UNITED STATES – ANTI-DUMPING MEASURES APPLYING DIFFERENTIAL PRICING METHODOLOGY TO SOFTWOOD LUMBER FROM CANADA

(DS534)

OPENING STATEMENT OF THE UNITED STATES OF AMERICA AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

December 4, 2018

TABLE OF REPORTS

Short Form	Full Citation
Japan – Alcoholic Beverages II (AB)	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996
US – Oil Country Tubular Goods Sunset Reviews (AB)	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004
US – Shrimp (Article 21.5 – Malaysia) (AB)	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, adopted 21 November 2001
US – Stainless Steel (Mexico) (AB)	Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico,* WT/DS344/AB/R, adopted 20 May 2008
US – Washing Machines (AB)	Appellate Body Report, *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, WT/DS464/AB/R, adopted 26 September 2016

Mr. Chairperson, members of the Panel:

1. On behalf of the U.S. delegation, I would like to thank you again for agreeing to serve on this Panel, and for meeting once more with the parties to explore together the important legal questions at issue in this dispute. The United States appreciates the significant time and effort that necessarily is involved in the Panel's work.

2. Canada, on the other hand, seeks to diminish the work of the Panel. Canada begins and ends its second written submission with the same flawed argument that it presented at the opening of its first written submission, and at the opening of its oral statement at the first panel meeting. Canada maintains that this dispute is "simple," and all the Panel must do – all the Panel is permitted to do – is just follow the findings in previous panel or Appellate Body reports.[1] As we will discuss further today, Canada's proposed approach is untenable and finds no support whatsoever in the DSU.[2]

3. The United States has presented an interpretive analysis of the relevant provisions of the AD Agreement[3] that is in accordance with customary rules of interpretation. Canada has not. In its second written submission, Canada asserts that it has provided the Panel an interpretive analysis, including "a detailed explanation of the ordinary meaning of the terms 'pattern' and 'among' in Article 2.4.2" as well as contextual arguments.[4] But the Panel can look at the footnotes in Canada's second written submission, go to the passages of Canada's earlier written submissions and statement to which those footnotes refer, and see for yourself what Canada has done (and not done).

4. Canada points, in particular, to paragraphs 38-39 and 51-53 of its first written submission, and paragraphs 25 and 26 of its opening statement at the first panel meeting.[5] At those paragraphs, Canada simply quotes and summarizes prior panel and Appellate Body findings. There is no "detailed explanation"[6] or interpretive analysis. Canada has not even presented arguments in support of concluding that those prior panel and Appellate Body findings are correct. Such a summary of prior findings – and mere assertions that they are correct – does not constitute an interpretive analysis pursuant to customary rules of interpretation, and is of no assistance to the Panel.

5. Canada continued to take the same approach in its second written submission, eschewing interpretive analysis in favor of citations to prior reports and unsupported assertions that those

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[1] *See* First Written Submission of Canada (June 22, 2018) ("Canada's First Written Submission"), para. 3; Second Written Submission of Canada (October 17, 2018) ("Canada's Second Written Submission"), paras. 1 and 23-25; Oral Statement of Canada at the First Substantive Meeting of the Panel (September 12, 2018) ("Canada's First Opening Statement"), paras. 1-2.

[2] *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").

[3] *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement").

[4] Canada's Second Written Submission, paras. 6-7.

[5] *See* Canada's Second Written Submission, footnotes 5, 6, 7, 8, and 9.

[6] Canada's Second Written Submission, para. 6.

prior reports are correct. For example, at paragraph 13 of Canada's second written submission, Canada summarizes prior findings concerning the meaning of the term "pattern" without responding to the interpretive arguments presented in the U.S. first written submission, including arguments that the prior findings on which Canada relies are incorrect.[7]

6. At paragraph 19 of Canada's second written submission, Canada asserts that the Appellate Body's approach in *US – Washing Machines* "is completely different from zeroing." But Canada does not explain how the Appellate Body's approach is different from zeroing, and Canada does not respond in any detail to the U.S. demonstration that the Appellate Body's approach is, in effect, the same as zeroing.[8]

7. At paragraph 20 of Canada's second written submission, Canada asserts that the Appellate Body's approach in *US – Washing Machines* "complies with the fair comparison requirement in Article 2.4. Zeroing does not." Again, Canada does not even attempt to support this assertion with any explanation. The United States has demonstrated that the Appellate Body's own approach would be inconsistent with the "fair comparison" requirement of Article 2.4 under the Appellate Body's own flawed reasoning concerning the meaning of Article 2.4.[9] Canada simply ignores the U.S. argument.

