ABCI Note

Fall 2023

Dear reader:

ABCI Institute is happy to share the Fall 2023 edition of ABCI newsletter.

The present newsletter provides the reader with a quick glimpse of the most important recent trade facts, and information about events recently carried out, including comments on the WTO Investment Facilitation for Development Agreement, the BRICS expansion, the comeback of the industrial policy debate, the UK proposal for the WTO Dispute Settlement System, and the proposed amendments to the US AD/CVD regulations.

This edition brings the contribution of Dayene Peixoto, Coordinator of Multilateral Disciplines at the Brazilian Ministry of Development, Industry, Trade, and Services (MDIC).

Enjoy the reading; comments are welcome!

Upcoming Events:

- ABCI's XIX Symposium on International Trade is expected to be held in the first week of December 2023: Stay tuned for more information!

Short notes:

- **The WTO Investment Facilitation for Development Agreement (Dayene Peixoto, Coordinator of Multilateral Disciplines at MDIC)**

On July 6th, the WTO Joint Statement Initiative (JSI) on Investment Facilitation for Development concluded the text negotiations for an Investment Facilitation for Development Agreement. More than 110 WTO Members take part in the initiative launched in 2017 by a group of developing and least-developed countries.

The negotiations for an Investment Facilitation for Development Agreement were formally launched in September 2020, aiming to improve investment climate by enhancing transparency, predictability, and simplification of investment-related measures; strengthening the dialogue between governments and investors; promoting both Responsible Business Conduct (RBC) and Special and Differential Treatment (SDT).

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One of the main purposes of the Agreement is to assist countries, notably the developing and the least developed ones, in attracting sustainable Foreign Direct Investment (FDI). The substantive commitments in the document cover principles and standards of RBC with the aim of contributing to sustainable development in all sectors. Market access, investment protection, investor-state dispute settlement, government procurement and certain subsidies fall outside the scope of the instrument. One key component of the Agreement is to provide SDT, including technical assistance and capacity building to developing and least developed countries.

The next steps for the initiative at the Organization include carrying out of an outreach process with other WTO Members; the negotiations to define the legal architecture of the Agreement; and the intensification of the Needs Assessment process. For the legal architecture there are currently two possibilities to go forward: (1) multilaterally, in Annex 1 of the WTO framework; or (2) plurilaterally, in Annex 4 of the WTO framework. Both decisions for legal definition require consensus of the Organization's Members.

Full implementation of the Agreement in Brazil will entail commitments regarding electronic availability of up-to-date information on measures related to investment and on requirements and procedures for the entry and temporary stay of persons. As for requirements and procedures for investing, the information must be in one of the official languages of the WTO (English, Spanish, or French). The Brazilian government also needs to evaluate authorization procedures to ensure simplified, impartial, and adequate procedures; to establish and/or monitor the periodic review process of measures related to investments to determine their maintenance, modification or revocation; to promote the permanent improvement and updating of the electronic database of domestic suppliers for foreign investors; to implement programs to increase the capacity of local providers; and to establish cooperation mechanisms with other countries, among other measures.

- **The BRICS expansion**

The BRICS group of major emerging economies - Brazil, Russia, India, China and South Africa - held its 15th summit in Johannesburg, from August 22 to 24, where significant economic issues emerged that are worth taking note. The summit's declaration can be read here.

First, the expansion of membership to include Argentina, Egypt, Iran, Ethiopia, Saudi Arabia and the United Arab Emirates as of January 2024 will increase the group's international influence. In addition to representing almost 30% of the world's GDP, 47% of global population, 20% of world exports and imports, and having sovereignty over significant reserves of critical raw materials and minerals, the BRICS+6 will encompass 72% of OPEC's[1] and 58% of the world's[2] crude oil reserves.

