAFTA and/or the WTO are not, strictly speaking, in a relation of *res judicata*. Traditionally, for the principle of *res judicata* to apply and, therefore, for two rulings to be genuinely in conflict, the overlapping proceedings must involve (1) the same parties, (2) the same subject matter, and (3) the same legal claims.

Most obviously, as concerns the first requirement (“same parties”), the NAFTA Chapter 11 cases are between private investors and the US/Mexican government. In contrast, the WTO and NAFTA Chapter 19 and 20 cases are *between* governments. Under NAFTA Chapter 11, private investors have standing. At the WTO and under NAFTA trade chapters, however, standing is reserved to state parties (not private traders).¹⁸

Considering the second requirement (“same subject matter”), the NAFTA lumber panel *rejecting* a US finding of threat of material injury was made with reference to a US determination of May 2002.¹⁹ In contrast, the WTO lumber panel *accepting* a US finding of threat of material injury relates to a December 2004 re-determination concerning the

environmental laws by allowing gasoline to be released into the environment from leaking underground storage tanks. If confirmed, such factual record could have assisted Methanex with its claim of discrimination under NAFTA Chapter 11 regarding a Californian ban on MTBE, a gasoline additive.

¹⁸ Under NAFTA Chapter 19, although it is always a government that will initiate a panel, private parties can force the government to do so. See NAFTA Article 1904.5.

¹⁹ On 18 May 2004, the NAFTA Chapter 19 panel rejected a US request to reopen the record. See ECC Opinion, *supra* note 3, at para. 8.

same period of investigation but made on the basis of a *different* (i.e., reopened) record.²⁰ Equally, the specific subject matter of the blocked NAFTA panel on sweeteners is: *US* quotas on Mexican cane sugar. In contrast, the subject matter of the WTO sweeteners panel is: a *Mexican* tax on sweeteners other than cane sugar.

Finally, the different proceedings do not exactly involve the same legal claims (third requirement for *res judicata*). WTO panels examine claims of violation of WTO rules. NAFTA Chapter 11 and 20 panels (such as the blocked sweetener panel) examine claims of violation of NAFTA. Crucially, whilst the WTO lumber panel *accepting* a US finding of threat of material injury did so pursuant to *WTO rules*, the NAFTA Chapter 19 panel *rejecting* a US finding of threat of material injury did so pursuant to *the United States own trade laws*. Indeed, the applicable law under NAFTA Chapter 19 is not NAFTA but the domestic law of the defending country.

Nonetheless, the absence of *res judicata* should not lead one tribunal to completely ignore the work of the other.

Firstly, WTO panels must carefully examine whether NAFTA proceedings do not preclude the WTO's jurisdiction (and vice versa). As far as normal trade panels under NAFTA Chapter 20 are concerned, for example, (to be distinguished from NAFTA Chapter 19, dealing exclusively with dumping and subsidies) NAFTA Article 2005 explicitly provides that "disputes" regarding a "matter" arising under both NAFTA and the WTO can be brought to either forum. However, once "procedures have been initiated" at either forum (there does not seem to be a need for an actual panel), the forum selected shall be used (either by the complainant or the defendant, it would seem) "to the exclusion of the other". In the WTO sweetener panel, however, neither Mexico nor the panel referred to NAFTA Article 2005. Similarly, in the lumber dispute (brought before

²⁰ The WTO panel accepting threat of injury was a so-called compliance panel. In 2004, the panel found that the original US determination of May 2002 was inconsistent with WTO rules (WT/DS277/R, adopted on 26 April 2004). Under WTO rules the United States was then allowed to make a new (so-called Section 129) determination where additional information was gathered and new hearings held (unlike in the NAFTA proceedings where the panel denied a US request to reopen the record, see *supra* note 19). This led to the December 2004 re-determination, accepted by the 2005 WTO compliance panel.