8. Where Canada does directly reference a U.S. argument, Canada fails to respond to the argument that the United States has actually made. For example, Canada asserts that the United States "is simply incorrect" to argue that "the Appellate Body's approach 'simultaneously reduces and expands' the universe of export transactions."[10] But the U.S. argument is not about the Appellate Body's "approach." The U.S. argument – still unrebutted – concerns the Appellate Body's interpretation of the term "individual export transactions." As explained in the U.S. first written submission, as well as in response to question 18 from the Panel,[11] the purported textual basis for the prohibition on zeroing described by the Appellate Body majority in *US – Washing Machines – i.e.*, the requirement to expand the set of transactions included in the analysis and not disregard any so-called "pattern transactions" – is the presence of the clause "individual export transactions" in the second sentence of Article 2.4.2.[12] Elsewhere in the Appellate Body report, however, the Appellate Body considered that the word "individual" also narrows the scope of application of the alternative, average-to-transaction comparison methodology, limiting it to so-called "pattern transactions."[13] The United States has explained why it is untenable – as a matter

[7] *See* First Written Submission of the United States of America (Confidential) (July 24, 2018) ("U.S. First Written Submission"), paras. 41-52, 69-74, 80-88.

[8] *See* U.S. First Written Submission, paras. 195-199; Responses of the United States to the Panel's First Set of Questions to the Parties (September 27, 2018) ("U.S. Responses to the First Set of Panel Questions"), paras. 57-61.

[9] *See* U.S. First Written Submission, paras. 195-199; U.S. Responses to the First Set of Panel Questions, paras. 57-61.

[10] Canada's Second Written Submission, para. 16.

[11] *See* U.S. First Written Submission, paras. 97-100; U.S. Responses to the First Set of Panel Questions, paras. 66-69.

[12] *See US – Washing Machines (AB)*, para. 5.151 (opinion of two Appellate Body members).

[13] *See US – Washing Machines (AB)*, para. 5.52.

of textual interpretation – that the same instance of the term "individual" could be considered to have such divergent meaning. Canada as not even said what it believes the term "individual" means.

9. Instead of mounting affirmative arguments in support of its claims, based on interpretive analyses that accord with customary rules of interpretation of public international law, Canada insists that the Panel "must" find in Canada's favor because the United States purportedly has "failed to offer any cogent reason for this Panel to depart from the findings of the Appellate Body in *US – Washing Machines*."[14] In the remainder of this statement, the United States will further elaborate why Canada's proposed approach to this dispute is contrary to – indeed, it is corrosive to – the DSU. This is an issue of fundamental importance to the WTO dispute settlement system. A failure by WTO adjudicators to follow the agreed rules undermines Members' support for the WTO dispute settlement system.

10. 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, the DSU and the WTO Agreement[15] reserve 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 provides in Article 3.9 that the dispute settlement system operates without prejudice to this interpretative authority. The DSU states that it exists to resolve disputes arising under the covered agreements[16] – not disputes concerning panel or Appellate Body interpretations of those agreements. The DSU also provides that a panel or the Appellate Body is to apply customary rules of interpretation of public international law in assisting the DSB to determine whether a measure is inconsistent with a Member's commitments under the covered agreements.[17] Those customary rules of interpretation likewise do not assign a precedential value to interpretations given as part of dispute settlement for purposes of discerning the meaning of agreement text.

11. In this, the DSU presented no change from the dispute settlement system under the GATT,[18] a point which the Appellate Body understood clearly in its early years. The United States is, of course, aware that 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, as we shall explain in detail. But what is most ironic is that this Appellate Body statement, which asserts a value like "precedent" for prior Appellate Body interpretations, would be rejected as precedent in a common law system, like that of the United States, in which precedent is an inherent feature of adjudication.

[14] Canada's Second Written Submission, para. 3.

[15] *Agreement Establishing the World Trade Organization* ("WTO Agreement").

[16] DSU, Art. 1.

[17] DSU, Arts. 3.2, 7.1.

[18] *General Agreement on Tariffs and Trade* ("GATT").

12. The reason that the "cogent reasons" assertion would not itself be treated as precedent is that the Appellate Body made this assertion in a report considering a claim on which it did not make findings. For that reason, the Appellate Body's statement was a mere advisory opinion (or *obiter dicta*) and would not, under a system of precedent, be entitled to any deference in a subsequent proceeding.

13. All the more so in the WTO, in which 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".[19] 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.[20]

14. 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 a panel is that persuasive interpretations are less likely to arise from the dispute settlement system.

