

4. STATEMENT BY THE UNITED STATES ON THE PRECEDENTIAL VALUE OF PANEL OR APPELLATE BODY REPORTS UNDER THE WTO AGREEMENT AND DSU

1. Madame Chair, for more than 15 years, the United States has sounded the alarm about the Appellate Body exceeding its authority and straying from the role agreed for it by WTO Members.

2. More recently, over the course of 2018, the United States has delivered detailed interventions here at the Dispute Settlement Body that have comprehensively outlined specific concerns.

3. In several meetings of the DSB, including at the February 28 meeting, we explained that the Appellate Body simply does not have the authority to deem someone who is not an Appellate Body member to be a member.²

4. At the June 22 DSB meeting, we highlighted how the Appellate Body has repeatedly issued its reports beyond the 90-day deadline mandated by the Dispute Settlement Understanding.³

5. At the August 27 DSB meeting, we outlined how the Appellate Body has consistently engaged in review of panel fact-finding, including the meaning of a Member's municipal law, despite lacking the authority to do so.⁴

6. At the October 29 DSB meeting, the United States explained that the Appellate Body's issuing advisory opinions by making findings that are not necessary to resolve a dispute is contrary to the DSU.⁵

² See, e.g., U.S. Statement at the August 31, 2017, Meeting of the DSB, *available at*: https://geneva.usmission.gov/wp-content/uploads/sites/290/Aug31.DSB_.Stmt_.as-delivered.fin_.public.pdf and U.S. Statement at the February 28, 2018, Meeting of the DSB, *available at*: https://geneva.usmission.gov/wp-content/uploads/sites/290/Feb28.DSB_.Stmt_.as-delivered.fin_.public-1.pdf.

³ Statement by the United States Concerning Article 17.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Meeting of the DSB on June 22, 2018, *available at*: https://geneva.usmission.gov/wp-content/uploads/sites/290/Jun22.DSB_.Stmt_.as-delivered.fin_.public.rev_.pdf.

⁴ Statement by the United States Concerning Article 17.6 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* and Appellate Review of Panel Findings of Fact, Including Domestic Law, Meeting of the DSB on August 27, 2018, *available at*: https://geneva.usmission.gov/wp-content/uploads/sites/290/Aug27.DSB_.Stmt_.as-delivered.fin_.rev_.public.pdf.

⁵ Statement by the United States Concerning the Issuance of Advisory Opinions on Issues Not Necessary to Resolve a Dispute, Meeting of the DSB on October 29, 2018, *available at*: https://geneva.usmission.gov/wp-content/uploads/sites/290/Oct29.DSB_.Stmt_.as-delivered.fin_.rev_.public.pdf.

7. Today, we will focus on the Appellate Body's misguided insistence that its reports must serve as precedent "absent cogent reasons."

8. Before moving to the detailed interpretive discussion under this agenda item, let me repeat the U.S. position expressed at last week's General Council meeting: the United States is ready to engage with other Members on these and other important issues related to the proper functioning of the dispute settlement system.

9. As part of this process, it will be critical for Members to consider why the Appellate Body has felt free to depart from the clear rules we WTO Members have agreed to. Through such a discussion, we can consider how best to ensure that the dispute settlement system adheres to WTO rules as written.

I. Introduction: WTO Members have the exclusive authority to adopt authoritative interpretations in the Ministerial Conference, and the DSU does not assign precedential value to panel or Appellate Body reports

10. The United States requested this agenda item to draw Members' attention to an important systemic issue, the concern that the Appellate Body has sought to change the nature of WTO dispute settlement reports from ones that assist in resolving a dispute, and may be considered for persuasive value in the future, to ones that carry precedential weight, as if WTO Members had agreed in the DSU to a common law-like system of precedent.

11. This is an issue of fundamental importance to the WTO. It is not for WTO adjudicators to seek to change the nature of the WTO dispute settlement system as agreed by Members in the text of the DSU. A failure by WTO adjudicators to follow the agreed rules, including those rules that define the adjudicators' role and authority, undermines Members' support for the WTO dispute settlement system.

12. In short, the DSU does not assign precedential value to panel or Appellate Body reports adopted by the DSB or interpretations contained in those reports. Instead, it reserves such weight to authoritative interpretations adopted by WTO Members in a different body, the Ministerial Conference or General Council, acting not by negative consensus but by positive consensus and under different procedures that promote awareness and participation by Members.⁶ The DSU explicitly notes that the dispute settlement system operates without prejudice to this interpretative authority.⁷

13. The DSU states that it exists to resolve disputes arising under the covered agreements, not under panel or Appellate Body interpretations of those agreements, and that a panel or the Appellate Body is to apply customary rules of interpretation of public international law in

⁶ WTO Agreement, Art. IX:2.

⁷ DSU Art. 3.9.

assisting the DSB in determining whether a measure is inconsistent with a Member's commitments under the covered agreements. Those rules of interpretation do not assign to interpretations given as part of dispute settlement a precedential value for purposes of discerning the meaning of agreement text. In this, the DSU presented no change from the dispute settlement system under the *General Agreement on Tariffs and Trade* (1947) ("GATT"), a point which the Appellate Body understood and expressed clearly in its early years.

14. Remarkably, the Appellate Body has more recently suggested that a panel must follow a prior Appellate Body interpretation absent undefined "cogent reasons" for departing from that interpretation. The Appellate Body's statement is wrong under the DSU and the WTO Agreement, as we shall explain in detail.

15. WTO Members did not establish a common law system or a system of precedent, but rather reserved to themselves, in the Ministerial Conference, the authority to establish precedent through an "authoritative interpretation."⁸ It is not for WTO adjudicators, through their reports, which are adopted by negative consensus, to change the nature of the WTO dispute settlement system, and certainly WTO adjudicators may not and must not alter the rights and obligations of Members under the covered agreements.⁹

16. What is more, the United States would not agree, as a matter of the design of an adjudicatory system, that assigning precedential weight (or a "cogent reasons" approach) is appropriate or positive for the WTO. The Appellate Body's assertion diminishes the value of the work of panels. It inhibits the engagement of panels with the text of the covered agreements, contrary to a panel's function to make an objective assessment of the applicability of and conformity with the covered agreements. The result of diminishing the role of each panel is that errors will become locked in, and persuasive interpretations are less likely to arise from the dispute settlement system.

17. To think otherwise would require one to consider that *the first time* the Appellate Body considers an interpretive issue, it will necessarily render not only a *correct* interpretation, but the *best* interpretation. The United States considers that proposition to be contrary to experience and human nature.

18. Through this statement today, the United States again attempts to facilitate a broader discussion on whether Members share a common understanding of, and respect for, the rules we have written and agreed to. To advance this discussion, in this statement the United States will highlight the relevant text of the WTO Agreement and the DSU. We then explain why recent Appellate Body reports do not provide a justification or legitimate basis for a panel or the

⁸ WTO Agreement, Art. IX:2.

⁹ DSU Arts. 3.2, 19.2.

Appellate Body to disregard the pertinent provisions of the WTO Agreement or the DSU that do not accord precedential value to adopted dispute settlement reports.

II. The DSU does not require, or even permit, a panel to apply as law or controlling “precedent” a prior Appellate Body interpretation

19. The DSU does not assign precedential value to panel or Appellate Body reports adopted by the DSB, or interpretations contained in those reports. Instead, it reserves such weight to authoritative interpretations adopted by WTO Members in a different body, the Ministerial Conference or General Council, acting not by negative consensus but under different procedures. The DSU explicitly notes that the dispute settlement system operates without prejudice to this interpretative authority.

20. The DSU states that a panel or the Appellate Body is to apply customary rules of interpretation of public international law in assisting the DSB in determining whether a measure is inconsistent with a Member’s commitments under the covered agreements. Those rules of interpretation do not assign to interpretations given as part of dispute settlement a precedential value for purposes of discerning the meaning of agreement text. A panel is not required – nor is it permitted – to ignore this task and instead simply treat prior panel or Appellate Body reports as binding “precedent.”