For international trade transactions, proposals were made to create a BRICS currency and for increased use of local currencies, not only with a view of decreasing costs but also as insurance against dollar-related sanctions. While the first option may not be feasible in the short or medium term, the latter is already under way. The New Development Bank (NDB - the BRICS bank) General Strategy for 2022-2026 calls for 30% of its financing to be done in member countries' local currencies. According to its president, for 2023 and 2024, it has

[1] OPEC share of world crude oil reserves 2021 at https://www.opec.org/opec_web/en/data_graphs/330.htm
[2] Oil reserves by country at https://www.worldometers.info/oil/oil-reserves-by-country/

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76 projects in the pipeline totaling $18.2 billion. Domestic currency use by China has been increasing in the period 2017-2021, reaching a record in 2021 when half of its international trade and investment transactions were settled in *renminbi* (RMB).[3]

With regard to the WTO, the members reaffirm their support to a rules-based multilateral trading system, with special and differential treatment (S&DT) for developing countries, including Least Developed Countries; also to a fully and well-functioning two-tier binding WTO dispute settlement system by 2024; as well as to the achievement of a fair and market-oriented agricultural trading system; and to the need to deliver on agriculture reform in accordance with the mandate in Article 20 of the Agreement on Agriculture. "BRICS members are also concerned with trade restrictive measures which are inconsistent with WTO rules, including unilateral illegal measures such as sanctions, that affect agricultural trade."[4]

Addressing the trade policy tools of the BRICS countries on the eve of the summit, a Global Trade Alert (GTA) report showed that while BRICS countries rely predominantly on subsidies to import competing firms and import tariff increases, non-BRICS prefer mostly export bans, licensing requirements and export taxes.[5] Another GTA report shows the dominance of China on trade flows within the group. "For 20 years about a fifth of China's commodities have come from [the other BRICS countries]. Meanwhile, since 2020 a third of [BRICS] commodities have been exported to China–a fraction that has more than doubled since China joined the WTO."[6] To secure its need for commodity supplies, there has been "significant Chinese development financing for minerals and mining projects, in particular in Brazil and Russia[:] since 2010 Brazil has received almost $11.5 [billion] in Chinese financial support–Russia has received over $60 billion."[7]

- **The comeback of the industrial policy debate**

For years the debate on industrial policy has been discouraged. According to "The Return of the Policy That Shall Not Be Named: Principles of Industrial Policy," a 2019 IMF working paper[8], "Industrial policy is tainted with bad reputation among policymakers and academics and is often viewed as the road to perdition for developing economies." Now, according to "Economists Reconsider Industrial Policy," a recent *Project Syndicate*

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[3] See Canuto at https://www.policycenter.ma/publications/rising-use-local-currencies-cross-border-payments
[4] XV BRICS Summit Decaration
[5] See Reigado and Evenett at https://www.globaltradealert.org/reports/download/116
[6] See Brotto at https://www.globaltradealert.org/reports/download/117
[7] Ibid
[8] Cherif and Hasanov (2019): *The Return of the Policy That Shall Not Be Named: Principles of Industrial Policy*. IMF Working paper. https://www.imf.org/en/Publications/WP/Issues/2019/03/26/The-Return-of-the-Policy-That-Shall-Not-Be-Named-Principles-of-Industrial-Policy-46710

op-ed from Dani Rodrik, Réka Juhász and Nathan Lane, "the debate over its effectiveness is reaching fever pitch."[9]

The *Project Syndicate* op-ed is a condensed version of a more detailed working paper entitled "The New Economics of Industrial Policy."[10] In the working paper, the authors:

- survey standard arguments both in favor of and against the use of industrial policy. Considering such arguments, they ask why the debate on industrial policy in economics has focused on the "whether" ("should governments carry out industrial policy?") rather than on the "how" ("how should industrial policy be carried out?");

- describe the actual practice of industrial policy, which typically targets outward-orientation and export promotion rather than inward-looking, protectionist trade. They also mention that advanced economies are heavier users of industrial policy today than developing countries;

- discuss how industrial policy works. They argue that early studies that show a negative correlation between industries that receive governmental help and their economic performance are uninformative because they do not distinguish between the extreme cases of rent-seeking and developmental governments – or anything in between. Recent papers employing new identifications strategies yield results that are much more favorable to industrial policy;