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

16. We instead expect and request that each panel fulfill its role as set out in the DSU. By applying customary rules of interpretation to the text of the WTO agreements, a panel contributes its efforts to explaining an interpretation that may, through the persuasive reasons given, earn respect from WTO Members. As part of that endeavor, we also consider that a panel should take into account any previous reports – panel or Appellate Body – in order to engage with those previous efforts, as this will contribute to the panel's own efforts to provide the best report possible for the DSB. Whether or not that would result in this Panel coming to interpretive conclusions that differ from the findings in prior reports, it is the task that WTO Members, in the DSU, have set out for any panel,[21] and it is the task that the DSB has set out for this Panel in particular.[22]

17. Therefore, given the critical systemic interests presented, the United States requests that the Panel engage in the interpretive exercise called for by the DSU and reject the misguided

[19] WTO Agreement, Art. IX:2.

[20] DSU, Arts. 3.2, 19.2.

[21] *See* DSU, Art. 7.1.

[22] *See United States – Anti-Dumping Measures Applying Differential Pricing Methodology to Softwood Lumber from Canada*, Constitution of the Panel Established at the Request of Canada, WT/DS534/3 (May 23, 2018).

"cogent reasons" approach of the Appellate Body, on which Canada proposes the Panel rely exclusively in this dispute. Such an approach finds no support in, and in fact contradicts the DSU and the WTO Agreement, as we shall explain.

I. CANADA'S RELIANCE ON A "COGENT REASONS" APPROACH IS INCONSISTENT WITH THE DSU AND WTO AGREEMENT

18. As the United States has demonstrated, Canada, throughout this panel proceeding, has not engaged with the text of the AD Agreement, but instead has referred to and relied on various findings in prior panel and Appellate Body reports, without even attempting to establish that those findings are correct or that they should be viewed by the Panel as persuasive. Canada simply contends that it should prevail in this dispute because "there are no cogent reasons for this Panel to depart from the Appellate Body findings with respect to the DPM."[23]

19. Canada's approach is inconsistent with the task assigned to panels under the DSU. The DSU does not require, or even permit, a panel to apply as law or controlling "precedent" the reasoning set out in prior panel or Appellate Body reports. Rather, the DSU is explicit that WTO adjudicators are to apply the text of the covered agreements. Moreover, none of the reports cited by Canada support Canada's proposed analytical approach, as we will discuss later in this statement.

A. The DSU Does Not Require, or Even Permit, the Panel to Apply as Law or Controlling "Precedent" a Prior Appellate Body Interpretation

20. The DSU provides that a panel or the Appellate Body is to apply customary rules of interpretation of public international law in assisting the DSB to determine whether a measure is inconsistent with a Member's commitments under the covered agreements.[24] Those rules of interpretation do not assign a precedential value to interpretations given as part of dispute settlement for purposes of discerning the meaning of agreement text. A panel is not required – nor is it permitted – to ignore the task it has been given under the DSU and instead simply treat prior panel or Appellate Body reports as binding "precedent".

1. The Function of Panels and 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 of the DSU, 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 that the DSB establish a panel to examine a matter. Through the

[23] Canada's Second Written Submission, para. 25.

[24] *See* DSU, Art. 3.2.

standard terms of reference for panels in Article 7 of the DSU, the DSB charges the panel with two tasks: (1) to "examine … the matter referred to the DSB" in a panel request, and (2) "to make such findings as will assist the DSB in making the recommendations" provided for in the DSU.[25] 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 findings as will assist the DSB in making the recommendations" provided for in the covered agreements.[26]

23. Members reinforced in Article 11 of the DSU that the "function of panels is to assist the DSB in discharging its responsibilities under [the DSU]." In exercising this function, 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 requires that a panel properly weigh the evidence and make factual findings based on the totality of the evidence and within its bounds as trier of fact in the dispute. An objective assessment also requires that a panel 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.[27]

24. Article 3.2 of the DSU further informs the function of a panel that has been 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 under those 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," which are reflected in Articles 31 and 32 of the Vienna Convention.[28]

25. Accordingly, 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, although the role of the Appellate Body is even more limited than the role of panels. Under Article 17.6 of the DSU, 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 of the DSU, 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 Article 11 of the DSU is "to assist the

[25] DSU, Art. 7.1.

[26] DSU, Art. 7.1.

[27] 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 . . . .").

[28] *Vienna Convention on the Law of Treaties* ("Vienna Convention").

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.

