

Statement by the United States at the Meeting of the WTO Dispute Settlement Body

Geneva, February 28, 2020, Reconvened on March 5, 2020

8. UNITED STATES – COUNTERVAILING MEASURES ON SUPERCALENDERED PAPER FROM CANADA

A. REPORT OF THE APPELLATE BODY (WT/DS505/AB/R AND WT/DS505/AB/R/ADD.1) AND REPORT OF THE PANEL (WT/DS505/R AND WT/DS505/R/ADD.1)

- The United States has serious concerns with the documents being considered by Members under this agenda item.
- In particular, the document circulated as WT/DS505/AB/R heightens the concerns that the United States has been raising about the Appellate Body and its effect on the WTO dispute settlement system.
- As the United States will explain in this statement, the document is not a valid Appellate Body report and represents the latest example of the Appellate Body’s failure to respect WTO rules.
- The document circulated by the Appellate Body is not a valid Appellate Body report under Article 17 of the DSU.¹
- The document was not provided and circulated on behalf of three valid Appellate Body members as required by Article 17.1. Extraordinarily, none of the individuals serving on this appeal – Mr. Ujal Bhatia (presiding member), Mr. Thomas Graham, or Ms. Hong Zhao – was a valid member of the Appellate Body when the document was issued to WTO Members.
- With respect to the first two, this dispute presents the familiar issue of individuals continuing to serve and decide appeals after their term of appointment has expired. The U.S. position that this is illegitimate is well known.
- But we will first discuss service on this appeal by Ms. Zhao. This is an unprecedented situation. This individual cannot be, and is not, a member of the Appellate Body because she is not eligible under the DSU.
- On January 31, 2020, the United States informed the WTO Director-General and the DSB Chairperson that it had become aware of information that indicates this individual is not “unaffiliated with any government” as required by Article 17.3 of the DSU and,

¹ *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”).

therefore, is not a valid member of the Appellate Body.

- Article 17.3 of the DSU provides that persons comprising the Appellate Body “shall be unaffiliated with any government.” To “affiliate” is to “attach to or connect with an organization,”² and an affiliation is a “connection, association.”³
- Ms. Zhao is affiliated with the Government of the People’s Republic of China and therefore cannot serve as a member of the Appellate Body.
- According to official Chinese government documents, Ms. Zhao currently serves as Vice President and a “leader” of China’s “Ministry of Commerce Academy of International Trade and Economic Cooperation” (MOFCOM-AITEC).
- When Ms. Zhao was nominated as a candidate for the Appellate Body, her *curriculum vitae* (CV) indicated that she was at that time serving as the “Vice President of the Chinese Academy of International Trade and Economic Cooperation.”⁴ Ms. Zhao’s CV did not reflect the official title for this entity: the “*Ministry of Commerce Academy of International Trade and Economic Cooperation*.”⁵ Although there are different potential translations for the name of this entity,⁶ the official title in Chinese includes “Ministry of Commerce.”
- Ms. Zhao continues to serve as Vice President of the Ministry of Commerce Academy of International Trade and Economic Cooperation.⁷ The “leadership” page on the MOFCOM-AITEC website also identifies Ms. Zhao among its six current leaders.⁸

² *The New Shorter Oxford English Dictionary* (1993) at p. 35 (definition 2: “Adopt as a subordinate member of a society, branch of an organization or company, etc.; attach *to* or connect *with* an organization etc.”). WTO Members in 1995 considered that, in light of Article 17.3, persons serving on the Appellate Body “should not therefore have any attachment to a government that would compromise their independence of judgment.” Recommendations by the Preparatory Committee for the WTO approved by the Dispute Settlement Body on 10 February 1995 (WT/DSB/1), para. 7.

³ *The New Shorter Oxford English Dictionary* (1993) at p. 35 (definition 2(b)).

⁴ JOB/DSB/CV16/3.