- survey recent studies that revisit the industrial policy experience in East Asia countries (Japan, South Korea, and China), including new empirical studies. They draw lessons from these experiences but also show the difficulty of deriving broad generalizations for other countries and time periods from these experiences without taking institutional differences into consideration;

The last section addresses three challenges: (i) to characterize an alternative model of regulation, based on interactive collaboration between government and firms; (ii) to deviate from the classic instrument of subsidies and tariffs and include customized public services and inputs that are tailored to firms' needs and target specific obstacles to productivity enhancing investments; and (iii) to pay more attention to productivity in services, and come up with "industrial" policies that are more suited to services in order to create jobs as manufacturing continues to employ fewer workers.

We could add a fourth challenge: adapting, designing, and empowering international and domestic institutions to prevent the overuse of industrial policy and the capture of the state by rent-seeking groups, both in developed and developing economies.

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[9] Rodrik, D.; Juhász, R. and Lane, N.: *Economists Reconsider Industrial Policy*. https://www.project-syndicate.org/commentary/new-economic-research-more-favorable-to-industrial-policy-by-dani-rodrik-et-al-2023-08

[10] Available at https://drodrik.scholar.harvard.edu/sites/scholar.harvard.edu/files/dani-rodrik/files/the_new_economics_of_ip_081423.pdf

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- **Sunset Review for the WTO Dispute Settlement System?**

The Appellate Body of the World Trade Organization (WTO) became inoperative in 2019 due to a blockage in the appointment of new Appellate Judges, resulting in the WTO lacking the number of judges necessary to hear an appeal. Some WTO members created the Multi-Party Interim Appeal Arbitration Arrangement as an alternative method to resolve disputes while the Appellate Body remains inoperative.

Geneva-based reporter Ravi Kanth reported on an informal process to discuss potential paths to reform the WTO dispute settlement system. The United Kingdom presented a proposal that includes (1) alternative dispute resolution mechanisms, (2) streamlined panel process, (3) accessibility, (4) accountability, and (5) focus on what is necessary to resolve the dispute. One element of the "accountability" measures would be a sunset provision on adjudicative provisions. Reportedly supported by the United States, many other WTO members strongly opposed the sunset provision.

The sunset review provision, however, does not seem consistent with the criticism from the United States that led to the impasse and the crisis of the WTO dispute settlement system. The United States repeatedly stated it would not accept a system that creates a body of trade jurisprudence where prior decisions have precedential value. The United States argues that the Appellate Body overreached its mandate, increased its own power, departed from mandatory rules set out by the WTO members, took away rights, and imposed new obligations through erroneous interpretations of WTO agreements. These critiques and the fact that the panels and appellate decisions constantly cited their prior decisions imposed a precedential system that, for the United States, departed from the dispute-centered resolution.

The United States defends a dispute resolution system akin to commercial arbitration, in which *ad hoc* tribunals are impaneled and resolve particular disputes and that the panel decisions are applied only to the parties in the dispute. A sunset review provision on adjudicative measures would be superfluous in a system where prior decisions would apply only to the parties to the dispute, and that would not have precedential value.

A much more complex (and, for some, problematic) discussion would be if the sunset provision advocated by the United Kingdom and the United States is not limited to adjudicative measures but aimed at a broader array of commitments. The United States-Mexico-Canada Agreement (USMCA) establishes a review and term extension mechanism for the entire Agreement. Under the USMCA, the Agreement shall terminate 16 years after the date of its entry into force unless each party confirms it wishes to continue for a new 16-year term. That is precisely what former USTR Ambassador Robert Lighthizer defends to the WTO--as a whole--in his later book "No Trade is Free."

No formal document has been presented laying out the United Kingdom's proposed reforms. It remains to be seen if the sunset review provision is circumscribed to the WTO dispute settlement system or applies to all WTO Agreements. However, the formal position adopted by the United States seems incompatible with support for sunset review to adjudicative measures. Either the United States is changing its position, or we might have misunderstood the scope of the reported United Kingdom's proposal.