2. The DSU Does Not Establish a System of Precedent

26. As is clear from the foregoing, there is no provision in the DSU or the covered agreements that establishes a system of "case-law" or "precedent," or that otherwise requires a panel to apply the provisions of the covered agreements consistently with the adopted findings of previous panels or the Appellate Body. Nor is there any provision of the DSU – or any covered agreement – that refers to "cogent reasons" or suggests that a panel must justify legal findings that are not consistent with the reasoning set out in prior reports. Indeed, were a panel to decide to apply the reasoning in prior Appellate Body reports alone, and decline to fulfill its function under Articles 7.1, 11, and 3.2 of the DSU – to make findings on the applicability of and conformity with existing provisions of the covered agreements, as understood objectively through the application of customary rules of interpretation – 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.

27. To say that an Appellate Body interpretation in one dispute is controlling for later disputes would effectively convert that interpretation into an authoritative interpretation of the covered agreement. Such an approach would directly contradict the agreed text of the WTO Agreement, which provides in Article IX:2 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." Thus, WTO Members reserved the authority to adopt interpretations to themselves, acting in the Ministerial Conference (or General Council), not the DSB. WTO Members further set out a different process for adopting such an interpretation. The Members decided that they would act on the basis of a recommendation from the relevant Council, ensuring discussion and deliberation by Members. Finally, WTO Members set out a special decision-making rule for adopting an authoritative interpretation, not the negative consensus adoption that applies to reports under the DSU.

28. 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 debate over the promulgation of "amicus procedures" by the Appellate Body, numerous WTO Members spoke in the General Council on this point. They correctly noted that it was not for panels or the Appellate Body to fill gaps in the DSU (or other covered agreements). It was rather for Members to amend the agreements or exercise their exclusive authority to adopt an authoritative interpretation under Article IX:2 to permit amicus submissions, if the Members considered this appropriate. Members making statements included Uruguay, Egypt (on behalf of the Informal Group of Developing Countries), Hong Kong, India, Brazil, Mexico, Singapore (on behalf of ASEAN), Colombia (on behalf of ANDEAN Members), Zimbabwe, Pakistan, Norway, Korea, Australia, Tanzania, and others.[29]

[29] *See* Minutes of Meeting of the General Council on 22 November 2000, WT/GC/M/60 (Uruguay, paras. 4-9), (Egypt, para. 11), (Hong Kong, para. 28), (India, paras. 37-40), (Brazil, paras. 46-47), (Mexico, paras. 50-52),

29. If this were not enough, the DSU also expressly confirms that panel and Appellate Body reports do not set out authoritative interpretations. Article 3.9 of the DSU provides 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, as such an authoritative interpretation 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 cannot do so either.

30. In its second written submission, Canada discusses Article IX:2, and asserts that it "has never claimed that adopted reports constitute 'authoritative interpretations' of the covered agreements."[30] Yet, in the very same paragraph, Canada also expresses the view that, "[i]f a multilateral interpretation under Article IX:2 conflicts with a prior Appellate Body interpretation, cogent reasons may exist [– **may** exist –] for a panel to refuse to follow the Appellate Body."[31] The disturbing implication of Canada's statement is that a panel might find that such "cogent reasons" do not exist and therefore an Appellate Body interpretation prevails over a "multilateral interpretation under Article IX:2" adopted by WTO Members. Canada's approach would elevate the Appellate Body over the sovereign Members of the WTO, a result that directly contradicts the express terms of the WTO Agreement, and one that would undermine Members' confidence in the WTO.

31. This does not mean that the United States considers a prior panel or Appellate Body interpretation to be without any value. 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 likely would add to the persuasiveness of the panel's own analysis, whether or not the panel agrees with 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.

3. The "Cogent Reasons" Approach to Prior Appellate Body Interpretations Is Inconsistent with DSU Requirements

32. As demonstrated, treating a prior Appellate Body interpretation as binding, or precedent, would be contrary to the structure of the DSU and the WTO Agreement, and contrary to the function of a panel assisting the DSB. Unfortunately, Canada's submissions, statements and responses to panel questions contain virtually no engagement with the text of the AD Agreement. Rather than understand and apply the text of the AD Agreement, Canada requests that the Panel

(Colombia, paras. 54-55), (Zimbabwe, para. 58), (Singapore, para. 61), Pakistan (para. 66), Norway (paras. 68-69), Korea (para. 85), Australia (para. 104), Tanzania (para. 107).

[30] Canada's Second Written Submission, para. 25.

[31] Canada's Second Written Submission, para. 25 (underlining added).

apply the text of the prior Appellate Body report in *US – Washing Machines*. The United States requests that the Panel undertake an interpretation of the second sentence of Article 2.4.2 of the AD Agreement using customary rules of interpretation, and take into account the arguments of the parties as well as prior interpretations of that provision.