A. The function of panels and the Appellate Body under the DSU

21. Fundamentally, the purpose of the WTO dispute settlement system is to resolve trade disputes between Members. In Article 3.7, WTO Members agreed: “The aim of the dispute settlement mechanism is to secure a positive solution to a dispute.” To achieve this focused aim, Members established in the DSU particular processes for resolving disputes promptly, including panels, and the Appellate Body where appropriate, assisting the DSB for this purpose.

22. When a Member has not been able to resolve a dispute with another Member through consultations, it may request the DSB to establish a panel to examine a matter. Through the standard terms of reference for panels in Article 7 of the DSU, the DSB charges the panel with two tasks: to “examine ... the matter referred to the DSB” in a panel request and “to make such findings as will assist the DSB in making the recommendations” provided for in the DSU.¹⁰ Article 19.1 of the DSU is explicit in what the recommendation is: “Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement.” Thus, it is through such a finding of WTO-inconsistency and through such a recommendation “to bring the measure into conformity” that panels carry out the terms of reference “to make such

¹⁰ DSU Art. 7.1.

findings as will assist the DSB in making the recommendations” provided for in the covered agreements.¹¹

23. Members reinforced in Article 11 that the “function of panels is to assist the DSB in discharging its responsibilities under [the DSU].” In exercising this function, DSU Article 11 states that a panel “should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.” That objective assessment calls on the panel to weigh the evidence and make factual findings based on the totality of the evidence. That objective assessment also calls on the panel to interpret the relevant provisions of the covered agreements to determine how they apply to the measures at issue and whether those measures conform with a Member’s commitments.¹²

24. Article 3.2 of the DSU further informs the function of a panel established by the DSB to assist it. Article 3.2 explains that “Members recognize that [the dispute settlement system] serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.” Thus, it is “the rights and obligations of Members under th[ose] covered agreements” that are fundamental. And for purposes of understanding the “existing provisions” of the covered agreements – that is, their text – the DSU directs WTO adjudicators to apply “customary rules of interpretation of public international law,” reflected in Articles 31 to 33 of the Vienna Convention.

25. Thus, a panel’s task is straightforward and also limited. The Appellate Body’s task under the DSU is similarly limited to assisting the DSB in discharging its functions under the DSU, albeit more so than panels. Under Article 17.6, an appeal is “limited to issues of law covered in the panel report and legal interpretations developed by the panel.” Further, under Article 17.13, the Appellate Body is only authorized to “uphold, modify or reverse the legal findings and conclusions of the panel.” Since a panel’s function under DSU Article 11 is “to assist the DSB in discharging its responsibilities” under the DSU, the Appellate Body, in reviewing a panel’s legal conclusion or interpretation, is thus also assisting the DSB in discharging its responsibilities to find whether the responding Member’s measure is consistent with WTO rules.

B. The DSU does not establish a system of precedent

26. As is clear from the forgoing, there is no provision in the DSU that establishes a system of “case-law” or “precedent,” or otherwise requires that a panel apply the provisions of the covered agreements consistently with the adopted findings of previous panels or the Appellate

¹¹ DSU Art. 7.1.

¹² DSU Art. 11 (“Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements . . .”).

Body. Nor is there any provision that refers to “cogent reasons” or suggests that a panel must justify legal findings not consistent with the reasoning set out in prior reports.

27. Indeed, were a panel to decide to simply apply the reasoning in prior Appellate Body reports alone, it would fail to carry out its function, as established by the DSB, under DSU Articles 7.1, 11, and 3.2 to make findings on the applicability of existing provisions of the covered agreements, as understood objectively through customary rules of interpretation. In so doing, the panel would risk creating additional obligations for Members that are beyond what has been provided for in the covered agreements – an act strictly prohibited under Articles 3.2 and 19.2 of the DSU.

28. To say that an Appellate Body interpretation in one dispute is precedent or controlling for later disputes would effectively convert that interpretation into an authoritative interpretation of the covered agreement. But such an approach would directly contradict the agreed text of the WTO Agreement. In Article IX:2, the WTO Agreement provides that: “The Ministerial Conference and the General Council shall have the *exclusive authority to adopt interpretations* of this Agreement and of the Multilateral Trade Agreements.” [italics added]

29. Through this provision, WTO Members reserved the “exclusive authority” to adopt interpretations to themselves acting in the Ministerial Conference (or General Council), not the DSB. The specification that the authority of the Ministerial Conference or General Council to adopt an authoritative interpretation is “exclusive,” and the requirements in the WTO Agreement for exercising this authority, make clear that such authority is *not* exercised by the DSB when it adopts a panel or Appellate Body report.

30. The WTO Agreement specifies the process for adopting such an authoritative interpretation. It provides that “[i]n the case of an interpretation of a Multilateral Trade Agreement in Annex 1, [the Ministerial Conference or General Council] shall exercise their authority on the basis of a recommendation by the Council overseeing the function of that Agreement.” Proceeding in such a manner would provide for transparency, participation, and consent of all Members. It would permit all Members to become aware of the issue, to discuss the issue with other Members, and to participate – first in the relevant Council and then at the Ministerial Conference or in the General Council – based on instructions from capital reflecting input from all relevant stakeholders. And, critically, in light of the relevant decision-making rules and practice in the WTO, the recommendation by the relevant Council and the subsequent adoption by the Ministerial Conference or General Council would normally proceed based on the consensus of WTO Members. This would thereby ensure that Members consent to an interpretation that could serve as precedent in future disputes.

31. The level of transparency, participation, and consent by Members in the process of adopting an authoritative interpretation does not resemble the process for adopting reports under the DSU. One obvious difference concerns the participation by Members. Whereas the process

for adopting an authoritative interpretation would involve all Members, a report adopted by the DSB may reflect varying degrees of participation by only a handful of Members.

32. And, as discussed, WTO Members set out a special decision-making rule for adopting an authoritative interpretation, which is different from the negative consensus adoption that applies to reports under the DSU. Given the important implications that flow from an authoritative interpretation, it makes sense that Members would have agreed to the process set out in Article IX:2, which envisions participation by the full Membership and informed consent. At the same time, it makes little sense to suggest given these provisions and the structure described that a particular interpretation contained within a report that reflects input from only a limited subset of Members, and that has been adopted by negative consensus, could similarly be regarded as setting out an authoritative interpretation for all disputes and all Members.

33. That Article IX:2 reserves to WTO Members in the Ministerial Conference the critical authority to adopt authoritative interpretations has been emphasized by Members. In the discussion on “amicus procedures” promulgated by the Appellate Body, for example, numerous WTO Members spoke in the General Council to argue it was for Members to exercise their exclusive authority to adopt an authoritative interpretation under Article IX:2 should Members consider it appropriate to permit amicus submissions in disputes generally.¹³

34. Article IX:2 of the WTO Agreement is conclusive that there is but one means in the WTO to obtain an authoritative interpretation. But if this were not enough, the DSU also expressly confirms that panel and Appellate Body reports do not set out authoritative interpretations.

35. Article 3.9 of the DSU states that “[t]he provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement or a covered agreement which is a Plurilateral Trade Agreement.” Thus, WTO Members again expressed that the adoption by negative consensus of an interpretation contained in a panel or Appellate Body report does not make that interpretation authoritative, which could only be adopted by the Ministerial Conference (or General Council) acting according to different decision-making rules. Put differently, if the DSB does not have the authority under the DSU to adopt an authoritative interpretation, then a panel or the Appellate Body assisting the DSB does not have this authority either.