- **U.S. Department of Commerce's controversial proposals to AD/CVD regulations**

On May 9, 2023, the Department of Commerce published a request for comments on several amendments it is proposing on antidumping duty (AD) and countervailing duty (CVD) regulations. The proposed rule is meant to revise procedures, codify areas of practice, and enhance methodologies and analyses regarding price and cost distortions. The deadline for comments ended on July 10, 2023, and all comments were made available through the Federal eRulemaking Portal (docket number 230424-0112).

Several aspects of AD/CVD regulations were addressed by Commerce in the proposed rule. Some of the topics appear to be more procedural, such as the treatment of references, citations, and hyperlinks provided in submissions; scope, circumvention and covered merchandise issues; the use of previous analysis and calculation memoranda from other segments or proceedings; and notices of subsequent authority submitted on the record. Other topics, however, appear to have a substantial impact on the scope of Commerce's investigations and methodology of calculation, raising considerable concern among other countries.

For that matter, Commerce is proposing to address and codify what it calls foreign government inactions that would benefit foreign producers. That would include not only unpaid or deferred fees, fines, and penalties, but also what Commerce considers weak, ineffective, or nonexistent property, intellectual property, human rights, labor, and environmental protections. Commerce considers that the lack of those protections impacts the costs and, therefore, the prices of products, creating an unlevel playing field for American producers. According to Commerce, "foreign government inaction could result in costs and prices that are unreasonably suppressed and create an unlevel playing field between producers and suppliers in countries in which governments provide weak, ineffective, or nonexistent property (including intellectual property), human rights, labor, and environmental protections, and producers and suppliers in countries in which the governments provide and enforce such protections."

Commerce is also proposing to create new regulations related to the determination of Particular Market Situation (PMS), addressing the elements the department may consider in determining if a particular market situation exists that might distort costs of production. That includes 12 examples of scenarios in which Commerce might determine the existence of a PMS. Commerce proposal is based on a previous consultation that addressed three main topics: "(1) identify information which they believe Commerce should consider in determining if a PMS exists which distorts the costs of production . . .; (2) identify information which they believe

Commerce should not be required to consider when determining if a PMS exists; and (3) provide comments on adjustments which Commerce may make to its calculations when it determines the existence of a PMS . . ..”

Finally, Commerce intends to incorporate into the regulations its recurrent practice on the following topics: mandates; treatment of outstanding loans as grants after three years of no payments of interest and principal; the use of an outside investor standard in determining the benefit of an equity infusion; the allocation period in measuring the benefit of an equity infusion; the allocation period in measuring the benefit of debt forgiveness; the treatment of certain income tax subsidy benefits as not tied with respect to particular markets or products; the use of a five-year period to determine if the premium rates charged on export insurance are inadequate to cover long-term operating costs and losses; and the use of alternative methodologies in attributing export subsidies and domestic subsidies to certain products exported and/or sold by a firm.

The law firm Sidley summarizes the nature of Commerce’s proposed regulations as follows:

> *This Update focuses on three of the most important new tools presented in these proposed regulations: (1) tools to address alleged government “inaction” related to property rights (including intellectual property), human rights, labor, and environmental protection issues; (2) tools to address potential excess capacity and oversupply of certain major inputs in the international market; and (3) tools to address transnational subsidization. These tools may result in new investigations, more rigorous administrative proceedings with higher burdens, and substantially increased AD/CVD rates in future proceedings. They may also be inconsistent with current U.S. law and the United States’ World Trade Organization (WTO) obligations.*