B. The Appellate Body Reports Canada Cites Do Not Support Canada's Proposed "Cogent Reasons" Approach

33. Canada contends that "[t]he Appellate Body has repeatedly confirmed that panels are expected to follow Appellate Body reports where the issues are the same, absent cogent reasons to do otherwise, to ensure the security and predictability of the multilateral trading system."[32] In support of this proposition, Canada refers to the Appellate Body reports in *US – Stainless Steel (Mexico)* and *US – Oil Country Tubular Goods Sunset Reviews*.[33]

34. As we will discuss, these reports do not provide a basis for a panel to disregard pertinent provisions of – and a panel's function under – the DSU. We will explain that 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 (Mexico)*, without explaining the basis for that changed approach. The statements in the *US – Stainless Steel (Mexico)* report, in addition to constituting *obiter dicta*, are fundamentally flawed and provide no support for the approach Canada asks the Panel to take. 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*.

1. The Appellate Body Report in *Japan – Alcoholic Beverages II* Explicitly Recognized that Adopted Panel and Appellate Body Reports Do Not Create Binding Precedent

35. In *Japan – Alcoholic Beverages II*, the Appellate Body explicitly found that adoption of reports under the WTO does not create "precedent" or assign a special status for interpretations reached in reports, as that status has been reserved for authoritative interpretations reached by the Ministerial Conference. In that dispute, the Appellate Body was confronted with a question concerning the status of panel reports adopted by the GATT Contracting Parties and the WTO DSB.[34] Looking first to the GATT 1947, 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 1947.[35] The Appellate Body then added the following: "Nor do we believe that this is contemplated under

[32] Canada's Second Written Submission, para. 23.

[33] *See* Canada's Second Written Submission, footnotes 33 and 35.

[34] *Japan – Alcoholic Beverages II (AB)*, p. 12.

[35] *Japan – Alcoholic Beverages II (AB)*, p. 13.

GATT 1994."[36] The Appellate Body explained that the "specific cause for this conclusion" is Article IX:2 of the WTO Agreement. The Appellate Body stated the following with regard to Article IX:2:

> 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.[37]

The United States agrees. It is remarkable that the Appellate Body later contradicted this statement in *US – Stainless Steel (Mexico)*, without explaining any basis for doing so – for example, the Appellate Body might have explained that it considered *Japan – Alcoholic Beverages II* wrongly decided.

36. In *Japan – Alcoholic Beverages II*, the Appellate Body also explained that the decision to adopt a panel report under Article XXIII of the GATT 1947 was different from joint action of the Contracting Parties under Article XXV of the GATT 1947; and under the WTO Agreement, the nature of adopted panel reports continues to differ from interpretations made under the WTO Agreement by the Ministerial Conference or the General Council.[38] According to the Appellate Body, "[t]his is clear from a reading of Article 3.9 of the DSU". The United States agrees with this finding as well, given that Article 3.9 confirms that panel and Appellate Body reports do not set out authoritative interpretations.

37. Thus, the Appellate Body, in an early report, shortly after conclusion of the Uruguay Round, made clear that the negative consensus procedure for adoption of reports by the DSB cannot supplant the "exclusive authority" of the Ministerial Conference and the General Council to adopt, by positive consensus,[39] an "authoritative interpretation" of a covered agreement, as explicitly established in Article 3.9 of the DSU[40] and Article IX:2 of the WTO Agreement.[41]

38. The Appellate Body report in *Japan – Alcoholic Beverages II* also made clear that adopted panel reports often are considered by subsequent panels, and may be taken into account where they are relevant, but "they are not binding".[42] As stated earlier, the United States considers that a panel may take into account the reasoning in prior reports and, to the extent that a panel finds the reasoning persuasive, rely on that reasoning in conducting its own objective

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[36] *Japan – Alcoholic Beverages II (AB)*, p. 13.

[37] *Japan – Alcoholic Beverages II (AB)*, p. 13.

[38] *Japan – Alcoholic Beverages II (AB)*, pp. 13-14.

[39] WTO Agreement, Art. IX:1.

[40] 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.").

[41] 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.").

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

assessment of the matter. To be clear, the United States encourages this, and expects prior reports may have valuable insight. This is why parties to a dispute – including the United States – often cite to prior reports for their persuasive value. But this is a very different statement than saying panels are bound to follow prior panel and Appellate Body reports, or that they may rely on those reports instead of conducting their own objective assessment.

