

16 WTO Members Establish Multi-Party Interim Appeal Arbitration Arrangement (MPIA) – Standing Pool of 10 Appeal Arbitrators to be Established by June 28th

On 27 March 2020, the following sixteen WTO Members issued a joint statement declaring the creation of a Multi-Party Interim Appeal Arbitration Arrangement (MPIA) for allowing appeals of panel reports in trade disputes:

1. Australia
2. Brazil
3. Canada
4. China
5. Chile
6. Colombia
7. Costa Rica
8. European Union
9. Guatemala
10. Hong Kong
11. Mexico
12. New Zealand
13. Norway
14. Singapore
15. Switzerland
16. Uruguay

The MPIA addresses the current suspension of the WTO Appellate Body due to the blockage of new members from being appointed (see “And then there was One... the Appellate Body Situation”). Other WTO Members can join the MPIA by notification to the Dispute Settlement Body (DSB). The MPIA is intended to remain in effect only until the Appellate Body is again fully functional.

Like the EU-Canada and EU- Norway agreements (see “Norway joins Canada and the European Union in Establishing an Interim WTO Appeal Arbitration System”), the MPIA establishes an appeal arbitration procedure under Article 25 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In disputes between the participating WTO Members, it replaces the original appeal procedures under Articles 16.4 and 17 of the DSU. It applies to any future dispute between any two or more participating Members, including the compliance stage of such disputes, as well as to any such dispute pending on 27 March 2020 (except if the interim panel report, in the relevant stage of that dispute, has already been issued on that date).

The principal differences between the two previous agreements and the MPIA are as follows:

Creation of a standing pool of appeal arbitrators: Instead of being heard by “three former members of the Appellate Body, serving as arbitrators”, appeals will be heard by three appeal arbitrators selected from a pool of 10 standing appeal arbitrators composed by the participating Members. The pool of arbitrators will comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They will be unaffiliated with any government. The composition of the pool of arbitrators will ensure an appropriate overall balance. There is a formal procedure for the nomination of candidates by the participating WTO Members by 29 April 2020 and a pre-selection process for those candidates which is to be completed by 29 May 2020. The pool of arbitrators will be composed by consensus of the participating Members by 28 June 2020.

Separate support structure from WTO Secretariat: The appeal arbitrators will be provided with “appropriate administrative and legal support, which will offer the necessary guarantees of quality and independence, given the nature of the responsibilities involved”. The support structure will be entirely separate from the WTO Secretariat staff and its divisions supporting the panels. Thus, it will be answerable, regarding the substance of its work, only to the appeal arbitrators.

Ability to streamline appeal procedures: The original 90-day period for appeals is affirmed and arbitrators are empowered to take appropriate organizational measures to streamline the proceedings – such as page limits, time limits, deadlines and decisions limiting the length and number of hearings required – provided there is no prejudice to the procedural rights and obligations of the parties and due process. If necessary, arbitrators may make non-binding proposals to exclude claims based on the alleged lack of an objective assessment of the facts pursuant to Article 11 of the DSU. That said, if all else fails, the parties may agree to extend the 90-day time period upon a proposal from the arbitrators.

Tereposky & DeRose LLP regularly provides advice and acts as counsel in international trade disputes, including WTO dispute settlement proceedings. If you have any questions about the foregoing subject, please do not hesitate to contact us.

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