both NAFTA Chapters 19 and 11), NAFTA explicitly regulates the interaction between NAFTA Chapter 11 investment disputes and NAFTA Chapter 19 antidumping and subsidy disputes. NAFTA Article 1901 states that nothing in Chapter 11 “shall be construed as imposing obligations” with respect to US “antidumping law or countervailing duty law”. This clause will be a difficult hurdle to overcome for the Canadian lumber companies in their (consolidated) Chapter 11 tribunal.²¹

Secondly, even if different proceedings can advance in parallel (or sequentially) without *res judicata* triggered and with no other hurdles elsewhere in either treaty, a WTO panel still ought to take cognizance of a NAFTA panel’s analysis (and vice versa), as well as factor in the risk of inconsistent rulings. Double recovery should also be avoided. Showing no sense of such “judicial comity”, the November WTO lumber panel, however, does not make a single reference to the concurrent NAFTA Chapter 19 proceedings. Similarly, in the sweetener dispute both the WTO and NAFTA are faced with claims of violation of national treatment (albeit under different legal provisions). Hence, one would expect, for example, that when the NAFTA Chapter 11 panel examines NAFTA Article 1102 on national treatment it would at least take cognizance of an earlier WTO analysis, of the very same tax measure, under the GATT’s national treatment provision.²²

3. What is next?

Where does this leave the Mexican sugar industry and Canadian lumber producers, both original complainants in these disputes?

²¹ The interaction between NAFTA proceedings and factual investigations under NAFTA’s side agreement on the environment (NAAEC) is also explicitly dealt with. Article 14.3(a) of the NAAEC provides that if “the matter is the subject of a pending judicial or administrative proceeding”, the Secretariat shall proceed no further. On that basis, a request by Methanex under the NAAEC was denied because of Methanex’s pending request under NAFTA Chapter 11. See *supra* note 17.

²² This does not mean that a violation of national treatment under GATT necessarily implies a violation of national treatment under NAFTA Chapter 11. For obvious reasons, Mexico was, indeed, adamant that the WTO panel make “clear that its findings apply solely to the parties’ respective rights and obligations under the WTO agreements and cannot be taken to prejudge legal rights under other rules of international law” (Panel Report, *supra* note 11, at para. 205). For a rejection of WTO national treatment concepts in NAFTA Chapter 11 proceedings, see *Methanex Corporation v. United States*, Final Award of the Tribunal on Jurisdiction and Merits, 9 August 2005, available at www.naftaclaims.com, Part IV – Chapter B (at para. 37: “the text and the drafters’ intentions, which it manifests, show that trade provisions were not to be transported to investment provisions”).

If confirmed by the WTO Appellate Body, Mexico will probably be forced -- under the threat of US trade sanctions -- to end the 20 % tax (albeit only *prospectively*). In addition, if the NAFTA Chapter 11 panels find against it, Mexico may have to pay close to 500 million US\$ in *retrospective* damages to US sweetener producers. WTO remedies are, indeed, purely prospective, centered on bringing inconsistent measures in compliance with WTO rules. In contrast, remedies under NAFTA Chapter 11 focus on the past and, apart from monetary compensation, cannot force a government to change its future conduct.²³ None of this litigation, however, is likely to provide greater US market access for Mexican sugar. To resolve this dispute, the United States ought to agree to a roster of Chapter 20 panelists (a roster which, pursuant to NAFTA Article 2009, should have been established more than 10 years ago). If so, the Chapter 20 panel which Mexico is asking for since 2000 could be appointed by lot and proceed to examine the NAFTA conformity of US quotas on Mexican sugar.²⁴ Ironically, what has expanded market access for Mexican sugar is not litigation, but the devastation caused by hurricanes Katrina and Rita to sugar producers and refiners in Louisiana and Florida. Causing a shortage in domestic sugar, these natural disasters forced the United States to dramatically increase import quotas.²⁵

As far as lumber is concerned, even if the WTO Appellate Body confirms that the December 2004 US re-determination *complies* with *WTO law*, the fact remains that the United States (pursuant to NAFTA Chapter 19) *violated* its *very own laws*, at least as between May 2002 (date of imposition of the duties) and December 2004 (date of the re-determination), a period during which around US \$3 billion were collected.²⁶ In this

²³ NAFTA Article 1134 provides that “the Tribunal may award only: (a) monetary damages ... or (b) restitution of the property”. Yet, in the latter case, “the award shall provide that the disputing Party may pay monetary damages ... in lieu of restitution”.