2. The Appellate Body Report in *US – Oil Country Tubular Goods Sunset Reviews (AB)* Does Not Support Canada's Proposed "Cogent Reasons" Approach

39. In support of its proposed "cogent reasons" approach to the Panel's inquiry, Canada cites to paragraph 188 of the Appellate Body report in *US – Oil Country Tubular Goods Sunset Reviews*. In that dispute, 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.[43]

40. Notably, the Appellate Body report in *US – Oil Country Tubular Goods Sunset Reviews* includes no reference to or discussion of "cogent reasons" as a basis for departing from the Appellate Body's interpretations in a prior dispute. Thus, this report cannot support the proposition for which it has been cited – namely, that "panels are expected to follow Appellate Body reports where the issues are the same, absent cogent reasons to do otherwise".[44]

41. The United States notes that, in paragraph 188 of the *US – Oil Country Tubular Goods Sunset Reviews* report, 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."[45] 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*. There is a significant difference between stating, on the one hand, 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), and saying, on the other hand, that one would expect a panel simply to follow a prior decision without conducting an objective examination of its own. There is no support in the DSU for the latter approach.

42. This statement by the Appellate Body is also problematic in its use of the phrase "especially where the issues are the same".[46] The Appellate Body report thus implies that following a prior conclusion "is not only appropriate" but "what would be expected" from a panel even in circumstances where the issues are not the same. There is no explanation given for this implication of the statement in the report.

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

[44] Canada's Second Written Submission, para. 23.

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

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

43. 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, as what matters in the WTO 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 and the terms of the covered agreements, as elaborated earlier in this statement.

44. Thus, the United States does not consider that the unsupported assertion in the *US – Oil Country Tubular Goods Sunset Reviews* Appellate Body report, which also contradicts the text of the DSU, supports Canada's proposed "cogent reasons" approach to the Panel's inquiry.

3. The Appellate Body Report in *US – Stainless Steel (Mexico)* Does Not Support Canada's Proposed "Cogent Reasons" Approach

45. Canada also cites the Appellate Body report in *US – Stainless Steel (Mexico)*.[47] This report contains the Appellate Body's first instance of applying the concept of "cogent reasons" to a dispute. The Appellate Body makes several disparate statements in articulating the "cogent reasons" approach; 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."[48] The *US – Stainless Steel (Mexico)* Appellate Body report does not support Canada's proposed approach to the Panel's examination of Canada's claims for several reasons. The Appellate Body's statement is, by definition, an "advisory opinion" or *obiter dicta* that, even under the Appellate Body's logic, is not a finding subject to its approach. More fundamentally, the "cogent reasons" approach is fundamentally flawed and at odds with the text of the DSU and WTO Agreement.

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

46. As an initial matter, and even setting aside 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 appear in the *US – Stainless Steel (Mexico)* Appellate Body report. In *US – Stainless Steel (Mexico)*, the discussion of "cogent reasons" appears in the context of Mexico's appeal under Article 11of the DSU.[49] Mexico argued on appeal that the panel acted inconsistently with Article 11 of the DSU by failing to follow what Mexico considered was "well-established Appellate Body jurisprudence."[50]

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[47] *See* Canada's Second Written Submission, footnotes 33 and 35.

[48] *US – Stainless Steel (Mexico) (AB)*, para. 160.

[49] *US – Stainless Steel (Mexico) (AB)*, para. 154.

[50] *US – Stainless Steel (Mexico) (AB)*, para. 154.

47. The Appellate Body did not, however, make a finding on Mexico's Article 11 appeal. Rather, the Appellate Body exercised judicial economy on Mexico's claim.[51] 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".[52] The "cogent reasons" approach (as explained by the Appellate Body) thus would not even apply to the Appellate Body's own statement on "cogent reasons".

48. 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.[53]

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*.

49. "Advisory opinions" are commonly defined as "a non-binding statement on a point of law given by [an adjudicator] before a case is tried or with respect to a hypothetical situation."[54] *Obiter dictum* has been defined "in common law context as a judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive)"[55] and "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".[56] Given that the Appellate Body expressly declined to make any finding on Mexico's appeal under Article 11 of the DSU, the preceding discussion – including on "cogent reasons" – is, by definition, merely advisory, or *obiter dicta*.

50. 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:

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[51] *US – Stainless Steel (Mexico) (AB)*, para. 162.

[52] *US – Stainless Steel (Mexico) (AB)*, para. 160.

[53] *US – Stainless Steel (Mexico) (AB)*, para. 162 (underlining added).

[54] *See, e.g.*, Oxford Dictionaries, "advisory opinion" (https://en.oxforddictionaries.com/definition/advisory_opinion).

[55] *See, e.g.*, Black's Law Dictionary (9th ed, 2009).

[56] Wharton's Law Lexicon (14th Ed. 1993).

