WTO Dispute Settlement in 2016:
BLUE SKIES OR STORM CLOUDS AHEAD?

In 2015, the WTO Dispute Settlement Body faced unprecedented challenges. Many consider the large number of dispute reports a testament to the success of the WTO's dispute settlement system, but others fear that the future success of that system is by no means assured. Recently, there have been delays in the dispute settlement process. Some argue that the factual intensity and overall complexity of disputes is pushing the limits of the system's capacity and stretching the resources of the WTO's Secretariat to the breaking point. Moreover, the limited outcomes of the recent Nairobi Ministerial Conference demonstrate that the WTO's negotiating branch itself is beset with stasis and challenges, leading WTO Members to look more frequently to the dispute settlement system for answers to problems that cannot be overcome through negotiations. A further challenge emerges with the conclusion of the Trans-Pacific Partnership Agreement (TPP), and progress on other "mega-regionals." Some suggest that the dispute settlement mechanisms in regional trade agreements (RTAs) may offer appealing alternatives to the WTO, especially where underlying disciplines in RTAs are more expansive than those offered under the WTO covered agreements.

Sidley's Geneva team, in an initiative led by **Christian Lau** and **Jan Yves Remy**, brought together a panel of five leading WTO law practitioners to talk freely about these challenges. The panel for "WTO Dispute Settlement in 2016: Blue Skies or Storm Clouds Ahead?" included **James Flett** (EU Commission, Legal Service); Professor **Gabrielle Marceau** (Professor, UNIGE and Counselor, WTO Legal Affairs Division); **Koji Saito** (Director, Japan's Ministry of Foreign Affairs); **Iain Sandford** (Partner, Sidley) and **David Unterhalter** (Former Appellate Body Member). Jan Yves Remy moderated the session.

Gabrielle Marceau kicked off the discussion, introducing the topic of interaction between RTAs and the WTO. The panel debated a number of points. It was suggested that RTA dispute settlement mechanisms will never replace those of the WTO. They nevertheless played a useful role in providing new ideas that could one day be incorporated into the WTO dispute settlement framework. The recent Appellate Body decision in *Peru – Agricultural Products* confirmed that the Appellate Body is clearly not in favour of allowing RTA provisions to displace or exclude the role of the WTO dispute settlement system in applying the disciplines of the WTO covered agreements.

The panel addressed the interesting question of whether the WTO could be used as a forum to resolve disputes under RTAs. The WTO's institutional experience and capacity means that it could, in principle, provide a useful framework for resolving issues arising beyond the WTO covered agreements. The possibility of connecting WTO dispute settlement and the proposed Trade in Services Agreement (TISA) was raised. So too was the possibility that special terms of reference for WTO panels, or a WTO arbitration, could address WTO-plus issues relating to RTAs, even without any formal change to the WTO Agreement.

Koji Saito introduced a discussion of the institutional balance between the WTO's dispute settlement system and the "political" organs through which Members make new rules and administer existing ones. The group discussed the slow progress of multilateral negotiations and the pressures placed on dispute settlement. It was suggested that the system itself could handle this perceived "disequilibrium," and that it had not appeared to trigger judicial activism thus far. There is a possibility, however, that there may be a need to move away from the consensus principle in the future. The experience within the European Union's political system could well serve as an example of how this could evolve.

A question was raised about the role of WTO committees in refining and developing new rules and principles to address trade issues. Do the Appellate Body's decisions in *U.S. – Clove Cigarettes* and *U.S. – Tuna II (Mexico)*, which relied on WTO Committee Decisions as "subsequent agreements" relevant to the interpretation of treaty provisions, provide an approach that allows panels and the Appellate Body to take account of Members' decisions other than formal Ministerial Conference decisions? Several panelists emphasized that committee decisions are decisions by Members which should be respected. The WTO should be proud of its regular work, including that of committees. Indeed, there is a question of whether the concept of "negotiating rounds" is outdated; instead, the WTO should be understood as a permanent forum for ongoing negotiations.

Turning to the problems besetting the dispute settlement system itself, David Unterhalter led a discussion focused on possible procedural innovations. It was noted that the current system lacks many of the procedural innovations seen in domestic systems and also lacks rules customized to the different types of proceedings. However, in discussion, the panel agreed that it is possible to introduce at least some procedural innovations, even in the absence of formal reform. In order to increase the efficiency of proceedings, it is important, for instance, to clearly distinguish which facts are in dispute. Panels should be encouraged to identify factual findings more clearly, and parties should work harder to identify agreed facts. It was suggested that provisions relating to "good offices" could be used to facilitate the identification of agreed facts, thereby relieving the panel — and the system generally — of unnecessary complexity and delay.

Another area in need of reform relates to the use of expert evidence in WTO dispute settlement. In David Unterhalter's view, mechanisms could be developed to ensure that experts from both parties work together to narrow down their different assessments to the points of real contestation. Others commented that experience so far with "expert testimony" at the panel stage revealed that it may be effective, but its utility in the WTO context was limited in the absence of a process for cross-examination. It was suggested that one option for reform may be the adoption of working procedures mandating that evidence not be accepted unless experts are available for questioning during the substantive meetings of the panel with the parties. One panelist emphasized the tension regarding the WTO standard of review, whereby, on the one hand, panels are cautioned not to re-assess the facts, including the level of risk (for instance in SPS cases), and, on the other hand, panels are assisted by experts to better assess such risks.

James Flett then led the panel in a discussion of the use of economic evidence in WTO disputes. While acknowledging that economic analysis and expert evidence usually contribute to WTO dispute settlement, the costs to the system and the parties need to be considered. For example, in the context of a "retaliation" arbitration involving the quantification of the level of nullification and impairment, it is questionable whether the degree of economic analysis being undertaken is warranted. Panelists agreed that in some cases economic analysis may not be of much help, but noted that there were some concepts under the covered agreements that, to be properly interpreted, required the help of economists and economic evidence. As a practical matter, there is some inevitability to the "arms race" of providing economic evidence as litigants become more and more sophisticated in their use of economic arguments to buttress their cases. In the current environment, it is important that adjudicators have access to economic expertise to decide the evidence being presented to them.

To close, Iain Sandford highlighted several points relevant to the manner in which state-owned enterprises (SOEs) have become an increasingly prominent feature in dispute settlement in the last 20 years. He argued that, in recent years, Members have increasingly used trade remedy measures to address alleged distortions caused by SOEs, for instance, through use of normal value cost adjustments in dumping cases or when identifying subsidies. Discussion among the panelists highlighted that new trade agreements, notably the TPP adopted specific, WTO-plus rules for SOEs. There was some debate about whether specific rules for SOEs were necessary or appropriate. It was notable, nevertheless, that disputes arising from WTO-plus SOE rules in TPP would inevitably be litigated under the TPP dispute settlement framework. The panel highlighted that issues pertaining to SOEs are not limited to emerging economies, but also impact "older" WTO Members, which is especially important to consider in the regulation of energy markets.

Jan Yves Remy wrapped up the discussion by returning to the theme of the session: blue skies or storm clouds ahead? The discussion showed that both sunscreen and umbrellas are required as Members continue to deal with new challenges from both outside and within the existing WTO dispute settlement system.

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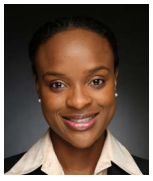

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