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The case *United States—Measures Concerning the Importation and Marketing and Sale of Tuna and Tuna Products* concerns whether United States (US) "dolphin-safe" labeling requirements comply with the Agreement on Technical Barriers to Trade (TBT Agreement) of the World Trade Organization (WTO).[2] Mexico brought a series of WTO claims against US labeling criteria under which tuna products may be labeled "dolphin-safe." The fishing practices predominantly used by the Mexican tuna fleet do not meet these criteria, even though they comply with the "dolphin-safe" standards provided in an international conservation treaty to protect dolphins negotiated among the US, Mexico, and twelve other countries that border or fish for tuna in the Eastern Tropic Pacific (ETP).

Mexico made three substantive claims under the TBT Agreement, as well as claims under the General Agreement on International Trade (GATT).[3] It claimed that the US labeling measures provided "less favorable treatment" to Mexican tuna under TBT Article 2.1; constituted "unnecessary obstacles to international trade" under TBT Article 2.2; and failed to comply with applicable international standards under TBT Article 2.4. Both the Panel and the Appellate Body (AB) ruled against the US, but on different grounds. The Panel ruled that although the US measures were non-discriminatory under Article 2.1, they were more trade-restrictive than necessary under Article 2.2 because a less trade-restrictive alternative was available that met US conservation and consumer objectives. Both the US and Mexico appealed and the AB overruled the panel on both findings, holding that although the US law was not more trade-restrictive than necessary to meet the US objectives under Article 2.2, it was discriminatory under Article 2.1.

The case was one of three WTO Appellate Body decisions issued in 2012 that interpreted and applied the key substantive provisions of the TBT Agreement for the first time.[4] The

[1] For the final published version, please see the AJIL publication in 2013.

[2] Panel Report, United States--Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, WT/DS381/R (Sept. 15, 2011) (Panel Report) and Appellate Body Report, United States-Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, WT/DS381/AB/R (May 16, 2012) (AB Report).

[3] The panel did not assess Mexico's GATT claims for reasons of "judicial economy." The AB found that this constituted a "false" use of judicial economy, but it did not "complete the analysis."AB Report, paras 405-406.

[4] Appellate Body Report, United States--Measures Affecting the Production and Sale of Clove Cigarettes, WT/DS406/AB/R (Apr. 4, 2012) (AB Report, US-Clove Cigarettes); Appellate Body Report, United States –

decision is of systemic importance for its interpretation of the TBT Agreement's substantive obligations; the types of labeling that fall within the scope of the Agreement; the legitimacy of labeling based on foreign, non-product-related process and production methods (PPMs); and the relation of other international law to WTO law.

A. Factual Background and Context. In the Eastern Tropical Pacific (ETP), schools of tuna often swim with dolphins, such that tuna trawlers can locate and catch the tuna by "setting" on dolphins with purse seine nets. In the 1980s, approximately 100,000 dolphins died annually from this fishing practice. In the 1970s, the US began to regulate the practice, and, in 1984, US law banned the use of the fishing practice by US vessels (subject to some conditional exceptions in the ETP), and called for a ban by 1991 of the import of tuna from countries that did not adopt an environmental program comparable in its effectiveness to protect dolphins.[5] Following a court injunction, the US government implemented the ban on Mexican tuna imports in 1991. The US import ban triggered the most controversial case in the history of the GATT, the US-tuna-dolphin decision of 1991 in which a GATT panel found that the US ban on Mexican tuna imports failed to comply with the US's obligations under the GATT in light of its coercive, extraterritorial nature.[6] The US blocked adoption of the panel report, but the report stirred environmentalists' concerns with international trade law that have continued ever since.

Following the 1991 GATT report, the US and Mexico engaged in negotiations with other countries that border or fish for tuna in the ETP which gave rise to a series of agreements to address dolphin conservation concerns, including the 1992 La Jolla Agreement, the 1995 Panama Declaration, and the 1998 Agreement on the International Dolphin Conservation Program (AIDCP).[7] Under these agreements, the parties developed an International Dolphin Conservation Program (IDCP) that eventually established binding annual fleet-wide mortality limits apportioned into individual vessel limits; required the use of particular gear, equipment, and catching practices; mandated training for captains; and required a third party observer on all vessels who would certify whether any dolphin were killed or seriously injured. The results have been significant, with scientists reporting that dolphin mortality in the ETP has declined by over 99%, from around 132,000 per year in the mid-1980s to around 1,200 per year in recent years. The dolphin population is now recovering, although whether the recovery rate is sufficient is disputed.[8] Scholars working in the "new governance" experimentalist tradition have hailed the outcome as a form of an inclusive, cooperative, innovative standard-setting process.[9]

Certain Country of Origin Labelling (COOL) Requirements, WT/DS384/AB/R (June 29, 2012) (AB Report, US-COOL Labeling).

