

Farewell Speech by
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Dear Ambassador Sunanta, Deputy Director-General Karl Brauner, Amigos Todos,

The day I was sworn in was the 40th anniversary of a man landing on the moon. On that day, my older sister drew an analogy from that historic event and told me that she was very proud and happy that I had reached my "moon". So here I am, back on Planet Earth after a wonderful journey of almost nine years. I am an international trade lawyer whose ultimate professional wish was to be part of this institution.

I was part of a jewel in the crown created by you, the Membership. A sophisticated international adjudicatory system for solving disputes. A mechanism that has always privileged substance over form. One that follows a method of interpretation and where parties' due process rights are fully respected. An institution that strives to find, as Professor Howse puts it, the "equilibrium between domestic regulatory autonomy and trade liberalization", as agreed by WTO Members in the treaty text.

I want start this address by thanking all of the participants involved in the dispute settlement process.

First, the delegates and litigants, who, with great advocacy skills and sophisticated arguments made every deliberation challenging. My respect and recognition go out to all of them. I know that AB deadlines are often challenging to meet, and that answering our questions in hearings can be exhausting. I have always appreciated your tireless cooperation in our efforts to explore fully all issues raised on appeal.

Second, I shall recognize a group of young, and not that young, lawyers and professionals in the Appellate Body Secretariat. They challenged me to the limit and, with every interaction, made me a better professional. It was an amazing experience witnessing how each of them grew professionally and personally during these years. I've never seen any institution working with this level of quality, commitment, and expertise. The ABS and the other Dispute Settlement Divisions not only administer disputes but are also an essential element in the process of solving them. They perform a unique task with the highest degree of expertise, and this organization should, especially in these times of uncertainty, recognize and act upon this fact. Finally, it is a good opportunity to set the record straight. Our Secretariat is not the 8th ABM. It is the engine that helps us reach our destiny. But we, the ABMs, are in the driver's seat.

Finally, my colleagues, I have always said that the greatest strength of the AB is the diversity – both cultural and professional – of its Members. During my time as an ABM, I had the pleasure of working with 13 extraordinary individuals, all of whom with every chat and discussion gave me infinite lessons not only about international trade, law, economy, and politics but also, and most important, about life. And if all their teaching and shared wisdom were not enough, the most important gift I got from them was their friendship. A bond enhanced because I shared with each and every one of them a keen sense of commitment to this institution and a belief that the Appellate Body is an important part of the WTO's rules-based multilateral trading system. The Membership could question many things about ABMs, but never their full commitment to this institution, sometimes at great personal cost.

Now I'm going to share with you some thoughts about the serious crisis that the dispute settlement mechanism and, in particular, the AB are currently facing. I will try to lay out some considerations for helping the Membership address some of the problems raised, trying always to keep in mind that, at the end, as an adjudicator you speak through your decisions and work with the body of law you are provided with.

Let me start by a personal reflection. It seems to me that the crisis we now face could have been avoided if it had been addressed face-on, as it began to escalate. The WTO is a consensus-based collective. This means that this crisis should not be attributed to one Member. Rather there is a need to recognize the need for leadership within and outside this house. A need to recognize that there must be genuine engagement when one Member is raising problems. The signals have been there for some time. No matter how difficult or insurmountable the issues may seem, all those who are part of the WTO community must be willing to engage, and must refrain from putting personal or national trade interests before attempting to come up with a solution. The first question is whether the Membership still wants to have an instance to review panels reports.

If the answer is affirmative then we have to face the conceptual differences among the Membership as to the nature of the WTO, i.e. Is the WTO a contract or a constitution? And, following immediately from that question, what is the nature of the AB? Is it or should it be an International Court? Many of the issues identified in the lead-up to the current state of affairs go to the core and the nature of what the AB is or should not be. If Members want to make progress and solve the current deadlock maybe this is a good place to start. Or, alternatively, maybe there needs to a pragmatic discussion which leaves this conceptual notions aside and goes to the very basic or minimal elements with which all Members can live with to have a fully functioning

AB. But it is undeniable that there needs to be a discussion. With this in mind, I will now address each of the issues that have been identified:

Rule 15. Rule 15 is an operational rule. It was designed to expedite the dispute settlement process by avoiding a “reset” of a dispute if an ABM's term ended before a dispute was finalized. Nothing more. Perhaps an objective criteria as to the circumstances in which such a “reset” would be appropriate would help. But in my view, a rule that leaves discretion to the Membership whether or not to extend an ABM's term after it has expired would not only create uncertainty but also jeopardize an expedited solution to a dispute.

