



ABCI Note

Spring 2024

Dear reader:

ABCI Institute is happy to share the Spring 2024 edition of the 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's 13TH Ministerial, trade remedies measures in Brazil in the first year of Lula III, the U.S. safeguard investigation, and the Fourth Session of the Intergovernmental Negotiating Committee on Plastic Pollution.

This edition brings the contribution of Prof. Jesse Kreier, professor at Georgetown Law Center and the Washington College of Law.

Enjoy the reading; comments are welcome!

Short notes:

- **The WTO's 13TH Ministerial: More Downs Than Ups**

The WTO's 13th Ministerial Conference¹ (MC13) in Abu Dhabi had two concrete, positive outcomes. The conference extended the moratorium on e-commerce duties, which was considered a significant achievement.² This decision was crucial for the digital economy, particularly in developing countries, by allowing them to participate in global value chains and benefit from technology and globalization. Moreover, the conference saw the admission of two new WTO members, Timor-Leste and Comoros, which was a step forward in the organization's goal of expanding membership.³

However, MC13 failed to deliver concrete results on all other issues. The negotiations on more disciplines for fisheries subsidies,⁴ a key agenda item, did not result in an agreement. This failure was a significant disappointment, given the global importance of sustainable fisheries management. The conference also failed to deliver on developmental issues, such as the expansion of the TRIPS waiver, which would have allowed for easier access to vaccines, diagnostics, and therapeutics.⁵ This decision was met with criticism, especially from developing nations.

¹ See Ministerial Declaration at <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN24/DEC.pdf&Open=True>

² See Ministerial decision at <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN24/38.pdf&Open=True>

³ WTO report at https://www.wto.org/english/news_e/news24_e/acc_26feb24_e.htm

⁴ See draft text at <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN24/W10.pdf&Open=True>

⁵ See Ministerial decision at <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN24/39.pdf&Open=True>



Furthermore, the conference did not make substantial progress in reforming the dispute settlement system, a critical aspect of the WTO's functioning.⁶ The conference's inability to address these issues effectively was seen as a reflection of the broader dysfunction within the WTO's recent proceedings.

On agriculture subsidies, with particular emphasis on reducing trade-distorting domestic support, for one more time, no progress was made. Both the reform of agricultural trade rules and reduction of trade-distorting subsidies remain crucial for global food security and fair trade. It seems that there is no light at the end of the tunnel on this item.

In summary, while MC13 achieved some successes, such as extending the e-commerce moratorium and expanding WTO membership, it failed to make significant progress on key developmental and systemic issues, including fisheries and agriculture, reflecting ongoing challenges within the organization.

- **A new safeguard investigation: what should we expect?**

The U.S. International Trade Commission (ITC) initiated a [safeguard investigation](#) on “fine denier polyester staple fibers” (PSF). A safeguard investigation requires the ITC to determine whether an article is being imported in such increased quantities as to be a substantial cause of serious injury or the threat of serious injury to a U.S. industry. Global safeguard investigations do not require a finding of an unfair trade practice, such as subsidies or dumping. If the ITC issues an affirmative determination, it may recommend to the President the imposition of a remedy that can take the form of a duty increase, a quota, a tariff-rate quota, trade adjustment assistance, or any combination of such actions.

The present safeguard investigation is the fourth of its kind in the past seven years. Even though the United States has always preferred using antidumping and subsidy investigations to address injury to its domestic industries, it still used safeguards investigations during the first years of the WTO. The United States accounted for almost 15% of the safeguard investigations initiated from 1995 to 2001. Safeguard measures were often litigated in the WTO, and all safeguard measures examined by the Appellate Body were deemed to have violated the Agreement on Safeguards to some degree.

Successive defeats in the dispute settlement mechanism raised criticism regarding the overreaching approach of the Appellate Body and led the United States to stop using safeguards for almost 20 years. Parallel to the crisis of the Appellate Body and its inability to hear appeals, the United States resumed using safeguard investigations. In 2017, the ITC initiated two safeguard investigations—one for residential washing machines and one for solar panels – and, in 2021, on blueberries.