[5] Pub. L. 98-364, July 17, 1984, 98 STAT. 440; Pub. L. 100-711, Nov. 23, 1988, 102 STAT. 4755.

[6] Panel Report, United States--Restrictions on Imports of Tuna, GATT B.I.S.D. (39th Supp.) at 155 (1993), *reprinted in* 30 ILM 1594 (Aug. 16, 1991) (unadopted) (Panel Report, Tuna I).

[7] See Agreement on the International Dolphin Conservation Program, May 28, 1998, T.I.A.S. 12956, in force 15 Feb. 1999, *available at* http://www.iattc.org/IDCPENG.htm; and Richard W. Parker, *The Use and Abuse of Trade Leverage to Protect the Global Commons: What We Can Learn from the Tuna-Dolphin Conflict*, 12 GEO. INT'L ENVTL. L. REV. 1 (1999) (discussing the 1992 La Jolla Agreement, the 1995 Panama Declaration, and the 1998 AIDCP).

[8] Panel Report, paras. 7.557 and 7.609 (citing variation in estimates from 1.4% increase per year to increases near the 4-8% maximum possible). See also Charles F. Sabel & William H. Simon, *Contextualizing Regimes: Institutionalization as a Response to the Limits of Interpretation and Policy Engineering*, 110 MICH. L. REV. 1265 (2012).

[9] See Sabel & Simon, *supra* note….

In 1990, the US created a regime for the labeling of tuna as "dolphin-safe" under the Dolphin Protection Consumer Information Act (DPCIA), which was targeted, in particular, at tuna fishing practices in the ETP. Under the original DPCIA, no tuna could be labeled as "dolphin-safe" when they were caught by the method of setting on dolphin in the ETP.[10] The Annex to the 1995 Panama Declaration; however, provided for "Envisioned Changes in United States Law" which included permitting the labeling of tuna as "dolphin-safe" caught with purse seine nets in the ETP provided that an observer documented that there was no "dolphin mortality" in the set.[11]

In 1997, five major environmental NGOs that had pressed for the international conservation agreements supported the US Congress' termination of the ban against imports from countries in compliance with the IDCP, as well as amendment of the US "dolphin-safe" labeling law, the DPCIA.[12] Congress amended the DPCIA to provide that tuna caught by the method of setting on dolphin in the ETP could be labeled as "dolphin-safe" when an international observer certifies that no dolphin were killed or seriously injured in the set, *provided* that the US National Marine Fisheries Service (NMFS) finds that the setting on dolphins is not "having a significant adverse impact on any depleted dolphin stock in the ETP."[13] NMFS made this finding in 2002, and Mexican tuna were briefly permitted to use the AIDCP "dolphin-safe" label in the US. A US environmental group, the Earth Island Institute, then successfully challenged NMFS' findings in federal court. As a result of a 2007 US 9th Circuit Court of Appeals decision, the US government again prohibits the use of a "dolphin-safe" label for any tuna caught in the ETP through setting on dolphins.[14] The major US canners and distributors only buy tuna that can be labeled "dolphin-safe," effectively shutting most Mexican tuna out of the US market.[15] In 2008, Mexico filed a WTO complaint challenging the US measure, collectively consisting of the DPCIA, the US implementing regulations, and the 9th Circuit decision. The WTO Panel issued its decision in September 2011, and the AB its decision in May 2012.

B. The Panel and AB Reports.

1. Application of the TBT Agreement. Before assessing the substantive issues, the panel had to decide if the TBT Agreement applied to the measure. The substantive provisions of the TBT Agreement only apply to "technical regulations," which are defined as "mandatory."[16] The United States maintained that the US labeling measure was "voluntary" because it did not mandate that tuna products be labeled "dolphin-safe" so that private parties had the option to use

[10] Pub. L. 101-627, Nov. 28, 1990, 104 STAT. 4465.