36. This does not mean that the United States considers a prior panel or Appellate Body interpretation to be without any value. For example, to the extent that a panel finds prior Appellate Body or panel reasoning to be persuasive, a panel may refer to that reasoning in conducting its own objective assessment of the matter. Such a use of prior reasoning would likely add to the persuasiveness of the panel’s own analysis, whether or not the panel agrees with

¹³ See Minutes of Meeting of the General Council on 22 November 2000, WT/GC/M/60.

the prior reasoning. But considering an interpretation in a prior Appellate Body report is very different from a statement that the interpretation is controlling or “precedent” in a later dispute.

III. Panel Reports Were Not Treated as Precedent under the GATT Dispute Settlement Rules and Procedures

37. The United States notes that not treating an interpretation in an adopted report as controlling or a precedent is consistent with the treatment of reports under the GATT dispute settlement rules and procedures.

38. There was no question that GATT dispute settlement did not treat reports as binding precedent. For example, a Report by the Chairman of the GATT Negotiating Group on Dispute Settlement noted that “[s]everal delegations express the view than an appeals procedure might lead to the dilution of the importance of panels and, unless the appellate decisions were submitted for adoption by the Council, of the authority of the CONTRACTING PARTIES.” But the Chair went on to record that “[o]ther delegations note that despite the creation of an appellate body, the CONTRACTING PARTIES would retain their authority to interpret the General Agreement pursuant to Article XXV [of the GATT].”¹⁴ A draft text on dispute settlement prepared by the GATT Secretariat at the request of the Negotiating Group recorded the same view: “The CONTRACTING PARTIES retain their authority to interpret the General Agreement pursuant to Article XXV.”¹⁵

39. Provisions of the GATT dispute settlement rules and procedures – provisions nearly identical to analogous provisions of the DSU – confirm that GATT panels functioned to assist the Contracting Parties in making the recommendations or in giving the rulings provided for in the GATT – not to provide authoritative interpretations.

40. Paragraph F(b)(1) of the Montreal Rules provided that GATT panels would have standard terms of reference.¹⁶ Just like DSU Article 7.1, this text made explicit that GATT panels functioned to assist the Contracting Parties in making the recommendations to bring a measure found inconsistent with the GATT into conformity with those rules. The terms of reference of GATT panels, like WTO panels today, did not empower them to make interpretations that would be considered precedent for future panels.

¹⁴ Negotiating Group on Dispute Settlement: Report by the Chairman, MTN.GNG/NG13/W/43, para. 7 (18 July 1990).

¹⁵ Negotiating Group on Dispute Settlement: Draft Text on Dispute Settlement, MTN.GNG/NG13/W/45 (General Provisions, para. 5) (21 September 1990).

¹⁶ *Decision of 12 April 1989 on Improvements to the GATT Dispute Settlement Rules and Procedures* (“Montreal Rules”), para. F(b)(1) (“To examine, in the light of the relevant GATT provisions, the matter referred to the CONTRACTING PARTIES by (name of contracting party) in document L/... and to make such findings as will assist the CONTRACTING PARTIES in making the recommendations or in giving the rulings provided for in Article XXIII:2.”).

41. Paragraph A1 of the Montreal Rules¹⁷ included language identical in relevant part to the language in DSU Article 3.2 on the WTO dispute settlement system preserving the rights and obligations of Member and serving to clarify the existing provisions of the covered agreements. The use of “clarify” in this text did not authorize GATT panels to provide interpretations that would constitute precedent. Rather, it was simply a statement of what Contracting Parties agreed flowed from the GATT dispute settlement system when it operated in accordance with the agreed provisions.

42. The DSU also carried forward the GATT’s understanding that the “aim of the CONTRACTING PARTIES [in dispute settlement] has always been to secure a positive solution to the dispute”¹⁸ – not to render authoritative interpretations.

43. The approach to dispute settlement under the GATT was never understood as giving adjudicators the authority to make interpretations that would constitute precedent for the Contracting Parties and future adjudicators. That authority was understood to reside in the CONTRACTING PARTIES acting under Article XXV. The GATT dispute settlement language carried forward into the DSU does not provide panels and the Appellate Body such authority. And as noted previously, WTO Members agreed to provisions in both the WTO Agreement, in Article IX:2, and the DSU, in Article 3.9, that made explicit what had been understood and practiced in the GATT.

IV. The Appellate Body’s own reports do not support a proposed “cogent reasons” approach

44. With increasing frequency, the Appellate Body has summarily suggested that, absent cogent reasons, an adjudicatory body should “resolve the same legal question in the same way in a subsequent case.”¹⁹ In doing so, the Appellate Body would seem to consider the interpretation found in Appellate Body reports to be authoritative. Yet, in claiming this authority, the Appellate Body has not grappled with the relevant legal text, discussed above, or even with the Appellate Body’s own prior reports.

45. As we will discuss, these reports do not provide a basis for a panel to disregard pertinent provisions of a panel’s function under the DSU. The Appellate Body, in its report in *Japan – Alcoholic Beverages II*, properly understood the value the DSU assigns to prior reports. However, several years later, and without any change in the relevant text of the DSU or the WTO Agreement, the Appellate Body asserted a very different approach in *US – Stainless Steel*

¹⁷ Montreal Rules, para. A1 (“Contracting parties recognize that the dispute settlement system of GATT serves to preserve the rights and obligations of contracting parties under the General Agreement and to clarify the existing provisions of the General Agreement. It is a central element in providing security and predictability to the multilateral trading system.”).

¹⁸ Annex: Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement, L/4907, para. 4.

¹⁹ *US – Stainless Steel (Mexico) (AB)*, para. 160.

(*Mexico*), without explaining the basis for that changed approach. The statements in that report, in addition to constituting *obiter dicta*, are fundamentally flawed and provide no support for a “cogent reasons” approach. Ironically, if the Appellate Body actually believed that any prior interpretation in an adopted report must be followed absent cogent reasons, it would not have, without any explanation, departed from its understanding in *Japan – Alcoholic Beverages II*.

A. The Appellate Body report in *Japan – Alcoholic Beverages II* explicitly recognized that adopted panel and Appellate Body reports do not create binding precedent

46. In *Japan – Alcoholic Beverages II*, the Appellate Body explicitly found that adoption of reports under the WTO did not create “precedent” or assign a special status for interpretations reached in reports. Rather, the Appellate Body noted that status has been reserved for authoritative interpretations reached by the Ministerial Conference. The Appellate Body’s report in that appeal directly contradicts the Appellate Body’s later statements concerning “cogent reasons”.

47. In *Japan – Alcoholic Beverages II*, the Appellate Body was confronted with a question concerning the status of panel reports adopted by the GATT Contracting Parties and the WTO DSB.²⁰ Looking first to the GATT, the Appellate Body expressed the view that the GATT Contracting Parties, in deciding to adopt a panel report, did not intend that their decision would constitute a definitive interpretation of the relevant provisions of the GATT.²¹ It then added the following: “Nor do we believe that this is contemplated under GATT 1994.”²² The Appellate Body stated the “specific cause for this conclusion” was Article IX:2 of the WTO Agreement. The Appellate Body stated the following with regard to this provision:

The fact that such an “exclusive authority” in interpreting the treaty has been established so specifically in the WTO Agreement is reason enough to conclude that such authority does not exist by implication or inadvertence elsewhere.²³

We agree. It is remarkable that the Appellate Body later contradicted this statement in *US – Stainless Steel (Mexico)*, without explaining any basis for so doing, such as that it considered that it had wrongly decided *Japan – Alcoholic Beverages II*.

48. In *Japan – Alcoholic Beverages II*, the Appellate Body also explained that the decisions to adopt panel reports under Article XXIII of the GATT was different from joint action of the Contracting Parties under Article XXV of the GATT. The Appellate Body considered that under

²⁰ *Japan – Alcoholic Beverages II (AB)*, p. 12.