The new PSL safeguard investigation fits in the same patterns as the two 2017 safeguard investigations. The safeguard investigation is preceded by and supplements more traditional trade remedy investigations. In 2018, the United States imposed AD duties on imports from China, India, Korea, and Taiwan, as well as CVD on imports from China and India. The washing machines and solar panel investigations followed a similar pattern. Instead of relying on the safeguard investigation on its own, the United States used the safeguard mechanism

⁶ See Ministerial decision at <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN24/37.pdf&Open=True>



as an additional resource when antidumping and countervailing measures proved insufficient to address the injurious effect of unfair imports. This evolution in time brings complexity to the investigations because the ITC needs to investigate the impact of the AD/CVD measures, their relative effects on the injury indicators, and the flow of imports.

Because safeguard measures address the underlying cause of the increase in imports, not unfair practices, the Agreement on Safeguards requires a higher standard of injury. While AD/CVD measures may be applied when unfair imports cause or threaten to cause material injury to a domestic industry, a safeguard may only be applied when the domestic industry suffers serious injury, which requires showing a heightened degree of injury. AD/CVD measures may protect the domestic industry from the injurious effects of subsidies and dumping practices. However, trade diversion may frustrate this objective when imports are readily available from other sources. If total imports continue to increase despite the remedial measures, further damaging the domestic industry, safeguard investigations might be a viable solution for the affected industry. Also, safeguards are not country-specific, and the ITC is required to make additional separate findings for certain countries with which the U.S. has free trade agreements, such as Canada, Mexico, and Korea. This requirement adds complexities to the analysis, especially where these countries are a significant source of imports or remedial measures have been taken against preferential trade partners, which is the case of PSF AD measures against Korean imports.

The paralysis of the Appellate Body might have revived the use of safeguards. But the United States does not seem to be willing to use safeguard mechanisms to replace traditional AD/CVD investigations. Rather, safeguard investigations seem to function as an additional layer of protection when AD/CVD measures are insufficient to protect the industry. However, a heightened standard of injury, potential conflicting effects of the AD/CVD measures, and preferential trade partners confer complexities to the ITC's determination. We shall wait and see how the ITC will square the complexities of the case and the industry's allegations of serious injury caused by increased imports and insufficiency of the AD/CVD measures.

- **Trade-defense measures in Brazil: the first year of Lula III**

The use of trade-defense measures in the first year of Lula III shows stability compared to the last years of Bolsonaro's presidency.

Graph 1 depicts a sharp decrease in trade defense measures during the final year of Michel Temer's presidency and the initial two years of Bolsonaro's tenure. However, during the last two years of Bolsonaro's presidency, the number of trade defense measures in force stabilized around 100-120 measures, a trend that has persisted.

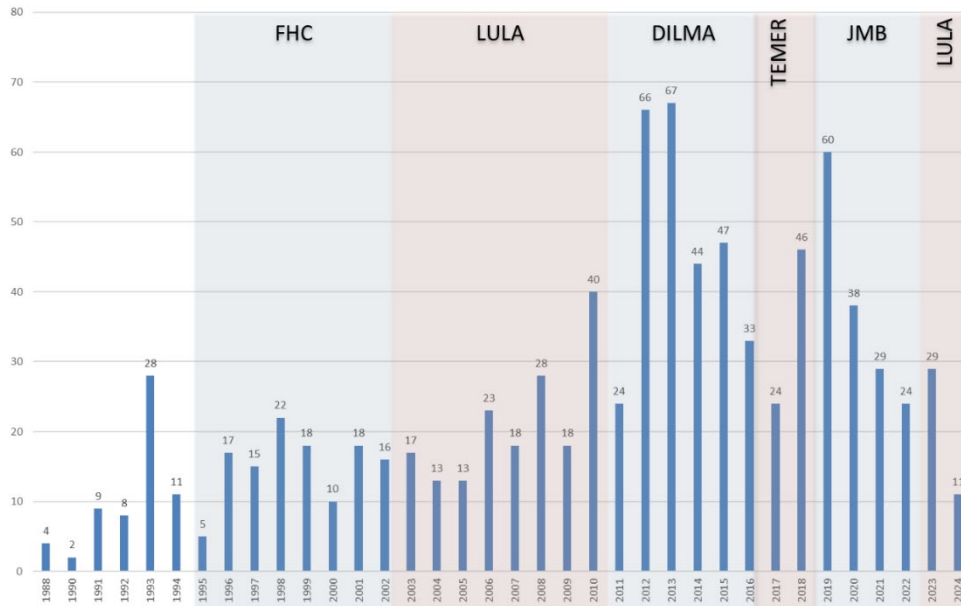
Graph 2 illustrates a similar stabilization in the number of investigation openings during the final two years of Bolsonaro's presidency. There were 29 investigation openings in the first year of Lula III's presidency, which mirrors the count during the third year of Bolsonaro's term. As of March 2024, there have been 11 investigation openings.