[11] Declaration of Panama, Oct. 4, 1995, *reprinted in* 143 CONG. REC. S396, S397 (1997).

[12] See Parker, *supra* note __, at 45 (stating that the five major environmental NGOs were Greenpeace, Environmental Defense Fund, World Wildlife Fund, Center for Marine Conservation, and National Wildlife Federation).

[13] 16 U.S.C. § 1385(g)(1)-(2) (2006).

[14] See *Earth Island Institute v. Hogarth*, 494 F.3d 757 (9th Cir. 2007).

[15] There is some evidence that US canners and distributors, pressed by the threat of an NGO-organized boycott, might still not accept an AIDCP "dolphin-safe" label, but currently US law prohibits such use in any case.

[16] Annex 1.1 of the TBT Agreement ("[d]ocument which *lays down product characteristics or their related processes and production methods*, including the applicable administrative provisions, *with which compliance is mandatory*. It may also include… *labeling requirements as they apply to a product, process or production method*" (emphases added)).

the label "dolphin-safe" (when meeting the criteria) or sell the tuna products without the label. A number of third parties in the case, including Australia, the European Union and New Zealand, supported the US interpretation, while Brazil and Japan supported Mexico's.[17]

The majority of the panel sided with Mexico in a 2-1 decision, while one panelist agreed with the US. The majority found that the US requirements were mandatory in that they set out "the conditions under which" tuna can be labeled as "dolphin-safe" and apply sanctions against parties that label tuna in "violation" of these conditions. The AB upheld the majority's decision based on "the circumstances of the case."[18] The special nature of the US labeling law should thus be taken into account before reaching any conclusion regarding the implications for all "social labeling" requirements. The US law effectively prohibits the use of any mention of dolphin safety on cans of tuna that do not meet US regulatory requirements, which effectively prohibits Mexico from labeling tuna to highlight the substantial dolphin-protection measures that it has taken under the AIDCP and its predecessor agreements.

2. Article 2.1 Claim of Discrimination. Article 2.1 of the TBT Agreement provides that "Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded *treatment no less favourable* than that accorded to like products of national origin and to like products originating in any other country" (emphasis added). In its decision, the AB applied analysis that parallels what is used in GATT Article III:4. It also read provisions of the preamble of the TBT Agreement that mirror language in the chapeau of GATT Article XX (regarding "arbitrary and unjustifiable discrimination") as "context" for interpreting this provision. In this way, although an Article XX defense is not formally available for TBT claims, the language in an Article XX defense has been incorporated into the analysis of the claim.[19]

The US maintained that its labeling provisions are non-discriminatory under Article 2.1 because they are origin-neutral; that is, they apply equally to tuna caught by US and foreign fleets. Mexico noted that the US tuna fleet fished almost exclusively outside of the ETP and thus was not subject to the more restrictive "dolphin-safe" labeling provisions, giving rise to discrimination. The Panel agreed with the US, finding that the US law was non-discriminatory because the Mexican fleet had the equal opportunity to comply with the US labeling standards by not using purse seine nets in the ETP or by fishing outside of the ETP. It found that any adverse impact on the Mexican fleet was "primarily the result of factors or circumstances unrelated to the foreign origin of the product."[20] Its finding reflected that of the 1991 GATT tuna-dolphin report, which found that the US "dolphin-safe" labeling standard was non-discriminatory because it was not based on the nationality of the tuna vessels so that any trade effects resulted from consumer choice.[21]

The Appellate Body reversed the panel, finding that the US labeling provisions adversely affected "the conditions for competition in the US market" to the detriment of Mexican tuna products. The AB cited factual findings of the panel that the US applied stringent "dolphin-safe" labeling requirements for tuna caught in the ETP, but significantly more lenient labeling rules for tuna caught outside of the ETP, even though tuna fleets in other oceans used fishing techniques,

[17] AB Report, paras. 138, 140, -141, 154-155, 161-163, and 166-167.
[18] AB Report, para. 199.
[19] See also AB Report, US-Clove Cigarettes, paras. 96 & 109.
[20] Panel Report, para. 7.378.
[21] Panel Report, Tuna I, paras. 5.42-5.43.