⁵ See, e.g., MOFCOM-AITEC Website, Profile page, Ms. Zhao’s biography (indicating at the bottom of the webpage “All rights reserved: Ministry of Commerce Academy of International Trade and Economic Cooperation”) The biographies for three of the six MOFCOM-AITEC vice presidents refer to the “Ministry of Commerce Academy of International Trade and Cooperation”. Two do not refer to MOFCOM-AITEC. Ms. Zhao’s biography is the only one that refers to MOFCOM-AITEC as the “Chinese Academy of International Trade and Economic Cooperation.”

⁶ See, e.g., Notice of the Ministry of Commerce on the Establishment of Institutions (translating the name of this entity as “International Trade and Economic Cooperation Research Institute **of the Ministry of Commerce**”) (emphasis added).

⁷ MOFCOM-AITEC Website, Profile page, Ms. Zhao’s biography.

⁸ MOFCOM-AITEC Website, Leadership.

- This entity is a “public institution” under Chinese law that is affiliated with and subordinate to China’s Ministry of Commerce. In the “Notice of the Ministry of Commerce on the Establishment of Institutions,”⁹ China explicitly identifies MOFCOM-AITEC’s status as a “public institution.” Under Chinese law, a “public institution” refers to “public service organizations that are established by the state organs or other organizations by using the state-owned assets for the purpose of engaging in activities of education, science and technology, culture and hygiene.”¹⁰
- MOFCOM-AITEC is also an “affiliated” entity “subordinate” to China’s Ministry of Commerce. The “Notice of the Ministry of Commerce on the Establishment of Institutions” sets out that MOFCOM-AITEC is a “Public Institution[] Directly under the Ministry of Commerce.”¹¹ MOFCOM’s website similarly lists MOFCOM-AITEC as a “public institution under the Ministry of Commerce.”¹² Further, Article 3 of the “Regulations on the Personnel Management of Public Institutions” indicates that the “competent departments of public institutions [e.g., MOFCOM] shall be specifically *responsible for* the personnel management of their *affiliated* public institutions [e.g., MOFCOM-AITEC].”¹³ And MOFCOM’s 2019 annual budget states that “[w]ork units under the Ministry of Commerce budget include ... *subordinate* public institutions,”¹⁴ of which MOFCOM-AITEC is one.
- MOFCOM-AITEC’s budget is also part of MOFCOM’s budget, such that the salary for Ms. Zhao’s Vice President position at MOFCOM-AITEC is funded by the Government of the People’s Republic of China.¹⁵ For example, MOFCOM’s 2019 annual budget states that “[w]ork units under the Ministry of Commerce budget include ... subordinate public institutions.”¹⁶ The 2019 budget lists 33 constituent “work units” that fall under it, including both MOFCOM itself as well as MOFCOM-AITEC.¹⁷ MOFCOM’s 2019

⁹ Notice of the Ministry of Commerce on the Establishment of Institutions, Section III (listing the “Public Institutions Directly Under the Ministry of Commerce”).

¹⁰ Interim Regulation on the Registration of Public Institutions, Article 2.

¹¹ Notice of the Ministry of Commerce on the Establishment of Institutions, Section III.

¹² MOFCOM Website, Organization.

¹³ Regulation on the Personnel Management of Public Institutions, Article 3 (third paragraph) (*italics added*).

¹⁴ MOFCOM 2019 Budget, p. 6. This is also represented graphically on p. 7.

¹⁵ MOFCOM-AITEC’s status as a public institution that is affiliated with and subordinate to MOFCOM demonstrates that her position as Vice President, and one of six “leaders” of that entity, is not a function independent of the Government of the People’s Republic of China. *See* Recommendations by the Preparatory Committee for the WTO approved by the Dispute Settlement Body on 10 February 1995 (WT/DSB/1), para. 7 (expressing a view that “[t]his requirement [of not having an attachment to a government] would not necessarily rule out persons who, although paid by a government, serve in a function rigorously and demonstrably independent from that government”).

¹⁶ MOFCOM 2019 Budget, p. 6. This is also represented graphically on p. 7.

