

Farewell Speech of Seung Wha CHANG at the DSB on 26 September 2016

Mr. Chairman Carim, Members of the Appellate Body, Members of the Dispute Settlement Body, WTO staff, friends and colleagues;

I would like to start by thanking all of the WTO Members, first for agreeing, four years ago, to appoint me to serve this wonderful institution with the honor of being a Member of the Appellate Body and for enabling me to speak here today as I leave. For the last four years, I have constantly felt that I was a junior Appellate Body Member. But now, as I am leaving earlier than my more senior colleagues, I feel like I am suddenly becoming senior to them. This is a good feeling. What a day!

I would like to address three aspects of WTO dispute settlement, and to follow that with a somewhat more personal reflections regarding the past four years at the Appellate Body. The first of these three aspects is what I see as one of the current challenges facing WTO dispute settlement in general. The other two relate more specifically to the Appellate Body's mandate, as well as its independence and impartiality.

Over the last twenty years, the WTO disputes have not only increased in number; they also have become more legalistic, more complex, and more sophisticated. This reflects the success of the WTO: national economies are more intertwined. It also reflects the increasing role of lawyers/litigators in WTO dispute settlement. The problem is, however, that this evolution appears not to have been contemplated in the DSU. For example: the 90-day time limit for appellate proceedings and the part-time status of Appellate Body Members appear to be incompatible with the increased size and complexity of appeals brought to the Appellate Body.

Some may take the view that WTO panels and the Appellate Body were not designed to, and thus should not, operate in the same way as traditional judicial bodies. But if the users of the WTO dispute settlement system present their cases and request various procedural rulings with sophisticated advocacy skills and strategies as do litigants before such judicial bodies, the WTO panels and the Appellate Body will have no other way than to respond accordingly to accommodate the ways in which the dispute settlement system is currently being used by WTO Members. I believe the Appellate Body has done its best to accomplish this mission, while streamlining its case management practices accordingly. However, the Appellate Body has done it under the structural constraints that flow from the over-twenty year-old framework provided by the DSU.

So now the time has come for WTO Members to take action with regard to the legal framework of the dispute settlement system, whether through a revision to the DSU, or an adoption of supplementary rules or decisions by the DSB.

Now I turn to more specific issues. First, the Appellate Body mandate.

Of course, the scope of the Appellate Body's mandate should be defined in accordance with the DSU. Under the DSU, the Appellate Body is required to "address" each of the issues raised by the parties to a dispute during an appellate proceeding, and such issues are

limited to "issues of law covered in the panel report and legal interpretations developed by the panel". Accordingly, once duly raised by the parties on appeal, the Appellate Body is under its 'legal duty' to address each of those issues.

WTO Members may diverge on how the Appellate Body should "address" each of the issues raised by the parties. In my view, this depends largely on how the parties presented their claims. But in the end it will be the Appellate Body who will decide, on a case-by-case basis, how to address each issue appealed, in the light of the guiding principles, for example, the aim of the dispute settlement system, which is the prompt resolution of disputes, and, equally importantly, due process concerns.

Article 3.2 of the DSU provides that "[t]he dispute settlement system of the WTO ... serves ... to clarify the existing provisions of [the covered] agreements in accordance with customary rules of interpretation of public international law." As the Appellate Body has said, this mandate to "clarify" is not an invitation for "the Appellate Body to 'make law' by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute." Thus, the Appellate Body should be careful not to provide general interpretations of the provisions of the covered agreements in an abstract or overly comprehensive manner disconnected from the scope of the issues appealed in a particular dispute, and thereby take the risk of foreclosing the interpretative window for future cases, in which a more pertinent dispute may arise.

At the same time, remember, the whole of the covered agreements of the WTO constitute a "single package" multilateral trading system, and each component cannot be interpreted or applied in isolation from other components. In interpreting certain provisions, panels and the Appellate Body face the delicate task of striking a balance between maintaining coherence among different but systemically connected WTO provisions, on the one hand, and respecting contextual peculiarities of each of them, on the other hand. This is why the Appellate Body should carefully consider systemic implications of the legal interpretations of any particular WTO provisions that may have an impact on other contextually relevant parts of the covered agreements.