such as trolls, gillnets, and fish aggregating devices (FADs), that resulted in significant harm to dolphins.[22] The AB did not accept that the US measures were proportionately calibrated to the likelihood of injury to dolphins, and was thus not "even-handed."[23]

The AB nonetheless indicated that it could be relatively easy for the US to comply with the decision, noting "the possibility that only the captain provide such a certification."[24] If the US amends its labeling requirement to require a certification from only the captain of tuna vessels fishing in other oceans and using other fishing techniques, Mexico could challenge the US for failing to comply with the decision because it is not "even-handed." The AB, however, indicated that Mexico would not be successful because the US may calibrate its labeling requirements to address the relative regulatory compliance costs involved in relation to the relative risks of harm to dolphins in different oceans from different fishing practices.[25]

3. Article 2.2 Claim for Unnecessary Obstacles to International Trade. Article 2.2 of the TBT Agreement prohibits "unnecessary obstacles to international trade" where the obstacle is "more trade-restrictive than necessary" to meet the standard setter's "legitimate objective."[26] To determine whether a measure is "necessary," the AB stated that a panel should weigh and balance "(i) the degree of contribution made by the measure to the legitimate objective; (ii) the trade-restrictiveness of the measure; and (iii) the nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment of the objective(s)."[27] The AB, however, did not engage in such balancing, but rather focused on whether the alternative offered by Mexico would meet the US objectives.

The US stated that its legitimate objectives were, on the one hand, to ensure that consumers were not misled by the labels, and, on the other hand, to protect dolphins. Mexico proposed a "less trade-restrictive alternative" that would meet these objectives under which the US would permit the labeling of Mexican tuna as "dolphin-safe" under the IDCP since these standards were at least as protective of dolphins and informative to consumers as those used by the US. The Panel agreed with Mexico, finding that the current US labeling requirements only partially ensured that tuna labeled as "dolphin safe" would protect dolphins and inform consumers given the documented risks to dolphins from fishing techniques used in other oceans. The Panel thus found that permitting the use of the AIDCP "dolphin-safe" label was a less trade-restrictive alternative that met the US objectives to the same degree.[28]

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[22] These practices can also result in greater harm to other bycatch, including fish that may be endangered or depleted, than the practice of setting on dolphins. See Sable & Simon, *supra* note…, at 1294; Parker, *supra* note__, at 38.

[23] AB Report, para. 297.

[24] AB Report, para. 291. The AB also wrote that "nowhere" did the Panel state that "imposing a requirement that an independent observer certify that no dolphins were killed or seriously injured in the course of the fishing operations in which the tuna was caught would be the only way for the United States to calibrate its "dolphin-safe' labeling provisions." *Id*.

[25] AB Report, paras. 293-297

[26] Article 2.2 provides: "Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment…."

[27] AB Report, paras 321-322.

[28] Panel Report, paras. 7.618-7.621.

The Appellate Body reversed the panel. Given the potential unobserved consequences of setting on dolphins (such as through injury, stress, or the separation of calves from mothers), and since setting purse seine nets on dolphins do kill and injure around 1,200 dolphins per year, the AB found that the stricter US standard is protective of dolphin in the ETP to a greater degree.[29] The AB critiqued the panel for making the wrong comparison between the US labeling of tuna inside and outside of the ETP, rather than comparing the two alternatives for labeling tuna that were caught inside the ETP.

4. Article 2.4 Claim for Failure to Comply with International Standards. Article 2.4 of the TBT Agreement maintains that, "where international standards exist," WTO Members are to use them "as a basis for their technical regulations except when" their use "would be an ineffective or inappropriate means for the fulfilment of the [Member's] legitimate objectives."[30] The parties to the IDCP agreed that "[d]olphin safe tuna is tuna captured in sets in which there is not mortality or serious injury of dolphins," and they created an AIDCP "dolphin-safe" label under this standard in 2001.[31] Mexico contended that the AIDCP standard for "dolphin-safe" labeling was an international standard that is an effective and appropriate means to meet the United States' legitimate objectives.