²¹ *Japan – Alcoholic Beverages II (AB)*, p. 13.

²² *Japan – Alcoholic Beverages II (AB)*, p. 13.

²³ *Japan – Alcoholic Beverages II (AB)*, p. 13.

the WTO Agreement the nature of adopted panel reports continued to differ from interpretations made under the WTO Agreement by the Ministerial Conference or the General Council.²⁴ According to the Appellate Body, “[t]his is clear from a reading of Article 3.9 of the DSU.” We also agree, as Article 3.9 confirms that panel and Appellate Body reports do not set out authoritative interpretations.

49. Thus, the Appellate Body in an early report shortly after conclusion of the Uruguay Round made clear that the DSB cannot supplant the “exclusive authority” of the Ministerial Conference and the General Council to adopt, by positive consensus,²⁵ an “authoritative interpretation” of a covered agreement, as explicitly established in DSU Article 3.9²⁶ and WTO Agreement Article IX:2.²⁷

50. The Appellate Body report in *Japan – Alcoholic Beverages II* also made clear that adopted panel reports are often considered by subsequent panels, and may be taken into account where they are relevant, but “they are not binding”.²⁸ As stated earlier, the United States considers that a panel may take into account the reasoning in prior reports and, to the extent a panel finds the reasoning persuasive, rely on that reasoning in conducting its own objective assessment of the matter. To be clear, the United States would encourage this and expects prior reports may have valuable insight. This is why parties to a dispute often cite to prior reports for their persuasive value. But this is very different than saying panels are bound to follow the prior Appellate Body reports, or that they may rely on those reports instead of conducting their own objective assessment.

B. The Appellate Body report in *US – Stainless Steel (Mexico)* does not support the “cogent reasons” approach

51. The Appellate Body report in *US – Stainless Steel (Mexico)* contains the Appellate Body’s first effort to introduce the concept of “cogent reasons.” The Appellate Body’s articulation of the “cogent reasons” approach comprised several disparate statements; key among them is the contention that “[e]nsuring ‘security and predictability’ in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.”²⁹ The United States explains how this report does not support a “cogent reasons” approach for several reasons. The Appellate Body’s statement is, by definition, an “advisory opinion” or

²⁴ *Japan – Alcoholic Beverages II (AB)*, pp. 13-14.

²⁵ WTO Agreement, Arts. IX:1.

²⁶ DSU, Art. 3.9 (“The provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement or a covered agreement which is a Plurilateral Trade Agreement.”).

²⁷ WTO Agreement, Art. IX:2 (“The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements.”).

²⁸ *Japan – Alcoholic Beverages II (AB)*, p. 14.

²⁹ *US – Stainless Steel (Mexico) (AB)*, para. 160

obiter dicta that, even under the Appellate Body’s logic, cannot serve as a precedent. More importantly, the “cogent reasons” approach is fundamentally flawed and at odds with the text of the DSU and WTO Agreement.

1. The Appellate Body’s Statements Concerning Cogent Reasons in *US – Stainless Steel (Mexico)* are *Obiter Dicta*

52. As an initial matter, and even setting aside for a moment the fundamental flaws under the DSU with the “cogent reasons” approach, the United States would see no basis to cite and follow Appellate Body statements that have appeared in *US – Stainless Steel (Mexico)*. In *US – Stainless Steel (Mexico)*, the discussion of “cogent reasons” appears in the context of Mexico’s appeal under DSU Article 11.³⁰ Mexico argued on appeal that the panel acted inconsistently with Article 11 of the DSU by failing to follow what it considered was “well-established Appellate Body jurisprudence.”³¹

53. The Appellate Body did *not*, however, make a finding on Mexico’s Article 11 appeal. Rather, it exercised judicial economy on Mexico’s claim.³² Thus, there was *no* “legal finding” on Mexico’s claim of error, and the Appellate Body’s discussion is *not* reasoning “resolv[ing] a legal question.” The “cogent reasons” approach (as explained by the Appellate Body) would thus *not even apply* to the Appellate Body’s own statement on “cogent reasons”.

54. That the Appellate Body made no legal finding on Mexico’s appeal is made explicit by the Appellate Body’s conclusion at paragraph 162 of its report, where it stated the following:

Since we have [elsewhere in the report] corrected the Panel’s erroneous legal interpretation and have reversed all of the Panel’s findings and conclusions that have been appealed, *we do not*, in this case, *make an additional finding* that the Panel also failed to discharge its duties *under Article 11 of the DSU*.³³

Therefore, the entire discussion of “cogent reasons” and any reasoning leading up to the conclusion *not* to make a finding on Mexico’s appeal is, by definition, an “advisory opinion” or *obiter dicta*.

55. As the United States explained in its statement to the DSB on October 29, 2018, “advisory opinions” are commonly defined as “a non-binding statement on a point of law given

³⁰ *US – Stainless Steel (Mexico) (AB)*, para. 154.

³¹ *US – Stainless Steel (Mexico) (AB)*, para. 154.

³² *US – Stainless Steel (Mexico) (AB)*, para. 162.

³³ *US – Stainless Steel (Mexico) (AB)*, para. 162 (italics added).

by [an adjudicator] before a case is tried or with respect to a hypothetical situation.”³⁴ *Obiter dictum* has been defined as “an opinion not necessary to a judgment; an observation as to the law made by a judge in the course of a case, but not necessary to its decision, and therefore of no binding effect.”³⁵ Given that the Appellate Body expressly declined to make any finding on Mexico’s Article 11 appeal, the preceding discussion – including on “cogent reasons” – is, by definition, merely advisory, or dicta.

56. In this regard, we note that the Appellate Body itself elsewhere confirms that, on its approach, statements that are not necessary to “resolve [a] legal question” would not be subject to its approach. At paragraph 158 of its report, the Appellate Body itself states the following:

It is well settled that the Appellate Body reports are not binding, except with respect to resolving the particular dispute between the parties. This, however, does not mean that subsequent panels are free to disregard the legal interpretations and the *ratio decidendi* contained in previous Appellate Body reports that have been adopted by the DSB.³⁶

57. The implication of this statement, particularly the second sentence, is that the Appellate Body in this report considers panels may not disregard the “ratio decidendi” contained in previous reports adopted by the DSB. Given that the Appellate Body did not make findings on Mexico’s Article 11 claim, the Appellate Body’s “cogent reasons” analysis did not and could not form part of the “ratio decidendi” of the report in *US – Stainless Steel (Mexico)*.

58. Therefore, even under the Appellate Body’s own approach, its discussion of “cogent reasons” is “not binding” on a subsequent panel, and a panel is “free to disregard” it.

2. The Appellate Body’s Statements Concerning Cogent Reasons in *US – Stainless Steel (Mexico)* are Profoundly Flawed

59. More fundamentally, however, the Appellate Body’s statement concerning “cogent reasons” in *US – Stainless Steel (Mexico)* is profoundly flawed in several respects. These include:

(1) a failure to properly appreciate the functions of panels and the Appellate Body within the WTO dispute settlement system;

³⁴ See, e.g., Oxford Dictionaries, “advisory opinion” (https://en.oxforddictionaries.com/definition/advisory_opinion); Statement by the United States Concerning the Issuance of Advisory Opinions on Issues Not Necessary to Resolve a Dispute, Meeting of the DSB on October 29, 2018, available at: https://geneva.usmission.gov/wp-content/uploads/sites/290/Oct29.DSB_Stmt_as-delivered.fin_rev_public.pdf.

³⁵ Wharton’s Law Lexicon (14th Ed. 1993).

³⁶ *US – Stainless Steel (Mexico) (AB)*, para. 158.