> 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.[57]

51. 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 claim under Article 11 of the DSU, the Appellate Body's "cogent reasons" analysis did not and could not form part of the "*ratio decidendi*" of the Appellate Body report in *US – Stainless Steel (Mexico).*

52. 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. We would certainly encourage this Panel to do so. In the view of the United States, if the Panel were to seek to rely on this Appellate Body report to conclude that the DSB has adopted "findings" in relation to "cogent reasons", the Panel would first need to consider and explain what value *obiter dicta* have within the framework of the DSU and whether they can form part of the recommendations or rulings adopted by the DSB. As explained in a recent meeting of the DSB, the United States considers that issuing advisory opinions or *obiter dicta* is not within the terms of reference of a panel, and therefore falls outside of the function of the panel or the Appellate Body.[58]

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

53. 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; (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 briefly discuss each of these in turn.

(i) Article 11 of the DSU

[57] *US – Stainless Steel (Mexico) (AB)*, para. 158.

[58] *U.S. statement on the Appellate Body's issuance of advisory opinions contrary to DSU Articles 7.1, 11, 17.6, and 3.2*, U.S. Statement in the DSB meeting of October 29, 2018 (https://geneva.usmission.gov/2018/10/30/statements-by-the-united-states-at-the-october-29-2018-dsb-meeting/).

54. 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",[59] the Appellate Body subsequently ignores the limitations of this text.

55. 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, Article 11 of the DSU 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 requires that a panel properly weigh the evidence and make factual findings based on the totality of the evidence and within its bounds as trier of fact in the dispute. An objective assessment also requires that a panel 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.

56. As noted previously, nowhere in Article 11 of the DSU is a panel's objective assessment linked to prior Appellate Body interpretations. Nor does the context of Article 3.2 of the DSU, which we discuss next, or the structure of Article IX:2 of the WTO Agreement or Article 3.9 of the DSU, support reading into Article 11 of the DSU 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.

(ii) Article 3.2 of the DSU

57. 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 the *US – Stainless Steel (Mexico)* 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."[60]

58. There are a number of evident flaws in this assertion. First, the statement that Article 3.2 of the DSU "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, by its terms, require or even set out a "cogent reasons" approach.

59. 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*. 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

[59] *US – Stainless Steel (Mexico) (AB)*, para. 155.

[60] *US – Stainless Steel (Mexico) (AB)*, para. 160.

"[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."[61]

60. 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.

61. 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 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.

62. 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 nowhere mentions precedent or cogent reasons, and immediate context in Article 3.9 of the DSU (and Article IX:2 of the WTO Agreement) reinforces that these concepts cannot be inserted through implication into Article 3.2.

63. 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. The passage in the *US – Stainless Steel (Mexico)* Appellate Body report 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.

64. 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

[61] *Japan – Alcoholic Beverages II (AB)*, p. 13 (underlining added).

interpretation and that interpretation has been adopted by the DSB, then the Appellate Body would need to follow that adopted panel interpretation, "absent cogent reasons" not to do so. But the Appellate Body has never suggested that it would accept that outcome. The Appellate Body report in *US – Stainless Steel (Mexico)* 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.

65. For all these reasons, the Appellate Body's reasoning on Article 3.2 of the DSU does not support a "cogent reasons" approach to dispute settlement.

(iii) Reliance on Prior Appellate Body Reports

66. 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*.[62] However, for the reasons already discussed, the *Japan – Alcoholic Beverages II* and *US – Oil Country Tubular Goods Sunset Reviews* reports provide no basis for a "cogent reasons" approach. The Appellate Body 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 that the "cogent reasons" approach is directed towards an outcome of ensuring panels follow Appellate Body statements, regardless of the lack of any basis in the DSU for that approach.

67. The *US – Shrimp (Article 21.5 – Malaysia)* Appellate Body report likewise does not support the Appellate Body's "cogent reasons" approach. Paragraph 109 of the report in *US – Shrimp (Article 21.5 – Malaysia)*, which follows a quotation from the report in *Japan – Alcoholic Beverages II* concerning the status of adopted panel reports, 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.[63]

68. 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".[64] That is, a panel may rely on them, but they are not binding and should not be understood as supplanting the

[62] *See US – Stainless Steel (Mexico) (AB)*, paras. 158-159.

[63] *US – Shrimp (Article 21.5 – Malaysia) (AB)*, para. 109 (underlining added).

[64] *US – Shrimp (Article 21.5 – Malaysia) (AB)*, para. 109.

"exclusive authority" of Members to seek authoritative interpretations of the covered agreements under the WTO Agreement.

69. In the second and third sentences of paragraph 109, 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, the United States agrees 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 its own reasoning".[65] 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 that it would be appropriate or permissible under the DSU for the panel to do so.

