# Farewell Speech to the WTO Dispute Settlement Body

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Ambassador Walker, Deputy Director-General Brauner, excellencies, colleagues, friends, ladies and gentlemen,

I stand here before you with a heavy heart but not because this is my farewell. I served on WTO dispute settlement appeals for nine years, three months, and three weeks, and that is long enough. Some of you may well say that my parting is much overdue and that I overstayed my welcome. I stand before you with a heavy heart because of the current crisis in the rules-based multilateral trading system. While it is a system that needs much improvement to be fair to all, as well as adapted to 21st-century realities, the rules-based multilateral trading system, as it progressively developed since the late 1940s, has served us well. It has allowed hundreds of millions of people to escape from poverty and has brought continued prosperity to many others. It has also been instrumental in keeping trade and broader economic disputes from boiling over and escalating beyond control.

At the core of a well-functioning multilateral trading system is an effective dispute resolution mechanism. The Uruguay Round negotiators understood this. They therefore agreed on the WTO Dispute Settlement Understanding, the DSU, to provide security and predictability to the multilateral trading system and to strengthen that system by prohibiting any WTO Member from determining unilaterally whether another Member violates its obligations

under WTO law. As Prof. Claus-Dieter Ehlermann, one of the original seven Appellate Body Members, wrote in 2003, the successful conclusion of the DSU was an extraordinary achievement that comes close to a miracle. With its combination of compulsory jurisdiction, independent and impartial adjudicators, appellate review, and binding rulings, the WTO dispute settlement system is indeed unique among international mechanisms for the resolution of disputes between sovereign states. Not surprisingly, it quickly became the most used state-to-state dispute resolution mechanism, and was acclaimed the jewel in the crown of the WTO. Those working in other fields of international law looked on with envy.

While there was high degree of satisfaction among WTO Members with the functioning of their dispute settlement system, concerns regarding certain aspects of the system were raised almost from the beginning. Many proposals to address these concerns were made and discussed, first in the context of the DSU review in 1998 and 1999, and later in the Doha Round negotiations on DSU reform. These negotiations came to nothing, and this is unfortunate because while some proposals aimed at introducing more Member control over dispute settlement, most proposals focused on further strengthening the system. How different is the situation today!

In response to concerns raised by the United States, in particular regarding the functioning of the Appellate Body, and the United States' obstruction of the appointment of Appellate Body Members, more than 20 WTO Members have made – individually or in groups – proposals for the reform of WTO appellate review. These proposals seek to address the United States' concerns relating to the alleged "overreach" by the Appellate Body, the precedential effect of case

law, the 90-day timeframe for appellate review, the Appellate Body's review of factual findings, including findings on the meaning of domestic law and the transition rules for outgoing Appellate Body Members. However, unlike most of the proposals for reform made in the context of the Doha Round negotiations, the proposals for reform currently discussed no longer have the ambition to strengthen the system but are merely aimed at ensuring its survival in some form or another. It is not my intention in this brief farewell speech to put up a strong defence of the Appellate Body and its functioning to date, or to engage in a detailed discussion of the reform proposals. Both such defence and discussion deserve more attention than I can give to either of them here and now. For the same reason, I will also not attempt in this speech to put the crisis of WTO dispute settlement in the broader context of the crisis in global governance, a crisis that manifests itself in the re-emergence of unilateralism and the failure to address global issues through earnest dialogue and cooperation.

With regard to the proposals on the reform of WTO appellate review currently under discussion, I will, however, say the following. First, while Members have made, and now discuss, multiple proposals on the reform of WTO appellate review to address the concerns raised by the United States, very few, if any, of these Members consider that there is something so fundamentally amiss with the Appellate Body and its functioning that blocking the appointment of Appellate Body Members – and thus endangering the very existence of the Appellate Body – is an appropriate and proportionate action. In this regard, I note that no less than 75 WTO Members have made, repeatedly, a joint proposal urging the DSB to fill the vacancies on the Appellate Body without delay. Second, to the extent that the concerns addressed in the reform

proposals are legitimate, and some of them certainly are, these concerns can be addressed without undermining the essential features of the current system. The proposal made by Thailand on 25 April 2019 (WT/GC/W/769) shows the way forward in this regard. In an attempt to address the concerns raised by the United States, some other WTO Members have made proposals that would significantly change essential features of the current system. It is, however, not clear to me, as I am sure it is not clear to most of you, whether *any* reform of the current system, short of its virtual elimination, will satisfy the United States. The United States has stated – most recently at the General Council meeting of 7 May 2019 – that the Appellate Body should follow the rules set out in the DSU. Nobody would disagree with that, but the United States has largely remained silent on what this actually means and has not engaged in the discussions on any of the reform proposals currently on the table.