- (2) an erroneous interpretation of Article 3.2 of the DSU that does not reflect the text of that provision;
- (3) a reliance on reports that do not support a “cogent reasons” approach;
- (4) a misunderstanding (or misstatement) of why parties cite prior reports;
- (5) inappropriate and incomplete analogies to other international adjudicative fora; and
- (6) incorrect assumptions concerning the existence of a hierarchical structure that does not reflect the limited task assigned to the Appellate Body in the DSU.

We will discuss each of these in turn.

a. First Error: The Appellate Body’s failure to properly appreciate the functions of panels and the Appellate Body within the WTO dispute settlement system, including Article 11 of the DSU

60. First, the Appellate Body’s statements concerning “cogent reasons” reflect a failure to properly appreciate the tasks assigned to panels and the Appellate Body by the relevant provisions of the DSU. Although the Appellate Body purports to “begin [its] consideration with the text of Article 11 of the DSU,” the Appellate Body subsequently ignores the limitations of this text.

61. As discussed, Article 11 of the DSU stipulates that “[t]he function of panels is to assist the DSB in discharging its responsibilities” under the DSU and the covered agreements. In exercising this function, DSU Article 11 states that a panel is to conduct “an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.” An objective assessment calls for the panel to weigh the evidence and make factual findings based on the totality of the evidence. An objective assessment also calls for a panel to interpret the relevant provisions of the covered agreements to determine how they apply to the measures at issue and whether those measures conform with a Member’s commitments.

62. As noted previously, nowhere in this article is a panel’s objective assessment linked to prior Appellate Body interpretations. Nor does the context of Article 3.2 (which we discuss next) or the structure of WTO Agreement Article IX:2 or DSU Article 3.9, support reading into Article 11 a requirement for panels to establish “cogent reasons” to depart from findings by the Appellate Body in a separate dispute. The Appellate Body makes no real attempt to ground such a requirement in the text of Article 11 of the DSU.

b. Second Error: The Appellate Body’s erroneous interpretation of Article 3.2 of the DSU

63. Second, the Appellate Body relies on an interpretation of Article 3.2 of the DSU that fails to reflect the plain reading of that provision. At paragraph 160 of its report, the Appellate Body states that “[e]nsuring ‘security and predictability’ in the dispute settlement system, as contemplated by Article 3.2 of the DSU, *implies that*, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.”³⁷

64. There are a number of evident flaws in this assertion. First, the statement that Article 3.2 “implies” an approach reveals the weakness of the Appellate Body’s argument. The Appellate Body through this language concedes that Article 3.2 does not require or even set out a “cogent reasons” approach.

65. Second, the statement that Article 3.2 implies a “cogent reasons” approach to past Appellate Body interpretations plainly contradicts the Appellate Body’s own understanding of the DSU in *Japan – Alcoholic Beverages II (AB)*. In that report, after examining Article 3.9 of the DSU and Article IX:2 of the WTO Agreement, the Appellate Body correctly concluded that “[t]he fact that such an ‘exclusive authority’ in interpreting the treaty has been established so specifically in the WTO Agreement is reason enough to conclude that such authority does *not* exist *by implication* or inadvertence elsewhere.”³⁸ Apparently, what the DSU “implies” can and did change for the Appellate Body.

66. Third, the Appellate Body statement that Article 3.2 “implies” a “cogent reasons” approach also rests on a misunderstanding of the text of Article 3.2. Article 3.2 provides in relevant part:

The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.

67. The “it” in the second sentence of Article 3.2 refers to the subject of the first sentence, “the dispute settlement system of the WTO.” In other words, Members recognized that the dispute settlement system of the WTO – as set out in the DSU – serves to preserve the rights and

³⁷ *US – Stainless Steel (Mexico) (AB)*, para. 160 (italics added).

³⁸ *Japan – Alcoholic Beverages II (AB)*, p. 13.

obligations of Members under the covered agreements, and the dispute settlement system of the WTO – as set out in the DSU – serves to clarify the existing provisions of those agreements.

68. This text of Article 3.2 is neither a directive to panels or the Appellate Body nor an authorization for them. There is no “shall” or “may” in this text. Instead, it is a statement of what Members have agreed flows from the system when it operates in accordance with the provisions agreed by Members in the DSU. Moreover, the text of Article 3.2 does not contain any mention of precedent or cogent reasons, and immediate context in DSU Article 3.9 (and WTO Agreement Article IX:2) reinforces that these concepts cannot be inserted through implication in Article 3.2.

69. Finally, the United States notes that the Appellate Body does not appear to take seriously its own statement on “cogent reasons.” Aside from the Appellate Body’s own failure to resolve the issue of the value of prior adopted reports the same way it had resolved that question in *Japan – Alcoholic Beverages II*, the Appellate Body statement confuses the “adjudicatory body” at issue.

70. The passage reads: “Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.” This statement describes “an adjudicatory body” – for example, the Appellate Body. But it does not address a different adjudicatory body, such as a panel. Thus, whether or not the Appellate Body statement could be correct as applied to “an adjudicatory body,” it says nothing about the approach of a *different* “adjudicatory body,” like a panel.

71. On the other hand, if the Appellate Body considered the DSB to be “an adjudicatory body,” the Appellate Body’s logic would suggest that, once a panel has given a legal interpretation adopted by the DSB, then the *Appellate Body* would need to follow that adopted *panel* interpretation “absent cogent reasons.” But the Appellate Body has *never* suggested it would accept that outcome. The Appellate Body report thus does not address or explain the discrepancy in using the phrase “an adjudicatory body” to imply something about a panel’s relationship to a prior Appellate Body interpretation.

72. For all these reasons, the Appellate Body’s reasoning on Article 3.2 does not support a “cogent reasons” approach to dispute settlement.

c. Third Error: The Appellate Body’s reliance on prior Appellate Body reports that do not support a “cogent reasons” approach

73. Third, the Appellate Body, in its discussion of cogent reasons, also cites to its reports in *Japan – Alcoholic Beverages II*, *US – Shrimp (Article 21.5 – Malaysia)*, and *US – Oil Country Tubular Goods Sunset Reviews*. However, these reports provide no basis for a “cogent reasons” approach.

i. Japan – Alcoholic Beverages II

74. The Appellate Body’s report in *Japan – Alcoholic Beverages II*, in particular, is contrary to such an approach. In fact, the Appellate Body provides no “cogent reasons” for departing from the reasoning in that prior report. This obvious failure to follow its own approach supposedly based on a systemic understanding of the DSU rather suggests the “cogent reasons” approach is directed towards an outcome of ensuring panels follow Appellate Body statements, regardless of the lack of basis in the DSU for that approach.

75. Rather than focus on the thrust of its decision in *Japan – Alcoholic Beverages II*, the Appellate Body draws attention to its statement in that report that adopted panel reports are “an important part of the GATT acquis.”³⁹ We have heard some Members quote this statement, without any explanation, as if its mere recitation provides the answer to the question of precedent. But what does it actually mean to say a report forms part of the GATT acquis? Very little in isolation. Given the way it has been misunderstood and misused, it is important to recall the context in which it was made, which makes clear it contradicts, rather than supports, the assertion for which it is often cited – and for which the Appellate Body appears to cite it in *US – Stainless Steel (Mexico) (AB)*.

76. The statement appears in a paragraph of the report in *Japan – Alcoholic Beverages II* where the Appellate Body is discussing the coming into force of the WTO Agreement and whether this has changed the character and legal status of adopted reports. The Appellate Body begins this paragraph by stating that Article XVI:1 of the WTO Agreement brought forward the experience and legal history under the GATT into the WTO.⁴⁰ The Appellate Body considered this to “affirm the importance to the Members of the WTO of the experience acquired by the CONTRACTING PARTIES to the GATT 1947 – and acknowledges the continuing relevance of that experience to the new trading system served by the WTO.”⁴¹

77. The Appellate Body then stated that “[a]dopted panel reports are an important part of the GATT acquis.”⁴² Read in context with the preceding statements, this reflects the view that the reports adopted under the GATT are an important part of the experience acquired by the Contracting Parties to the GATT. It says nothing about the precedential weight, if any, to be accorded to such reports.