90 days. The 90-day rule is a great rule. It was for a long time a unique feature of the AB process. Nevertheless, the growing complexity of WTO disputes, the high rate of appeal of panel reports and the number of issues appealed, the amount of jurisprudence, and size of the submissions, among other things, meant that this turned out to make a 90-day deadline unrealistic.

On top of that, as my colleague and friend Peter used to say, brevity requires time. So, if the Membership wants to keep the 90-day rule, it may require some sacrifices. Attempts to address some elements that will help expedite the process have been made. For example, not long ago the AB put forward the idea of reducing the length of the submissions. The idea was rejected by most of the Membership. If you want to preserve the 90-day rule, the praxis needs to change. For instance, by introducing summary judgements.

Reappointment. This is an issue in which I believe the text is crystal clear. Reappointment is an option not a right. Upon reflection, this is an issue that is within the realm of only the Membership. Again, however, engagement is needed. The Membership has adopted a process for the initial appointment of ABMs. WTO Members together need to agree on whether a process is needed for reappointment and, if so, what form it should take.

Advisory opinion. There is much scope for differences of opinion, in good faith, as to what rulings are necessary to resolve a dispute, and the extent to which rulings should be supported by reasoning. Moreover, all active users have at some point or in some instance requested a finding of the AB that is not necessary to solve a dispute. I’ve seen Members seek an AB interpretation of a covered agreement despite the fact that such clarification was not necessary to solve the dispute. I’ve seen Members ask the Appellate Body to disapprove unappealed panel statements and to set aside portions of panel reports, not to mention the frequent invitations to revisit the factual findings of panels. In this regard, the membership needs to solve the tension between the principle that the aim of the Dispute Settlement Mechanism “is to secure a positive solution” to a dispute with the obligation of the AB to “address each of the issues raised” on appeal.

Gap filling. No adjudicative entity is infallible and I believe this is also true of the AB. No system can exclude that some interpretations may diverge from expectations or be unacceptable to large parts of a constituency. Such risk needs to be mitigated through an operational negotiating branch that can adjust or realign the rules when this occurs.. In addition, I haven’t seen a WTO dispute in which all parties involved agree that there were mistakes made in the interpretation or that gap filling occurred. Maybe a serious discussion needs to take place about the method used for interpreting the covered agreements, for example, the Vienna Convention. Members might decide that the significance to be attributed to negotiating history should be elevated beyond the role attributed to it in Article 32 of the Vienna Convention. Finally, let me express my concern that whilst trade evolves and becomes more and more sophisticated, WTO disciplines are at risk of remaining static. It adds an extra hurdle when the Membership wants to fix current problems with old rules. Membership needs to engage in a serious update of its current disciplines and clarify or correct those that it considers have not worked.

Reliance upon previous cases. I've never seen a Member who has not argued its case based on previous case law. This type of reliance upon de facto precedent seems to be one that Members themselves value and attach importance to—it is, after all, closely linked to the idea of security and predictability of trading relations. Membership could very well stop doing this and ban the cogent reasons approach. I would just caution that this is precisely why many countries are complaining in the context of ISDS, that is, fragmentation and lack of cohesiveness in the ISDS jurisprudence.

Independence and impartiality. In my view this is the only non-negotiable aspect of our process if the Members decide to preserve the AB. As my former colleague David Unterhalter used to say, “the virtue of independence may seem self-evident, but it is not to be taken for granted”.

The AB now has only four Members. The AB is on the verge of becoming non-operational. Before some Members decide to take other routes such as Article 25 or plurilateral agreements, it is essential, as the AB Chair said recently, that the Membership truly engages in a constructive dialogue and tries to come up with a compromise. You, the Members, need to ask yourselves, what is the contribution of the AB to the international rule of law? What does this paralysis do to the WTO Dispute Settlement System as a whole? This institution does not deserve to die through asphyxiation. You have an obligation to decide whether you want to kill it or keep it alive.