Commerce received 55 comments on the proposed rule, 5 of which from foreign governments (Brazil, Canada, China, Mexico, South Korea, and Vietnam) and the rest from private parties (law firms, companies and chambers of commerce and associations). Mexico’s main concern is that the proposed regulation would withdraw the restriction that precludes Commerce from countervailing transnational subsidies (subsidies provided by a government for production in another country), for it is supported by the WTO Agreement and it is not clear how Commerce would investigate an alleged subsidy provided by a government that is not part of the investigation. The topic of transnational subsidies is also reason for concern and criticism from the Korean government, besides the arguments it extensively develops against the proposed changes to the PMS concept. South Korea affirms that PMS concept is intended to be used as an exception, and not as a rule, and that “[a]ntidumping duties are not intended to provide a tool to address concerns arising from government subsidies, differing levels of environmental protection or labor standards, perceived threats from global overcapacity, or potential impacts from non-market economies. The WTO agreements and U.S. laws already provide more targeted means to address these concerns.”

China is also concerned that many of the proposed modifications would violate basic principles of international law and the WTO rules, affirming that "they will unduly expand the scope of the investigation, unfairly increase the discretion of Commerce, irresponsibly increase the burden of proof borne by the respondent party, unreasonably harm the legitimate rights of interested stakeholders, with the adverse effect of disrupting the normal international industrial chain, supply chain and trade order". China specifically opposes Commerce's proposed regulation on "foreign government inaction that benefits foreign producers", such as property rights, human rights, labor rights and environment, alleging that these issues are not compatible to the nature of trade remedy investigations and arises national sovereignty concerns. Regarding the proposed rule for loans, China affirms that Commerce incorrectly treats loans as grants, with important consequences on the analysis of the transactions, that the three-year triggering period is not in line with standard practices, and that it should be subject to the provisions of the loan contract. Finally, China criticizes the withdrawal of the provision that prevents Commerce from conducting transnational subsidy investigations, stating that such investigations violate the WTO Agreement on Subsidies and Countervailing Measures and is inconsistent with previous U.S. legislation and practice. Vietnam, similarly, strongly opposes the proposed regulation on transnational subsidies and on "foreign government inaction that benefits foreign producers."

The Canadian Government commented that Commerce's proposed regulations do not observe fairness and impose unduly burden on the parties. Regarding the PMS methodology, Canada argues that the changes inappropriately lower the threshold to allege a PMS and ignores statutory requirements, like the demonstration of "prevent a proper comparison", particularity, or the causal connection. Canada also criticizes several other proposed changes that it considers inconsistent with U.S. enabling statutes, like the one that allows Commerce to ignore recent relevant authority or others that provide greatest discretion to Commerce and reduce predictability in the process.

Brazil expressed concern about the proposed changes particularly in regard to topics of "foreign government inaction that benefits foreign producers" and "regulation for determining the existence of a particular market situation." Without elaborating the arguments in detail, the Brazilian government stated that these changes "have the potential to significantly broaden the US investigating authority's discretion" and that "the US proposal incorporates concepts that are not embodied in the WTO trade remedies agreements." Brazil argued that the proposed amendments could lead US authorities to review aspects related to other countries domestic laws, policies and standards, and also that the standard of evidence considered by Commerce for the "relevant information reasonably available to the interested party making allegation of a particular market situation" raised concerns.

There has been no official publication or comments from the Department of Commerce regarding these proposed amendments and we are yet to see if and how the regulations will effectively be changed. In case they do come out similar to the consultation document, challenges to the changes are expected.

Past Events:

- **2023 Summer Webinar - Critical Raw Material: What's going on?,** held on July 24, 2023, presenting Prof. Simon Evenett, professor of international trade and economic development at the University of St. Gallen. The recording is available here.

- In this webinar, Prof. Evenett addresses Climate Change mitigation policies, such as the green energy transition. In the United States, for example, the Inflation Reduction Act, and the associated stimulus to domestic production of electric vehicles have caused the current and future demand for lithium to skyrocket. Also, he presented on governments weaponizing trade in critical raw materials, the conflict between Russian and Ukraine, and the threat for the world supply of fertilizers. Finally, Prof. Evenett addressed the European Critical Raw Materials Act, which aims to increase and diversify the EU's critical raw materials supply; to strengthen circularity, including recycling, and to support research and innovation on resource efficiency and the development of substitutes.

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