78. Continuing on, however, the Appellate Body makes the statements quoted in *US – Stainless Steel (Mexico) (AB)*, and then immediately states:

³⁹ *US – Stainless Steel (Mexico) (AB)*, para. 158 (citing *Japan – Alcoholic Beverages II (AB)*, p. 14).

⁴⁰ *Japan – Alcoholic Beverages II (AB)*, p. 14.

⁴¹ *Japan – Alcoholic Beverages II (AB)*, p. 14.

⁴² *Japan – Alcoholic Beverages II (AB)*, p. 14.

However, *they are not binding*, except with respect to resolving the particular dispute between the parties to that dispute. In short, *their character and their legal status have not been changed* by the coming into force of the WTO Agreement.⁴³

79. It is unfortunate, and perhaps telling, that the Appellate Body in *US – Stainless Steel (Mexico) (AB)* omits this key text from its selective quotation of *Japan – Alcoholic Beverages II (AB)*. This full text makes abundantly clear that the Appellate Body in *Japan – Alcoholic Beverages II (AB)* considered that adopted reports, notwithstanding their status as part of the “GATT acquis,” are not binding on future panels. To suggest now that adopted reports are precedent precisely because they are part of the “GATT acquis” is to turn the original statement in *Japan – Alcoholic Beverages II (AB)* on its head.

ii. *US – Shrimp (Article 21.5 – Malaysia)*

80. The second report cited by the Appellate Body – *US – Shrimp (Article 21.5 – Malaysia)* – similarly does not support a “cogent reasons” approach. The Appellate Body cites to paragraph 109 of that report, which follows a quotation from the report in *Japan – Alcoholic Beverages II* concerning the status of adopted panel reports. Paragraph 109 of the report in *US – Shrimp (Article 21.5 – Malaysia)* provides in part:

This reasoning applies to adopted Appellate Body Reports as well. Thus, in taking into account the reasoning in an adopted Appellate Body Report – a Report, moreover, that was directly relevant to the Panel's disposition of the issues before it – the Panel did not err. The Panel was correct in using our findings as a tool *for its own reasoning*.⁴⁴ [italics added]

81. With regard to the first sentence of this paragraph, the United States would agree that the Appellate Body's reasoning in *Japan – Alcoholic Beverages II* concerning the status of adopted panel reports also “applies to adopted Appellate Body Reports as well.”⁴⁵ That is, a panel may rely on them, but they are not binding and should not be understood as supplanting the “exclusive authority” of the Ministerial Conference (or General Council) to provide authoritative interpretations of the covered agreements.

82. In the second and third sentences of the paragraph, the Appellate Body points out that the panel in that dispute did not err by “taking into account” the reasoning of an adopted Appellate Body report. Here too, we would agree for the reasons explained. Moreover, it is critical to note that the Appellate Body explained the panel was correct in relying on prior findings “as a tool *for*

⁴³ *Japan – Alcoholic Beverages II (AB)*, p. 14 (italics added).

⁴⁴ *US – Shrimp (Article 21.5 – Malaysia) (AB)*, para. 109.

⁴⁵ *US – Shrimp (Article 21.5 – Malaysia) (AB)*, para. 109.

its own reasoning.” In other words, the panel did not use those prior findings as a substitute for its own reasoning or in place of conducting its own objective assessment, and the Appellate Body did not suggest it would be appropriate or permissible under the DSU for the panel to do so. Thus, rather than support the Appellate Body’s statement concerning “cogent reasons”, this report too contradicts it.

iii. *US – Oil Country Tubular Goods Sunset Reviews*

83. The third report cited by the Appellate Body in *US – Stainless Steel (Mexico)* is no more helpful. In *US – Oil Country Tubular Goods Sunset Reviews*, the Appellate Body found that it was appropriate for the panel to rely on a conclusion made by the Appellate Body in a prior dispute in determining whether a particular policy bulletin is a measure.⁴⁶

84. In particular, the Appellate Body stated that “following the Appellate Body’s conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same.”⁴⁷ This assertion, which is not explained or supported in the text of the Appellate Body report, would seem to itself contradict earlier statements by the Appellate Body, including in *Japan – Alcoholic Beverages II (AB)*. There is a significant difference between stating that one would expect panels to reach similar conclusions where the issues are similar (i.e., conducting their own objective examination, they may reach a similar outcome), on the one hand, and saying that one would expect a panel to simply follow a prior decision without conducting an objective examination of its own, on the other. There is no support in the DSU for the latter approach.

85. This statement by the Appellate Body is also problematic in its use of the phrase “*especially* where the issues are the same.” The report thus implies that following a prior conclusion “is not only appropriate” but is also “what would be expected” from a panel even “where the issues are [*not*] the same.” There is no explanation given for this implication of the statement in the report.

86. Further, the Appellate Body report’s use of the passive voice – “is what *would be expected* from panels” – avoids expressing *who* expects this from a panel. It is understood that the Appellate Body expects this as the author of the passage. But this Appellate Body expectation is irrelevant. What matters in the dispute settlement system is the expectations of *WTO Members* as specifically expressed through their agreement in the DSU. The Appellate Body cites to no language in the DSU that suggests that WTO Members expect panels to disregard the text and structure of the DSU, as elaborated earlier in this statement.

⁴⁶ *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 188.

⁴⁷ *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 188.

87. Thus, the United States considers that none of the reports cited provide any legal basis for the Appellate Body to depart from the text of the WTO Agreement and the DSU in adopting a “cogent reasons” approach.

d. Fourth Error: The Appellate Body’s misunderstanding (or misstatement) on why parties cite to prior reports

88. Fourth, in its discussion of cogent reasons, the Appellate Body also misunderstands or misrepresents why parties often cite to adopted panel and Appellate Body reports in dispute settlement proceedings.⁴⁸ There is nothing surprising about the fact that parties in WTO disputes cite to reports to the extent they may consider them persuasive. As mentioned, we would expect this, and expect panels to do the same. But there is no support for the proposition that parties cite to reports because they consider them somehow binding on or precedential for subsequent panels and the Appellate Body, which is what the Appellate Body appears to imply. Here again, the Appellate Body ignores that there is a significant difference between citing a report for its persuasive value, on the one hand, and arguing that the report is binding or precedential for future panels, on the other.

89. The Appellate Body also asserts that “when enacting or modifying laws and national regulations pertaining to international trade matters, WTO Members take into account the legal interpretation of the covered agreements developed in adopted panel and Appellate Body reports.”⁴⁹ The report cites no evidence for this proposition. To the extent the Appellate Body statement intended to refer to compliance actions taken by Members, those Members would be looking to the recommendations of the DSB in a particular dispute. More generally, we would expect Members to look first to the text of the covered agreements in enacting or modifying their national measures. And Members are entitled to act according to the text of those agreements embodying their commitments, as understood through customary rules of interpretation, rather than according to an interpretation rendered in a dispute settlement report. This is particularly so given the probability that some interpretations may be in error, and panel or Appellate Body findings may not add to or diminish the rights or obligations of Members under the covered agreements.

e. Fifth Error: The Appellate Body’s inappropriate and incomplete analogies to other international adjudicative fora

90. Fifth, to support its statement that Article 3.2 of the DSU implies that “absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case”, the Appellate Body report in *US – Stainless Steel (Mexico)* includes a lengthy footnote that attempts to draw significance from how consistency of disputes may be regarded in

⁴⁸ *US – Stainless Steel (Mexico) (AB)*, para. 158.

⁴⁹ *US – Stainless Steel (Mexico) (AB)*, para. 160.

other international fora for dispute settlement. This attempt is incomplete, at best, and misguided.