²⁴ See *supra* note 12.

²⁵ See *USDA Announces Increase in FY 2006 Sugar Availability*, USDA News Release No. 0525.05, December 2, 2005, available at www.usda.gov (increasing allowable sugar imports for fiscal year 2006 with 450,000 tons).

²⁶ On September 10, 2004, the US International Trade Commission did, indeed, determine that no threat of material injury existed as directed by the NAFTA Chapter 19 panel (see ECC Opinion, *supra* note 3, at para. 11). Yet, as pointed out earlier (see *supra* note 20), to comply with a 2004 WTO panel, the ITC

context, it is instructive that Article 103 of NAFTA includes a general conflict clause in favor of NAFTA in the event NAFTA provisions are inconsistent with GATT or other agreements to which all NAFTA members are party.

Canada is now suing the United States before the US Court of International Trade to have the duties removed and the deposits returned. In response, the US Coalition for Fair Lumber Imports has challenged the constitutionality of NAFTA Chapter 19 before the US Court of Appeals for the District of Columbia. If the United States refuses to comply with NAFTA Chapter 19 -- that is, its *own* laws as interpreted by a NAFTA panel -- Canada can request the establishment of a Special Committee under NAFTA Article 1905. If the Special Committee finds against the United States, Canada has the right to suspend any NAFTA benefits v-a-v the United States “as appropriate under the circumstances”.

Relief for Canadian lumber producers under NAFTA Chapter 19 may, therefore, not be immediate, but (like the investment complaints under Chapter 11) it could operate *retroactively* (at least from 2002 to 2004). As NAFTA Chapter 19 enforces domestic (US) law, the remedies it provides have retrospective potential. In contrast, as pointed out earlier, a WTO victory can only work prospectively and has never included a refund of past duties collected.

Another difference in the remedies structure relates to the period and way to implement adverse rulings. In NAFTA Chapter 19 there is, obviously, no appeal. The panel remands the case “for action not inconsistent with the panel’s decision” and establishes “as brief a time as is reasonable for compliance with the remand”.²⁷ For the three negative panel decisions in the lumber (injury) case, for example, this implementation period was, respectively, 100, 21 and 10 days.²⁸ Crucially, in quite a daring move, the third of these panel reports did not content itself with a simple remand. In addition, the

subsequently reopened the record and, in December 2004, made a new, positive determination that there was threat of material injury.

²⁷ NAFTA Article 1904.8.

²⁸ See ECC Opinion, *supra* note 3, paras. 6-11.

panel specifically precluded the US International Trade Commission (ITC) “from undertaking yet another analysis of the substantive issues” and instructed that the ITC determine “that the evidence on the record does not support a finding of threat of material injury”.²⁹ This made an end to a series of US re-determinations in September 2004. As one concurring panelist put it: “Due process is not endless process ... for the Panel to postpone finality by issuing yet another open-ended remand instruction to the Commission would be to allow the Chapter 19 process to become a mockery and an exercise in futility”.³⁰

The implementation of WTO panels, in contrast, takes considerably longer: WTO panels can be appealed and only recommend that the Member concerned “bring the measure into conformity”.³¹ The “reasonable period of time” to do so is not set by the panel itself, but agreed on by the parties or determined in a separate arbitration.³² The guideline in such arbitration is that this period should not exceed 15 months from the date of adoption of the report. In the WTO lumber (injury) case, for example, the United States and Canada fixed the implementation period at 10 months³³ (a far cry from the 100, 21 and 10 days under NAFTA Chapter 19). Crucially, the carousel of potentially endless re-determinations has so far not been stopped in any WTO proceeding. In contrast to NAFTA, no WTO panel has specifically ordered a WTO Member to make a negative finding on injury, dumping or subsidy. To make WTO dispute settlement more efficient, thought should be given to shortening the procedures and implementation periods in antidumping and countervailing duty cases, along the lines of the expedited procedures