This is a more difficult task than merely making an isolated and myopic decision of which party's argumentation regarding a specific WTO provision prevails. It is not an academic exercise, but rather a proper and required adjudicatory function of the Appellate Body. At the same time, it is the very core responsibility of the Appellate Body in clarifying the existing WTO provisions and thereby "providing security and predictability of the multilateral trading system," in which the whole WTO Members, including the third parties to a dispute, have a systemic interest.

Now I move on to the issue of independence and impartiality of the Appellate Body.

Undoubtedly, the independence and impartiality of adjudicators under the dispute settlement mechanism is the most fundamental pillar for the adjudicatory institution. Appellate Body Members of course have the duty to maintain their independence and impartiality. Similarly,

WTO Members who created this system also are obligated not to undermine the independence and impartiality of Appellate Body Members.

It is true that there is no right of automatic reappointment for Appellate Body Members. But, it is equally true that WTO Members as a whole have a very strong interest in preserving the independence and impartiality of the Appellate Body, and therefore they should be discouraged from using their sovereign right in ways that undermine basic confidence in the Appellate Body. Therefore, I recommend that the WTO Members through the DSB lay out some principles and procedural requirements that Members would be expected to observe regarding reappointments.

Each Appellate Body Member's reappointment should be secured unless there are legitimate reasons for WTO Members to oppose it. Further, the scope of these legitimate reasons should be very limited. For example, "incapacity," including illness, and material breaches of duties as required under the DSU and other relevant rules, such as the Code of Conduct, would, in my view, constitute legitimate reasons to oppose reappointment. Such violations of duties may include failure to maintain independence or impartiality, including affiliation with any government; *ex parte* communications of the type prohibited by the current rules; breach of confidentiality; and failure to avoid conflict of interests.

Nevertheless, these reasons should become legitimate only when sufficient evidence has been properly presented in a timely manner by a WTO Member who intends to oppose reappointment, and when the level of such breach is "material." If a WTO Member seriously considers opposing reappointment of an Appellate Body Member, it should make best efforts to raise this issue at the earliest practicable time, and sufficient due process opportunities for an Appellate Body Member to be heard should be guaranteed before her term expires. Without such principles, not only may confidence in the independence and impartiality of Appellate Body Members be eroded, but also unexpected vacancies in the composition of the Appellate Body may occur, which would be detrimental to the proper operation of the Appellate Body system.

Most importantly, the outcome of cases must never be an acceptable reason for opposing reappointment. And similarly, an Appellate Body Member's adjudicatory performance relating to case-management, including her "judicial style," should not be recognized as a legitimate reason for opposing reappointment. In particular, I believe that there should be only one occasion for vetting "judicial style" – the lead-up to the initial appointment. The term "judicial style" may capture various aspects of an adjudicator's performance, which are normally kept confidential and invisible to outsiders. If a WTO Member attempts to define an Appellate Body Member's 'judicial style' on the basis of its mere observation of that Member's adjudicatory performance during the oral hearing, it would be something like drawing an elephant after touching only its nose without looking at the whole body.

Throughout my professional career of more than twenty-five years as an adjudicator, whether as a national judge, an international arbitrator, a WTO panelist, or an Appellate Body Member, I have consistently applied one of my adjudicatory principles, that is, "If you cannot evenly please both parties with your questions in the hearing room, try to displease

them both with your questions, but always evenly.” In my recollection, for the last four years, in the Appellate Body hearings, my questioning has failed to evenly please both parties, but at every single one of them, I have tried my best to displease them in an evenhanded manner, whether they are claimants or respondents, large advanced countries or small less-developed countries. Yes, this is my “judicial style.”

Please imagine what would be the consequences to the proper functioning of the Appellate Body if individual Appellate Body Member’s questioning and judicial styles observed in the oral hearing room were to be assessed unilaterally by WTO Members (in particular, the parties to disputes) for their decision on whether to oppose her reappointment in the future? Should that continue to happen, I would rather suggest to my Appellate Body colleagues that the Appellate Body seriously consider eliminating oral hearings or replacing them with written questionnaires. Otherwise, no single Appellate Body Member during her first term will be free from the risk of non-reappointment unless she is a magician to evenly please all parties all the time. Under such circumstances, can you expect an Appellate Body Member to carry out her adjudicative functions in an independent and impartial manner, and how many Appellate Body Members actually would like to consider seeking reappointment?