I am afraid that – in spite of the most determined efforts of Ambassador Walker, efforts for which I would like to commend him, as well as the efforts of many WTO Members – it is ever more likely that the current crisis will be not be resolved by 11 December 2019. If this is indeed the case, the Appellate Body will no longer be able to hear and decide new appeals from that day onwards. As set out in Article 16.4 of the DSU, a panel report cannot be adopted by the DSB and become legally binding until after completion of the appeal. One can predict with confidence that, once the Appellate Body is paralyzed, the losing party will in most cases appeal the panel report and thus prevent it from becoming legally binding. Why would WTO Members still engage in panel proceedings if panel reports are likely to remain unadopted and thus not legally binding? As from 11 December 2019, it is therefore not

only appellate review, but also the entire WTO dispute settlement system that will no longer be fully operational and may progressively shut down.

While the United States may welcome such an outcome, most other WTO Members obviously would not. A return to some kind of pre-WTO dispute settlement system means a return to dispute settlement in which economic and other might trumps legal right. As Judge James Crawford of the International Court of Justice recently commented, for international trade dispute settlement, this would be "back to square one". Ambassador Julio Lacarte Muro, the first Chair of the Appellate Body, wrote in 2000 that the WTO dispute settlement system gives security to those WTO Members that “have often, in the past, lacked the political or economic clout to enforce their rights and to protect their interests". Most WTO Members do not want international trade without rules, or to be more precise, international trade with rules that are whatever the strongest party to a dispute says the rules are. They have a strong interest in an effective rules-based dispute settlement system.

Perhaps WTO Members will be able to reach in 2021, or sometime soon thereafter, consensus on reforms to the WTO dispute settlement system, and in particular WTO appellate review, that would preserve and even strengthen the key features of the current system, namely compulsory jurisdiction, the independence and impartiality of the adjudicators, appellate review, and binding rulings. However, if consensus among *all* WTO Members on such reforms is not possible, a coalition of willing WTO Members should consider establishing a new parallel dispute settlement system that would copy the existing, but dysfunctional, DSU, in order to settle WTO disputes between

them in an orderly and rules-based manner. While recourse to Article 25 of the DSU for appellate review or agreements between parties not to appeal may, for some time and in some cases, allow Members to ensure the availability of WTO dispute settlement, these are not long-term solutions.

Between December 2009 and March 2019, I have served on 20 appeals and have participated in the exchange of views in another 18 appeals. I feel very privileged to have been given the opportunity to serve the international community in this way. My experience as a WTO appellate judge has taught me – most appropriately – intellectual humility, and it has given me tremendous respect for the knowledge, skills, and dedication of those involved in WTO dispute settlement. Few of the questions of interpretation or application that come to the Appellate Body have a simple answer. Giving them a simple answer would not do justice to the arguments advanced by at least one of the parties. I have often struggled with what was the correct interpretation and/or application of the relevant WTO provisions in a particular case. The most challenging cases for me were those regarding the balance struck in the relevant WTO agreement between free trade and conflicting societal values, as well as cases regarding the proper role under WTO law of governments in the economy. The Appellate Body rulings in these cases have not seldom been severely criticized by Members. I have always – as have my colleagues on the Appellate Body – taken such criticism to heart, even when it was often merely a repetition of the arguments that were already presented during the appellate proceedings, were extensively addressed, and were found wanting by the Appellate Body. Some of these much-criticized rulings may have been in error. To say it in Latin, *errare humanum est*, but I am confident that wiser women and men on panels and the Appellate Body can and will in

the future correct such mistakes, if and when they get the chance to do so. The Appellate Body never proclaimed it is infallible, just as it never proclaimed that its reports constitute binding precedent.

I have very often been impressed by the knowledge and skills of the lawyers, whether government officials or private practitioners, pleading before the Appellate Body. In response to the Appellate Body's remorseless questioning at the oral hearing, I have seen a lot of impressive "thinking on your feet". I have also admired the lawyers' patience with our questioning, which may, at times, have revealed that, unlike them, we were still trying hard to come to grips with the complexity of the issues on appeal.

I have been equally impressed by many panels. I have never envied their difficult task to get the facts straight and to have a first shot at the correct interpretation and/or application of the relevant WTO provisions. With regard to the latter, I often found that the Appellate Body very much benefited from the fact that the parties' argumentation on appeal was more sophisticated and better articulated than their argumentation at the panel stage.

Finally, allow me to pay tribute to my colleagues on the Appellate Body and the staff of the Appellate Body Secretariat. Over the past nine years, I had the privileged to serve with 12 fellow Appellate Body Members. While the differences in our professional background and our approach to law were pronounced and our disagreement on important issues often profound, we worked well together. I learned from each of my fellow Appellate Body Members, and I am indebted to them for that. I could not have wished for better colleagues, especially in times that were difficult for me on a personal

level. As for the Appellate Body Secretariat, I can but say that its director, its senior and junior lawyers (past and present), and its support staff (past and present) are the most accomplished and dedicated professionals that I have ever worked with. It was a privilege for me to work with them on a daily basis for the past nine years. I will miss them dearly and wish them the professional recognition and success they so clearly deserve.

I cannot but conclude this farewell speech on a sombre note. There are very difficult times ahead for the WTO dispute settlement system. This system was – and currently still is – a glorious experiment with the rule of law in international relations. In six months and two weeks from now, this unique experiment may start to unravel and gradually come to an end. History will not judge kindly those responsible for the collapse of the WTO dispute settlement system.