The Panel agreed that the AIDCP standard was an international standard and that the US had failed to base its labeling provisions on it. The Panel nonetheless found that Mexico failed to demonstrate that the AIDCP standard constituted an effective means to meet the US objectives because the US standard was more protective of dolphins in the ETP than the AIDCP alternative. In its analysis of the Article 2.4 claim, the Panel focused on a comparison of the relative effectiveness of the US and international standard within the ETP, unlike in its analysis of Mexico's Article 2.2 claim. The Panel did so because an Article 2.4 claim contends that the domestic standard should be based on the international one, and the international standard only applied to the ETP.

In hearing appeals from the US and Mexico, the AB overruled the panel on the issue of whether the AIDCP labeling standard was an "international standard." The AB found that in order to constitute an international standard, the standard had to be adopted by "an international standardizing body,"[32] and that the AIDCP did not constitute one because it was not "open" for all WTO members to join. In support of its decision, the AB cited Annex 1.5 to the TBT Agreement that defines an "international body" as one "whose membership is open to the relevant bodies of at least all Members."[33] The AB also cited a 2000 TBT Committee decision that sets out principles and procedures that international standardizing bodies should observe, finding that it constituted "a 'subsequent agreement' of the parties within the meaning of Article 31(3)(a) of the Vienna Convention on the Law of Treaties"[34] (which could have implications for

[29] AB Report, paras. 229-330.
[30] Article 2.4 provides: "Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems."
[31] IDCP Agreement on the International Dolphin Conservation Program, May 28, 1998, T.I.A.S. 12956; see Panel Report, para 2.40.
[32] AB Report, para 356.
[33] AB Report, para 358.
[34] AB Report, para 372.

future decision making by committees). The Committee decision maintains that "[m]embership of an international standardizing body should be open on a non-discriminatory basis… at every stage of standards development."[35] The AB maintained that the analysis of "openness" had to be made "on a case-by-case basis," and found that the AIDCP was not a body open to all WTO members because a Member must be "invited" to join it and Mexico failed to prove that acceptance of the invitation "occurred automatically."[36] The AB was "not persuaded" by Mexico's argument that being invited to join the AIDCP is only a "formality," and that "[n]o additional countries or regional economic integration organizations have expressed interest in joining the AIDCP."[37]

C. Four Systemic Issues. Mexico primarily wanted the US to grant Mexican tuna access to the US market under the AIDCP "dolphin-safe" label. The Panel's decision would have granted it such access. In contrast, the AB decision permits the US to exclude Mexican tuna from using the AIDCP "dolphin safe" label in the US, provided the US applies more stringent "dolphin-safe" labeling requirements to tuna caught throughout the world. Although the US formally lost the Article 2.1 claim, it appears that the US should be able to comply with the AB decision, as the US did in the famous US-shrimp-turtle case.[38]

The AB decision is important in at least four systemic respects. First, the decision clarifies the meaning of the core substantive provisions of the TBT Agreement, Articles 2.1 and 2.2. In doing so, the AB incorporated traditional GATT analysis, although TBT Article 2.2 creates a substantive claim not provided under the GATT. While the analogue to TBT Article 2.1 is GATT Articles I and III.1 (respectively covering most-favored-nation and national-treatment obligations), the language of TBT Article 2.2 is used only when assessing an Article XX defense to an underlying GATT violation such as to GATT's most-favored-nation and national treatment clauses. As a result, the TBT Agreement appears to be more constraining of domestic regulatory choices than the GATT, subject to how it is interpreted.

In all three AB decisions in 2012 under the TBT Agreement, the AB found that the respondent (in each case the US) failed to comply with Article 2.1 non-discrimination obligations, but did not violate Article 2.2 obligations concerning "unnecessary obstacles to international trade." These AB decisions, two of which involved reversals of a Panel finding of non-compliance with Article 2.2, indicate that it will be more difficult for complainants to win Article 2.2 claims because of the AB's focus on the "degree" to which an alternative meets a respondent's objective, which can be narrowly defined.[39] In this way, the AB appears to have aligned the interpretation of the TBT Agreement more closely with traditional GATT claims and defenses. From a legal realist perspective, the AB did so because it arguably is more comfortable assessing whether a national regulatory measure is discriminatory than assessing whether it is "unnecessary," from the standpoint of the AB's legitimacy.