91. In footnote 313 of its report, the Appellate Body cited tribunal decisions from the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Centre for Settlement of Investment Disputes (ICSID) Arbitration Tribunal, apparently as support for why precedent should be adopted in WTO dispute settlement. These examples, however, are of no relevance.

92. First, the Appellate Body provides no explanation as to whether or how the relevant rules and structures of these fora are relevant for understanding the WTO dispute settlement system. The United States notes, for example, that the Tribunal for the former Yugoslavia is, just that, a tribunal, and therefore structured differently from the DSB administering the DSU and making recommendations based on panel and Appellate Body reports. Thus, the grounds for treating prior tribunal interpretations as precedent that may apply to an entity like the Tribunal are not applicable to the DSB.⁵⁰

93. In stating that the Tribunal should follow its prior legal interpretations absent cogent reasons for departing from that interpretation, the Tribunal reasoned that the Security Council envisaged a tribunal comprising three trial chambers and one appeals chamber.⁵¹ That is, while the Appeals Chamber has a particular function, the different “Chambers” are all part of one “Tribunal”, which should resolve a legal question in one way. As explained, this structure does not exist in the DSU; there is no one tribunal with trial and appellate chambers.

94. The Appellate Body also cited to a decision by the ICSID Arbitration Tribunal, in which the Tribunal stated that “[i]t believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases.”⁵² But the Appellate Body report provides no explanation for the basis on which the ICSID Tribunal considered “it has a duty” to follow prior interpretations. The Tribunal also went on to state that “[i]t also believes that, *subject to the specifics of a given treaty* and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law.” Whatever the reasons for that belief, this statement reveals that this Tribunal would consider that the “specifics of a given treaty” should prevail for its interpretive approach and outcome. As we have seen, the

⁵⁰ The ICTY is the first international war crimes tribunal since Nuremberg. It was established by the UN Security Council as a result of a 1993 resolution finding the existence of widespread humanitarian law violations in the former Yugoslavia and directing the creation of the Tribunal as a means to contribute to the restoration of peace and stability in the region.

⁵¹ See *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, at para. 113 (24 March 2000).

⁵² *US – Stainless Steel (Mexico) (AB)*, para. 160 n. 313 (citing the Decision of 21 March 2007 of the ICSID (International Centre for Settlement of Investment Disputes) Arbitration Tribunal, Case No. ARB/05/07, *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID IIC 280 (2007), p. 20, para. 67).

DSU does not support an approach in which prior Appellate Body interpretations are treated as binding, or precedent.

95. To the extent the Appellate Body intended to suggest “precedent” was reflective of customary international law, the United States would note that the statement of two tribunals would not establish the existence of such a rule.⁵³ Moreover, under international law, treaty text will prevail over customary law as between parties to the treaty. Customary law cannot override clear treaty text as to rights and obligations between parties to the treaty. The view that a “cogent reasons” approach is justified based on customary international law would conflict with the text of Articles 3.2, 3.9, 11 and other relevant provisions of the DSU and WTO Agreement. The approach of the DSU – that prior reports are not binding or precedent – would therefore prevail.

f. Sixth Error: The Appellate Body’s incorrect assumptions concerning the existence of a hierarchical structure that does not reflect the limited task assigned to the Appellate Body in the DSU

96. Finally, the Appellate Body’s discussion of “cogent reasons” is based on an asserted “hierarchical structure contemplated in the DSU” that fails to accurately reflect the important, but limited, role assigned to the Appellate Body, and is divorced from the text of the DSU.

97. At paragraph 161 of the report in *US – Stainless Steel (Mexico)*, the Appellate Body suggests that it was created by Members and “vested with authority” pursuant to Articles 17.6 and 17.13 of the DSU so as to promote security and predictability in the dispute settlement system.⁵⁴ And so, according to the Appellate Body, a panel’s “failure to follow previously adopted Appellate Body reports addressing the same issues undermines the development of a coherent and predictable body of jurisprudence clarifying Members’ rights and obligations under the covered agreements as contemplated by the DSU.”⁵⁵

98. Articles 17.6 and 17.13 of the DSU do not “vest” the Appellate Body with broad authority to develop “a coherent and predictable body of jurisprudence.” The latter phrase does not appear in those provisions – nor is there any hint of them.

99. In fact, those articles are *limitations* on the parameters of appellate review and on the permissible actions of the Appellate Body. For example, Article 17.6 provides that “[a]n appeal shall be *limited* to issues of law covered in the panel report and legal interpretations.”⁵⁶ And

⁵³ A rule of customary law is understood to comprise widespread and consistent State practice and “*opinio juris*” (or “a belief in legal obligation”). See, e.g., North Sea Continental Shelf cases, ICJ Reps, 1969, p. 3 at 44.

⁵⁴ *US – Stainless Steel (Mexico) (AB)*, para. 161.

⁵⁵ *US – Stainless Steel (Mexico) (AB)*, para. 161.

⁵⁶ DSU Art. 17.6 (emphasis added).

Article 17.13 limits the Appellate Body’s functions by saying it “may uphold, modify or reverse the legal findings and conclusions of the panel.” Of course, this list of authorized actions does not include issuing authoritative interpretations that must be followed by subsequent panels.

100. Given these limitations, it is not consistent with these texts to read them to provide the Appellate Body the authority to render an interpretation in one dispute that would relieve a panel of the responsibility it has to the DSB to conduct an objective assessment of the applicability of a covered agreement, using customary rules of interpretation, in a separate dispute. Rather, as discussed, authoritative interpretations of the covered agreements are reserved exclusively to WTO Members acting in the Ministerial Conference (or General Council).

101. The notion of a “hierarchical structure” in the dispute settlement system also fails to acknowledge the role of the DSB. It is the DSB that establishes a panel and charges it with making those findings necessary for the DSB to provide a recommendation to bring a WTO-inconsistent measure into conformity with the WTO agreements.⁵⁷ It is the DSB that panels and the Appellate Body assist by carrying out their functions as set out in the DSU.

102. As noted above, panel findings adopted by the DSB are of equal legal status as findings by the Appellate Body that are adopted by the DSB. The Appellate Body has never suggested that it would accept that it is bound to follow adopted panel findings as a consequence of the “hierarchical structure” of the DSU – likely because this would restrict its influence in the dispute settlement system. But the United States views the notion of a hierarchical structure in the DSU to be misguided, in any event.

103. DSB recommendations resulting from panel or Appellate Body findings, or arbitration awards under Article 25, are of equal value and directed at resolving a dispute between Members. Should a Member wish to obtain an authoritative interpretation that will serve as precedent in a future dispute, it must have recourse to the different process set out in Article IX:2 of the WTO Agreement for the hierarchically superior body, the Ministerial Conference.

3. Members’ reactions to the *US – Stainless Steel (Mexico)* report

104. When the reports in *US – Stainless Steel (Mexico)* were considered by the DSB, the United States expressed that its “systemic concern was of . . . enormous institutional significance for the dispute settlement system.” The United States elaborated its concerns that the approach

⁵⁷ DSU Art. 7.1 (“Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel: To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document . . . and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s).”).

of the Appellate Body would transform the WTO dispute settlement system, contrary to the structure set out in the DSU and WTO Agreement.⁵⁸

105. Some Members, while agreeing with the Appellate Body's substantive findings in that dispute, expressed concern that the Appellate Body's statements regarding "cogent reasons" not be understood as "crossing the line" of suggesting prior reports were binding on panels. For example, the minutes of the DSB meeting reflect the following statement by Chile:

In keeping with Chile's line of thought, the Appellate Body had confirmed that its reports created legitimate expectations among Members and should, therefore, be taken into consideration, although they were not – he reiterated not – binding. Chile thanked the Appellate Body for its confirmation in this regard and for refraining from crossing the "obligation" line... By crossing the line in stating that previous reports would provide a mandatory framework in subsequent disputes, according to the wish of some Members, the Panel would have not only prejudged future disputes and even tied the hands of future panels, but it would have also created rights and obligations when the Membership alone could do so.