Graph 1: Trade defense measures in force in Brazil, 1989 – 2024 (March).



Source: Based on Brazilian Ministry of Development, Industry and Trade data.

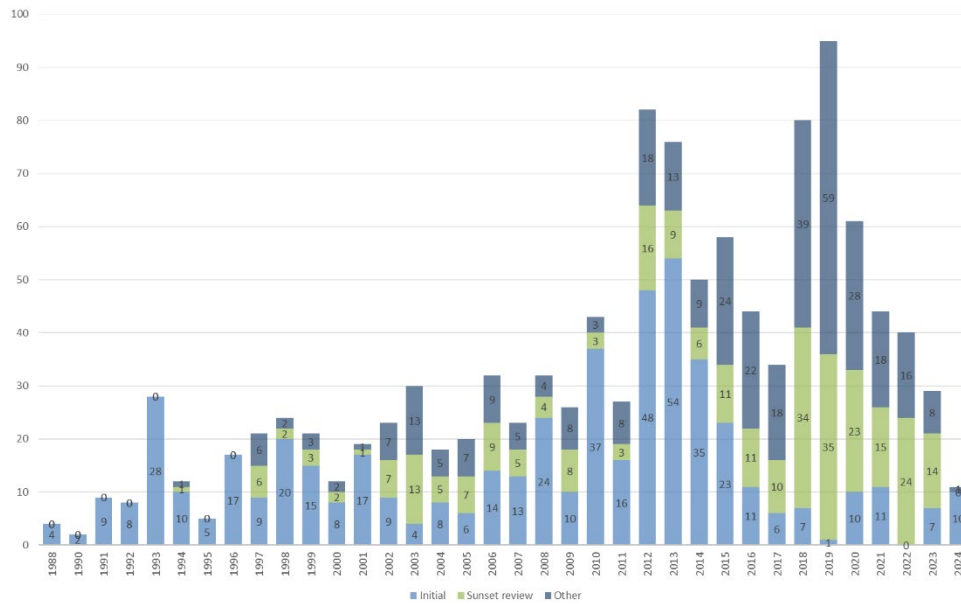
Graph 2: Trade defense investigation openings in Brazil, 1989 – 2024 (March).



Source: Based on Brazilian Ministry of Development, Industry and Trade data.

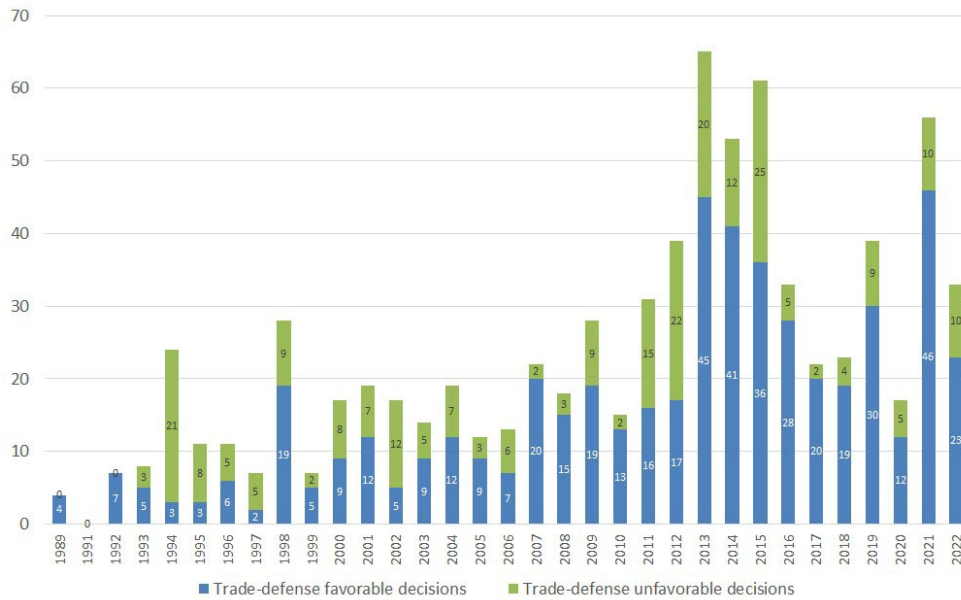
One significant disparity emerges in Graph 3. During the years of Temer and Bolsonaro, initial investigations virtually disappeared, with the majority of investigations being sunset reviews and public interest inquiries. However, in the initial two years of Lula III's presidency, the Brazilian Trade Secretary has already initiated 17 investigations and 14 sunset reviews.