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[35] AB Report, paga 373 (citing TBT Committee Decision, 6th ed.).
[36] AB Report, paras. 386 & 398.
[37] AB Report, para 398.
[38] See Gregory Shaffer, *United States - Import Prohibition of Certain Shrimp and Shrimp Products,* 93 AM. J. INT'L L. 507 (1999).
[39] In AB Report, US-COOL Labeling, the AB found that the country-of-origin labeling requirements were "disproportionate" and not "even-handed" under Article 2.1, but were not more trade restrictive than necessary under Article 2.2 because the regulations provided more information to consumers than the proposed alternative. See AB Report, US COOL Labeling, paras. 347 and 349.

Second, the AB clarified the application of the TBT Agreement to labels. Had the AB held that the US measure was not a "technical regulation," it would have created a potentially large carve-out under the TBT Agreement. Mexico would then have been limited to a TBT Article 4.1 claim that the US did not ensure compliance with the Code of Good Practice set forth in Annex 3 to the Agreement (which contains parallel obligations to those in TBT Article 2, but which have yet to be interpreted),[40] and to claims under the GATT.

Third, the case involved labeling based on a foreign, non-product-related PPM applying to the catching of tuna on the high seas and in foreign territorial waters. The AB implicitly found that the fault in the US measure was not that it regulated a foreign PPM, but rather that its scope of application was too narrow in applying a stringent labeling requirement only to tuna caught in the ETP; in this respect, the AB discussed evidence of the depletion of dolphin stocks off the coasts of Ghana and Togo, as well as of Thailand and the Philippines.[41] Mexico noted that the US objective was to "ensur[e] that the US market is not used to encourage" particular fishing practices, and contended that the US objective was "illegitimate" on this ground "because its purpose is to 'coerce' another WTO Member to change its practices to comply with a unilateral policy."[42] The AB decided against Mexico by focusing on the dolphin-protective aspect of the US objective, and thus accepted the US measure based on a foreign PPM without engaging on the extraterritoriality issue. It will be interesting to see the implications of this acceptance of a measure based on foreign PPMs, although the measure only concerned PPM *labeling* applying to a product, as expressly referenced in the TBT definition of a "technical regulation."[43]

Fourth the AB addressed the relation of other international agreements to a party's WTO obligations. The AB decision to not recognize the AIDCP as an "international standard" could be viewed as a means of promoting transparency and participation in international standard-setting processes. Yet one should question whether its approach will actually promote international environmental standard setting since it is easier to reach agreements with fewer participants. If all WTO Members participated, including those that have no interest in protecting dolphin in the ETP, effective conservation efforts could be impeded. Moreover, Taiwan is not a member of the United Nations and so, in fact, there are no international environmental standard setting organizations open to all WTO members. If this approach is followed, it effectively undermines TBT Article 2.5 which provides that a country whose technical regulation is in accordance with a relevant international standard is "rebuttably presumed not to create an unnecessary obstacle to international trade." Interestingly, the WTO itself would not meet the AB's criteria of "openness" and "automaticity," as attested by the fifteen and eighteen years that China and Russia respectively negotiated to join the organization.

Finally, the US initiated a case under NAFTA in 2010, calling into question the relation of WTO and NAFTA obligations regarding trade and environment claims. The US contended that Mexico was obligated under NAFTA Article 2005(4) to honor an earlier request of the US to resolve the dispute under NAFTA.[44] The NAFTA case has not proceeded because of the ability

[40] See Annex 3, paras. D-F. This issue has yet to be subject to a WTO dispute.
[41] See AB Report, par. 275-278.
[42] Paras. 335-339.
[43] See the definition in supra note…
[44] NAFTA Article 2005(4) provides: "In any dispute referred to in paragraph 1 where the responding Party claims that its action is subject to Article 104 (Relation to Environmental and Conservation Agreements) and requests in writing that the matter be considered under this Agreement, the complaining Party may, in respect of that matter, thereafter have recourse to dispute settlement procedures solely under this Agreement." See Jamie Strawbridge, U.S. Tuna-Dolphin Request Could Clarify NAFTA-WTO Relationship, Inside US TRADE, Oct 1, 2010.

of a NAFTA party (in this case Mexico) to effectively block the formation of a NAFTA arbitral panel under Chapter 20 of NAFTA by opposing the selection of panelists. The US, which has also blocked the hearing of NAFTA claims brought by Mexico, did not raise this issue in the WTO case.

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