²⁹ Second Remand Decision of the Panel, *In the Matter of Certain Softwood Lumber Products from Canada: Final Affirmative Threat of Injury Determination*, Secretariat File No. USA-CDA-2002-1904-07, 31 August 2004, at 4 and 7 (upheld by the ECC Opinion, *supra* note 3). In terms that cannot be mistaken, the Panel explained its ruling as follows (at 3): “The Commission has made it abundantly clear to this Panel that it is simply unwilling to accept this Panel’s review authority under Chapter 19 of the NAFTA and has consistently ignored the authority of this Panel in an effort to preserve its finding of threat of material injury. This conduct obviates the impartiality of the agency decision-making process, and severely undermines the entire Chapter 19 panel review process”.

³⁰ *Ibid.*, at 8 and 12.

³¹ DSU Article 19.1.

³² DSU Article 21.3, but note the exception for prohibited subsidies in Article 4.7 of the Subsidies Agreement (where the panel must recommend withdrawal of the subsidy and fix the time-period to do so, normally a mere 90 days).

³³ WTO Document WT/DS277/7.

for prohibited subsidies in the Subsidies Agreement.³⁴ WTO panels could also make use of their mandate in Article 19.2 of the DSU to “suggest ways in which the Member concerned could implement the [panel’s] recommendations”³⁵, suggestions that could, in extreme cases, eventually match the NAFTA Chapter 19 panel’s specific instruction not to find threat of injury.³⁶ Thus tightening the WTO process may not be appropriate for all WTO disputes. Yet given the purely prospective nature of WTO remedies, where WTO Members can effectively impose any extra duties for free during at least 2 years, the field of antidumping and countervailing duties are prime candidates for such reform.

More immediately, in its second administrative review³⁴ (deciding on actual assessments for 2003-2004), released on 6 December 2005, the United States lowered the combined duties on Canadian lumber from 20.15 % to 10.81 %.³⁷ The latter figure will soon be imposed also for new cash deposit rates for future shipments thus providing at least some relief for Canadian lumber producers.

4. Conclusion

The WTO-NAFTA spaghetti bowl is very real. To untangle it requires a complex and open-minded analysis. Tools to facilitate such analysis are available in international law (such as *res judicata*) and specific treaty provisions (such as NAFTA Article 2005). Success will depend above all on a healthy degree of judicial tolerance and curiosity. For private stakeholders the complexity is less attractive. In lumber and sweeteners, for example, one guesses that by now only the law firms involved are enjoying the feast. Treaty negotiators should keep this in mind and explicitly regulate potentially

³⁴ See *supra* note 32.

³⁵ In *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, for example, the Panel found that since “the entire investigation rested on an insufficient basis, and therefore should never have been conducted ... we suggest that Guatemala revoke the existing anti-dumping measure on imports of Mexican cement, because, in our view, this is the only appropriate means of implementing our recommendation” (WT/DS60/R, adopted on 25 November 1998, at para. 8.6, a panel finding that subsequently became moot as the Appellate Body decided that the matter fell outside the Panel’s terms of reference).

³⁶ Keep in mind that, as much as Article 19 of the DSU, NAFTA Article 1904.8 does not include an explicit mandate for a NAFTA Chapter 19 panel to instruct a negative determination.

³⁷ *US Department of Commerce to Lower Softwood Lumber Duties*, International Trade Canada, Press Release No. 243, December 6, 2005, available at www.softwoodlumber.gc.ca.

overlapping jurisdictions. Remedy structures should equally avoid endless litigation. Yet, at some stage, litigation reaches its limits. With the existing rulings in hand, and in the shadow of never ending litigation, time may have come, in both the lumber and the sweetener dispute, for comprehensive political settlements.