¹⁷ MOFCOM 2019 Budget, p. 7 (listing MOFCOM-AITEC in row 23).

budget indicates aggregate expenses for salaries, which would reflect the amount for all 33 constituent “work units”, including MOFCOM-AITEC.¹⁸ China’s National Audit Office carried out in 2016 an audit of MOFCOM’s 2015 budget, and this audit indicates specific amounts from MOFCOM’s budget allocated to and expended by MOFCOM-AITEC for salary expenses.¹⁹

- None of this information was disclosed to WTO Members when this individual was nominated as a candidate for the Appellate Body.
- In sum, Ms. Zhao is Vice-President of MOFCOM-AITEC, a “public institution” that is “affiliated,” “directly under,” and “subordinate” to MOFCOM. Salary expenses of MOFCOM-AITEC form part of MOFCOM’s budget, which means the government funds Ms. Zhao’s MOFCOM-AITEC salary. Thus, Ms. Zhao is affiliated with the Government of the People’s Republic of China.
- Because Ms. Zhao is not “unaffiliated with any government,” contrary to the requirement of Article 17.3 of the DSU, Ms. Zhao is not a valid member of the Appellate Body.
- This alone renders the document circulated as WT/DS505/AB/R invalid and incapable of being an Appellate Body report because the appellate “report” has not been provided and circulated on behalf of three Appellate Body members, as required under DSU Article 17.1.
- There are, in addition, two further reasons the document is not an Appellate Body report within the meaning of Article 17.
- With respect to Mr. Bhatia and Mr. Graham, the terms for these individuals expired on December 10, 2019.²⁰ The document was circulated to WTO Members on February 6, 2020, nearly two months after their terms had expired.
- The DSB had taken no action to permit either individual to continue to serve as an Appellate Body member. Therefore, neither individual was an Appellate Body member on the date of circulation of this document.
- The document is also not a valid Appellate Body report because it was not issued within 90 days, consistent with Article 17 of the DSU. The mandatory language in Article 17.5

¹⁸ MOFCOM 2019 Budget, p. 17.

¹⁹ Central Department Work Units 2015 Budget Implementation and Other Matters Audit Results (National Audit Office, Announcement Number 5 (2016), June 29, 2016), Ministry of Commerce 2015 Financial Appropriations Budget Implementation Status for Key Audit Work Units, Appendix 2.

²⁰ Dispute Settlement Body, Minutes of the Meeting Held on November 25, 2015 (WT/DSB/M/370), para 7.3 (“[H]e wished to propose that the DSB agree, at the present meeting, to reappoint Mr. Ujal Singh Bhatia and Mr. Thomas Graham for a four-year term, respectively, starting on 11 December 2015.”) and para. 7.4 (The DSB so agreed.”).

of the DSU states: “In no case shall the proceedings exceed 90 days.” And that provision specifically states that “the proceedings” encompass “the date the Appellate Body circulates its report.”

- In fact, 528 days passed between the date of the Notice of Appeal in this dispute (August 27, 2018) and circulation of the document as a purported Appellate Body report (February 6, 2020).
- Any one of these three reasons would suffice to prevent this document from serving as an Appellate Body report. But the concerns raised by the service of Ms. Zhao are compounded when Members consider the substance of this appeal.
- Members may recall that one appeal in this dispute involved an alleged unwritten measure that was considered “ongoing conduct”. The evidence that allegedly demonstrated the existence of that “ongoing conduct” measure consisted of actions by the U.S. Department of Commerce in 9 investigations. One of those involved Canada, and the countervailing duty was terminated in the course of this proceeding. Another investigation involved India. And 7 of the 9 investigations involved subsidies provided by China.
- Thus, this individual, affiliated with the Government of China, participated in an appeal in which the conduct complained about related almost exclusively to China.
- And so, besides the invalidity of this individual to serve on the Appellate Body, their participation in this particular appeal is impossible to see as impartial.
- The United States has serious substantive concerns about the appellate document as well. But given the invalidity of this individual to serve on the Appellate Body, it is not necessary to consider that document further. There is no Appellate Body report before the DSB today, and the United States objects to the adoption of this document.