(iv) Parties' Citation of Prior Reports

70. 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.[66] 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, the United States expects this, does this itself, and anticipates panels will 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 on or precedential for future panels, on the other.

71. 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."[67] 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, the United States 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.

(v) Other International Fora

[65] *US – Shrimp (Article 21.5 – Malaysia) (AB)*, para. 109 (underlining added).

[66] *See US – Stainless Steel (Mexico) (AB)*, para. 158.

[67] *US – Stainless Steel (Mexico) (AB)*, para. 160.

72. 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 other international fora for dispute settlement.

73. The Appellate Body provides no explanation as to whether or how the applicable rules and structures of the two tribunals it references are relevant for understanding the WTO dispute settlement system, or how the structure of these tribunals or their constitutive statutes give any insight into the role or value of WTO reports.

74. To the extent that the Appellate Body intended to suggest that "precedent" is 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.[68] 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, and 11 of the DSU, as well as other relevant provisions of the DSU and the WTO Agreement. The approach of the DSU – that no "cogent reasons" approach is necessary or appropriate – therefore would prevail.

(vi) Structure Contemplated in the DSU

75. Finally, the Appellate Body's discussion of "cogent reasons" is based on an asserted "hierarchical structure contemplated in the DSU," but the Appellate Body's assertion fails to accurately reflect the important, but limited, role assigned to the Appellate Body, and is divorced from the text of the DSU. 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.[69] 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 predicable body of jurisprudence clarifying Members' rights and obligations under the covered agreements as contemplated by the DSU."[70]

76. 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 either of those provisions – nor is there any hint of such terms. In fact, Articles 17.6 and 17.13 are <u>limitations</u> 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

[68] A rule of customary law is understood to be comprised of 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.

[69] *US – Stainless Steel (Mexico) (AB)*, para. 161.

[70] *US – Stainless Steel (Mexico) (AB)*, para. 161.

limited to issues of law covered in the panel report and legal interpretations."[71] And Article 17.13 limits the Appellate Body's functions by saying that 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.

77. Given these limitations, it is not consistent with the text of Articles 17.6 and 17.13 of the DSU to read those provisions as providing the Appellate Body the authority to render an interpretation in one dispute that would, in another separate dispute, relieve a panel of the responsibility it has to the DSB to conduct an objective assessment of the applicability of and conformity with a covered agreement, using customary rules of interpretation. Rather, as discussed, authoritative interpretations of the covered agreements are reserved exclusively to WTO Members acting in the Ministerial Conference (or General Council).

78. 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.[72] It is the DSB that panels and the Appellate Body assist by carrying out their functions as set out in the DSU.

79. As noted above, panel findings and recommendations that are adopted by the DSB are of equal legal status as Appellate Body findings and recommendations that are adopted by the DSB. The Appellate Body has never suggested that it would accept this consequence of the "hierarchical structure" of the DSU – that the Appellate Body itself would be "expected" to follow findings in prior panel reports adopted by the DSB – likely because this would restrict the Appellate Body's influence in the dispute settlement system. But the United States views the notion of a hierarchical structure in the DSU to be misguided.

80. DSB recommendations resulting from panel or Appellate Body findings, or arbitration awards under Article 25 of the DSU, are directed at resolving a dispute between Members. Should a Member wish to obtain an authoritative interpretation that will be binding on all Members, or 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.

81. 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, absent "cogent reasons" for departing from them. Given the significant flaws in the *US* –

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[71] DSU, Art. 17.6 (underlining added).

[72] DSU, Art. 7.1. Article 7.1 of the DSU provides that:

> 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)."

Stainless Steel (Mexico) Appellate Body report that we have detailed – including that the approach described in that report is *obiter dicta*; that the Appellate Body deviated from that approach to ignore its own prior interpretation on the value of prior, adopted reports; and that the analysis is logically flawed and not supported by the sources cited – the United States would expect this Panel not to endorse that *dicta*. Rather, the United States requests that the Panel expressly reject it.

II. CONCLUSION

82. Accordingly, the United States respectfully requests that the Panel examine Canada's claims concerning the AD Agreement by applying customary rules of interpretation, taking appropriate account of the arguments of the parties and prior interpretations of the cited provisions of the covered agreements. If the Panel does so, the United States remains confident that the Panel will find – as demonstrated in the U.S. written submissions, statements, and responses to questions – that all of Canada's claims are without merit, and the Panel properly will reject Canada's claims.

83. Mr. Chairperson, members of the Panel, this concludes our opening statement. We would be pleased to respond to your questions.