For all these reasons, I am glad that the DSB has launched the Dedicated Sessions on the issue of reappointment, including whether an amendment to the rules governing reappointment is necessary. I would strongly support a proposal to change the newly appointed Appellate Body Member’s term to a non-renewable six or seven year extended term. If this goal is too ambitious to achieve in the foreseeable future, then perhaps the DSB might use the Dedicated Sessions as a valuable forum to rationalize the reappointment process in order to preserve the independence and impartiality of the Appellate Body. I am truly (and truly) hopeful that WTO Members will convert my unfortunate event of non-reappointment into a valuable and positive opportunity to foster, rather than undermine, the independence and impartiality of the Appellate Body in the long run.

Let me lastly turn to my personal reflection on the last four years in this institution. First of all, it has been an enormous honour and privilege to work with so wise and dedicated six other colleagues. Recently, we have all marvelled, together, that, for the last few years, while listening carefully to the system users’ voices and wishes, the Appellate Body has made meaningful progress to improve its case-handling practices so as to make them more efficient and fair, and at the same time enhance our level of responsibility for the work products of the Appellate Body. I am proud of what I have done together with my colleagues so far, and I hope and believe that such efforts will continue after I leave.

The Appellate Body Secretariat lawyers, headed by the most dedicated Director, Werner, are one of the best and talented intellectual groups I have worked with in my entire professional life. Without them, under the short time limit and the part-time status of the Appellate Body Members, the appellate review system of the WTO would not be sustainable. Therefore, it is essential that they should be provided with sufficient human resources and the working environment so that they can thrive and be retained under sustainable working conditions. Victoria, both Carlo/Kaarlo(s), Jesse and all others, you will not receive my brutally harsh

comment-carrying emails at 2 or 3 A.M any more, and so you will no longer need to turn off message alarms on your mobiles while you sleep.

Now I cannot avoid briefly mentioning my personal farewell remarks to each of my six colleagues. First, Madame Caring and Collegiality, Yuejiao. You have always refuelled us with your Chinese home-cooking when we all worked and became exhausted on Sunday. You united us and our institution with a sense of family-bonding. I will miss your song entitled, "we are the family". Mr. Amigo and Efficiency, Ricardo. Do you remember our big fight in early days of my term? We quarrelled out of jealousy because we both loved the same person (but, a legal person, WTO), in slightly different ways. Then, we became real amigos. Mr. Prudent and Balanced, Shree. We often talked about the future of the Appellate Body while mistakenly assuming that I would stay in this institution with you for longer than other colleagues. Your prudent and kind advice about Geneva people and life will be truly missed.

Mr. Wisdom and Summarizer, Ujal. You will be able to summarize all the internal discussions with less difficulty from now since a troublesome colleague who always made seemingly simple issues more complicated will not be here any longer. You will no longer be bothered by your neighbouring colleague's abrupt visits with the same question: "Ujal, can I borrow your wisdom?" Mr. Principle and Commitment, Peter. I learned from you the virtue of disagreement with respect, or how to be reasonably persuaded. But, be careful, Peter, without me, you alone might take the whole blame if the time for exchange of views will be prolonged until late in the evening or if the Appellate Body is to be seen as being too academic.

Finally, Mr. Candour and Warm-hearted, and my dearest last Chairman, Tom. Without your leadership and personal care, I cannot imagine how I could have walked through the unexpected hardship for the last few months while maintaining the sense of honour and dignity. I am worried about who else will ring you up in your hotel room if you oversleep due to jet-lag, but at least you will no longer have to desperately persuade me, without evidence, that it is your turn to pay for our supper in the Café-de-Soleil.

Eight years may be too a long period for one person to keep affection for another person with the same high level of passion. (My wife, Jisoo, may not like this statement, I am afraid.) Likewise, my love for the WTO might have withered or faded away eventually, had I served two terms of four years. But, as I am leaving the WTO now after one term when my love for it is still at the highest gear, I will continue to be in love with WTO, in particular the Appellate Body, for the rest of my life.

And on a very final note, I recall, four years ago, I took an oath before all of you and my family including the twin children, while reading out this sentence: "I do solemnly swear that I shall perform my duties as a Member of the Appellate Body of the World Trade Organization honourably, independently, impartially, conscientiously, and in accordance with the law of the World Trade Organization. I shall, at all times, avoid direct or indirect conflicts of interest in the exercise of my functions and responsibilities, and shall respect the confidentiality of proceedings of the Appellate Body." Now, I can proudly confirm that I have strictly kept my promise for the last four years.

Thank you very much and Good-Bye....
