

May 31, 2016

Ambassador Xavier Carim
Of South Africa
Chairman
Dispute Settlement Body
World Trade Organization
Geneva, Switzerland

Dear Mr. Chairman:

We write in the hope that we can be of some assistance to the Members of the World Trade Organization. As the thirteen living former Members of the WTO Appellate Body, we have followed closely and with some concern the recent deliberations of the Members of the WTO on the pending candidacy for reappointment of one of our successors on the Appellate Body. We recognize that this is a political decision that is reserved exclusively for the Members of the WTO in their role as the WTO Dispute Settlement Body. We recognize, too, that, because it includes the possibility of the reappointment of a Member of the Appellate Body to a second four-year term, the WTO Dispute Settlement Understanding contemplates also the possibility that a Member may not be reappointed.

This acknowledged, we think it urgent nonetheless to voice our consensus that this political decision by the Members of the WTO must never be made in such a way that could threaten to politicize WTO dispute settlement and imperil the impartial independence of every Member of the Appellate Body that is required by the WTO Rules of Conduct. The continued impartial independence of the WTO Appellate Body is essential to upholding the rule of law in international trade; moreover, we see it as a prerequisite to providing security and predictability for the rule-based multilateral trading system for the benefit of all of the Members of the WTO.

We emphasize that the concerns raised for us by the current reappointment process are wholly institutional. One Member of the Appellate Body has been singled out for criticism by one Member of the WTO by reference to rulings in certain appeals in which he was a Member of the division concerned. The criticisms that have been directed toward that one Appellate Body Member in the current process could just as easily have been directed toward any of the six other Appellate Body Members. As the six other Members of the Appellate Body have explained in a recent letter to the Members of the WTO, the rulings and the recommendations of the Appellate Body cannot be attributed solely to any one Appellate Body Member, because “our reports are reports of the Appellate Body.”

Throughout the first twenty years of the WTO and the Appellate Body, this has always been so. In always ruling, recommending, and reporting as one, the Members of the Appellate

Body have maintained and mutually reinforced the strength of their individual commitments to impartiality and independence. But if, now, the fact that a Member of the Appellate Body joined in the consensus on the outcome on a particular legal issue or on a particular dispute becomes for the first time a factor in a decision on that Member's reappointment, all of the accomplishments of the past generation in establishing the credibility of the WTO dispute settlement system can be put in jeopardy. This raises the possibility of inappropriate pressures by participants in the WTO trading system. There must be no opening whatsoever to the prospect of political interference in what must remain impartial legal judgments in the WTO's rule-based system of adjudication.

As our revered late colleague Julio Lacarte once said of any action that might call into question the impartiality and the independence of the Appellate Body, "This is a Rubicon that must not be crossed." The unquestioned impartiality and independence of the Members of the Appellate Body has been central to the success of the WTO dispute settlement system, which has in turn been central to the overall success of the WTO. Undermining the impartial independence of the Appellate Body now would not only call into question for the first time the integrity of the Appellate Body; it would also put the very future of the entire WTO trading system at risk.

From time to time, one or more of the Members of the WTO may differ with a decision reached by the Appellate Body, but this does not necessarily mean that the Appellate Body has acted outside its mandate in reaching that decision. Such differences are unavoidable in a rule-based system that seeks to resolve international disputes between disputing parties that maintain conflicting views of the meaning of the rules. Indeed, such differences are intrinsic to the very process of legal interpretation – the core competency of the Appellate Body.

A decision on the reappointment of a Member of the Appellate Body should not be made on the basis of the decisions in which that Member has participated as a part of the divisions in particular appeals, lest the impartiality, the independence, and the integrity of that one Member, and, by implication, of the entire Appellate Body, be called into question. Nor should either appointment or reappointment to the Appellate Body be determined on the basis of doctrinal preference, lest the Appellate Body become a creature of political favor, and be reduced to a mere political instrument. Rather, as provided in Article 17.3 of the WTO Dispute Settlement Understanding, the standard for both appointment and reappointment should be whether the person in question is "of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally."

Should WTO Members ever conclude that the Appellate Body has erred when clarifying a WTO obligation in WTO dispute settlement, the Marrakesh Agreement establishing the World Trade Organization spells out the appropriate remedial act. Article IX:2 of the Marrakesh Agreement, on "Decision-Making," provides, "The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements" by a "three-fourths majority of the Members." Any such legal interpretation would, of course, be binding in WTO dispute settlement. We observe that, to date, the Members of the WTO have not seen the need to take any such action.

Furthermore, and importantly, should WTO Members conclude now that they would like to do still more to help ensure the impartial independence of the Appellate Body, we suggest that

the current system of reappointment be abolished. Instead of one four-year term, with the possibility of a second four-year term, we recommend a single, longer term for all Members of the Appellate Body.

Mr. Chairman, we respectfully request that you circulate this letter to all the Members of the WTO. We ask also that you assure them that we remain, as always, eager to serve them in any way we can.

We thank you very much.

Sincerely,

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