In their discussions, there are also topics that Membership may want to reflect under the current system.

Transparency. Membership has been pretending to be transparent, and the AB has been an accomplice to it. WTO hearings are not public. The fact that a few of them are broadcast, sometimes even days after the actual hearing takes place, in a room at the WTO headquarters is just simulating transparency. To truly achieve transparency, all WTO dispute settlement hearings should be broadcast live, of course always addressing any confidentiality consideration.

Damages. The great limitations or defects of the current prospective remedies system are well known. Back in 2002, Mexico, among other Members, made a first attempt to address one of the major defects of the DSU, the prospective nature of the remedies. The best deterrent for unilateral actions is that they are not free of consequences.

Remand. Remand is a tool that would greatly facilitate the work and streamline the dispute settlement process. It would be worthwhile to explore proposals that have already been tabled by some Members.

WTO and RTAs. Maybe the Membership could revive the discussion about the interactions between the WTO and regional agreements dispute settlement. Given the amount of expertise and knowledge developed over the past decades, the WTO could become the dispute settlement centre for all RTAs. We need to brand the name.

Spanish. Aunque algunos países de habla hispana presentan sus casos en español, no todos lo hacen o en algunos casos lo hacen de manera parcial. De alguna forma hemos sucumbido a que los procedimientos de solución de controversias se ventilen en inglés. Si este es el caso, dejemos de pretender y ahorremos dinero y recursos a la Organización. Si, por el contrario, queremos preservar el idioma, debemos de hacerlo relevante. Cela s'applique aussi en français. Aprovecho esta oportunidad para agradecer la valiosa labor de los intérpretes y traductores quienes realizan un trabajo espléndido que a veces no se valora lo suficiente. Confieso que soy su fan.

Although I've seen countries argue their cases in Spanish, not all Spanish-speaking countries plead in Spanish. In many ways, we have surrendered dispute settlement to English. If that is what you decide then let's stop the pretending game and accept that all disputes be adjudicated in English. We will save a lot of money and resources if we do so. If on the other hand, you want to preserve the Spanish language, you have to make it relevant. The same applies to French. I take this opportunity to give special thanks to our interpreters and translators who do a splendid job that sometimes is not valued enough. I am your fan.

Coming from a developing country and, now more often in developed countries, very often you hear in the same sentence that international trade, globalization, and liberalism are to blame for poverty, lost of jobs and lack of development. They are easy targets. They are faceless causes that can't defend themselves. Faulty internal industrial and agricultural policies, lack of rule of law, and corruption are hardly mentioned. The rules-based international trading system that I was mandated to protect contributes to global prosperity. The Membership should address how to spread across the populations of all its Membership the benefits of trade instead of finding ways to concentrate it. This organization needs to stop talking about barriers, and start building bridges for a better distribution of the benefits of international trade and to address the new challenges world international trade faces. I truly believe that the rules I contributed to uphold are helping the more than 50 million Mexicans who today live in extreme poverty, but much more needs to be done.

Globalization is a reality. Global value chains and global warming are just two examples to illustrate the fact that we are facing global challenges that can be addressed only with global solutions. Have no doubt, with or without the WTO, trade will continue, and globalization, and the technology that bolsters it, can't be stopped. But without a framework of binding and updated rules, anarchy and powerful actors, private and public, will take over. This will not be good, especially for those developing and least developed countries that require a system in which, to the eyes of the law, every country is equal.

My father and mother are two school teachers who, with honest and hard work, managed to raise a family. My brother has dedicated his life to help the communities in one of the poorest districts in Mexico City. My older sister is a human rights advocate, and my other sister is a hardworking and honest public servant. They are the ones who should be honoured today; I would not be here if it weren't for their love, example, and guidance. For the past years, one of my main goals was to show you that, despite what you hear in the news, Mexicans, like my family and many millions, are hardworking, honest, and decent people.

I have been to the moon. I have walked on it and can confirm that it was everything I expected and much more. I also realized how fragile it is. I hope you, the Membership, soon understand the importance of what you created and the value of its existence. As for me, few people can say they lived a dream. You made a dream come true and for that I will be eternally grateful.

Ricardo out.