That being said, certain phrases in the Report gave Chile some cause for concern. According to paragraph 160, "[e]nsuring "security and predictability" in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implied that, absent cogent reasons, an adjudicatory body would resolve the same legal question in the same way as had been done in previous cases." Paragraph 162 likewise stated as follows: "We are deeply concerned about the Panel's decision to depart from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues." Such phrases could lead to unfortunate conclusions regarding the nature of the dispute settlement system, and Chile hoped that this would not become a trend likely to constrain panels in future disputes, and above all, that this would not alter the nature of the rights and obligations negotiated by the Membership.⁵⁹

106. In a similar vein, Colombia welcomed the Appellate Body's substantive findings but expressed its disagreement with the "cogent reasons" approach on systemic grounds:

⁵⁸ Minutes of the Meeting of the DSB on May 20, 2008 (WT/DSB/M/250), paras. 50-55.

⁵⁹ Minutes of the Meeting of the DSB on May 20, 2008 (WT/DSB/M/250), paras. 67-68 (statement of Argentina).

Colombia wished to express its views on the systemic issue as to whether ... panels were required to follow the Appellate Body's findings. In this connection, Colombia agreed with the reasoning of the Panel that there was no provision in the DSU that required WTO panels to follow the findings of previous panels or of the Appellate Body on the same issues brought before them. In fact, a panel or Appellate Body decision bound only the parties to the relevant dispute[, and] the Ministerial Conference and the General Council alone were empowered to adopt authoritative interpretations.⁶⁰

107. The complaining party in the *Stainless Steel* dispute, while minimizing the concerns being raised, did not endorse the “cogent reasons” approach (that it had not even argued for), but merely stated that a panel “must pay attention to” prior Appellate Body interpretations.⁶¹

108. Unfortunately, the Member that held an expectation at the time of the adoption of the *Stainless Steel* report that the Appellate Body would not “cross the line” of suggesting an adopted Appellate Body report is binding misunderstood the meaning of that report. Although the Appellate Body avoided using the word “binding,” the meaning of its *dicta* and phrases such as “the panel’s *failure to follow*” was clear – Appellate Body reports should be treated as precedent. But neither wishing Appellate Body reports to have a different status, nor repeating the Appellate Body’s *dicta*, makes the analysis and statement of the Appellate Body any less erroneous.

109. It is simply inconsistent with the text and structure of the DSU and the WTO Agreement for a panel to treat prior interpretations in Appellate Body reports as binding, or precedent.

V. Certain Panels Have Followed a “Cogent Reasons” Approach Without Considering the Basis for Such an Approach

110. Before concluding, the United States would note with concern that, in several recent panel reports, certain panels have simply applied the Appellate Body’s *dicta* on “cogent reasons” as the Appellate Body intended. In those reports, the panels have failed to engage with the legal text of the DSU and WTO Agreement the United States has discussed in this statement.⁶² This

⁶⁰ Minutes of the Meeting of the DSB on May 20, 2008 (WT/DSB/M/250), para. 72 (statement of Colombia).

⁶¹ Minutes of the Meeting of the DSB on May 20, 2008 (WT/DSB/M/250), para. 73 (statement of Mexico) (“With regard to certain comments made by some delegations at the present meeting, Mexico pointed out that the decision by the Appellate Body should not be quoted out of its context. Panels must pay attention to the Appellate Body’s findings particularly when dealing with the same legal questions.”).

⁶² See, e.g., Panel Report, *European Union and its Member States – Certain Measures Relating to the Energy Sector*, WT/DS476/R and Add. 1, circulated 10 August 2018, para. 7.1350 (“We find no cogent reason to disagree with the legal interpretation of the panel in *India – Solar Cells*.”); Panel Report, *United States – Countervailing Measures on Supercalendered Paper from Canada*, WT/DS505/R and Add. 1, circulated 5 July 2018, para. 7.306

raises grave concerns for the dispute settlement system as it suggests that serious, systemic errors are increasingly being made without any consideration of the actual text that WTO Members have agreed to. If these errors are being made by panels at the urging of a party to the dispute, then certain WTO Members bear responsibility for promoting this breaking of WTO rules. These panel errors also reinforce the danger to the WTO and the dispute settlement system from the issuance of advisory opinions by the Appellate Body – an issue we have discussed at length⁶³ – as this “cogent reasons” approach contradicts the clear text of the DSU and the WTO Agreement.

VI. Conclusion: The Appellate Body’s “Cogent Reasons” Approach Usurps Authority Expressly Reserved to Members

111. In conclusion, the United States recalls the role of WTO Members, on the one hand, and WTO adjudicators, on the other. The text of the WTO Agreement and the DSU make clear that only Members, acting in the Ministerial Conference or the General Council – and not the DSB – have the right to issue authoritative interpretations.

112. The role of WTO adjudicators is different. The Appellate Body and panels are only to issue those findings necessary to resolve a dispute, and specifically, findings that will assist the DSB in making a recommendation to bring a measure into conformity with a WTO agreement. Those findings are to be based on the text of the covered agreements, not the text of prior appellate reports

113. While DSB recommendations resulting from reports “cannot add to or diminish the rights and obligations provided in the covered agreements,”⁶⁴ the Appellate Body’s approach would set the system on a path of departing from the agreed rights and obligations of Members under the WTO Agreement. Where the Appellate Body has not made a correct interpretation, panels would nonetheless be required to follow it. Those errors would accumulate over time, and where

(“we do not see any ‘cogent reasons’ to depart from the Appellate Body’s approach to ‘ongoing conduct’ expressed in *US – Continued Zeroing*.”); Panel Report, *European Union – Anti-Dumping Measures on Biodiesel from Indonesia*, WT/DS480/R and Add. 1, adopted 28 February 2018, para. 7.26 (“we see no basis to deviate from the findings by the panel in *EU – Biodiesel (Argentina)* in respect of Indonesia’s claim concerning Article 2.2.1.1 of the Anti-Dumping Agreement. Nor has the European Union identified any cogent reasons for us to do so.”); Panel Report, *Canada – Anti-Dumping Measures on Imports of Certain Carbon Steel Welded Pipe from The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu*, WT/DS482/R and WT/DS482/R/Add.1, adopted 25 January 2017, para. 7.37 (“For the reasons explained above, we find that Canada has failed to establish that there are cogent reasons for us to depart from those decisions.”); and Panel Report, *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/R and Add. 1, adopted 26 October 2016, as modified by Appellate Body Report WT/DS473/AB/R, para. 7.276 (“In the absence of cogent reasons for departing from the approach of the Appellate Body in prior cases, we adopt the same approach.”).

⁶³ Statement by the United States Concerning the Issuance of Advisory Opinions on Issues Not Necessary to Resolve a Dispute, Meeting of the DSB on October 29, 2018, *available at*: https://geneva.usmission.gov/wp-content/uploads/sites/290/Oct29.DSB_.Stmt_.as-delivered.fin_rev_public.pdf.

⁶⁴ DSU Art. 3.2.

the Appellate Body in a subsequent appeal builds its interpretation on a flawed interpretation, the interpretations and resulting findings would become more and more removed from what Members agreed. This is exactly the opposite of the system that Members agreed to.

114. The United States has long been concerned with actions by the Appellate Body that seek to usurp the authority expressly reserved to Members. In claiming the authority to issue authoritative interpretations through its “cogent reasons” approach, the Appellate Body upsets the careful balance of rights and obligations that exist within the WTO agreements. This is yet another example of a failure by the Appellate Body to follow the rules agreed by Members, undermining support for a rules-based trading system.