Graph 3: Trade defense investigation openings in Brazil, by type, 1989 – 2024 (March).



Source: Based on Brazilian Ministry of Development, Industry and Trade data.

Graph 4: Trade defense investigations decisions in Brazil, 1989 – 2024 (March).



Source: Based on Brazilian Ministry of Development, Industry and Trade data.

Finally, Graph 4 indicates no substantial difference in the distribution of favorable and unfavorable decisions during the first two years of Lula III's presidency compared to previous years.



Regarding countervailing measures, Brazilian Trade Secretary Tatiana Prazeres addressed the issue at the WTO 13th Ministerial Conference (WTO MC13), stating:

(...) if we see a subsidy race that is going on at the global level, for a country like Brazil that does not have the deep pockets of other countries, the challenge is how do you deal with that? There's a lot of conversation about this, green subsidies, subsidies race, etc. But for countries who don't have the same resources, what I fear is that we'll see a race towards trade remedies. And I'm in charge of trade remedies in Brazil, and I can tell you, it's coming. The wave is coming.⁷

Since 2023, the Brazilian Trade Secretary has initiated two countervailing measure investigations: one involving optical cables originating in China (initial) and another concerning grinding media originating in India (sunset review).

- **Fourth Session of the Intergovernmental Negotiating Committee on Plastic Pollution**

Between April 23 and April 29, UN countries convened in Ottawa, Canada, for the fourth session of the Intergovernmental Negotiating Committee to Develop an Internationally Legally Binding Instrument on Plastic Pollution, Including in the Marine Environment (INC-4). The negotiations happened under the mandate established in the fifth session of the UN Environment Assembly (UNEA 5.2) in March 2022, as per Resolution UNEP 5/14. It is based on a comprehensive approach of the full life cycle of plastic, including production, design, and disposal. Negotiations started in November 2022, with INC-1 in Punta del Este, Uruguay, followed by INC-2 in Paris, France, in May-Jun/2023, and INC-3 in Nairobi, Kenya, in November 2023. The ambition is to conclude the agreement by the end of 2024. 170 Members and over 480 Observers participated in INC-4, corresponding to more than 2,000 delegates.

In INC-4, negotiations were divided into two main fronts, the first one consisting of three subgroups and dedicated to discussing concepts and delimiting obligations under the agreement, the second one composed by two subgroups and related to establishing means and plans for the implementation of the binding instrument. The main points of discussion consisted of emissions and releases, production, product design, waste management, problematic and avoidable plastics, financing, and just transition. During the seven-day period, all five subgroups worked on discussing and improving the Revised Draft Text originated from INC-3, leading to a further streamlined version of the draft which will be the basis for the next and final round of negotiations.

Some important points of controversy that emerged during INC-4, however, were also left for latter discussion at INC-5, possibly compromising the goal of achieving an ambitious binding agreement by the end of this year. In the first front of negotiation, according to the IISD, the main points of divergence involved “whether to include any provisions on primary plastic polymers, how to address chemicals and polymers, and how to address linkages to existing processes”. In the second front, discussions were centered around the sources of means of implementation, especially a financial mechanism, but also on redirecting of existing financial flows

⁷ <https://ielp.worldtradelaw.net/2024/03/conversations-at-wto-ministerial-side-events.html>



and a proposal for a polymer production fee. Nevertheless, there were also some areas of convergence, according to the IISD, such as “provisions addressing plastic waste management and just transition.”

At the end of INC-4, Members agreed on conducting intersessional work before the next INC to seek convergence on some key negotiation points, such as discussions on plastic products and chemicals of concern, product design and recyclability, financial sources and means of implementation. Additionally, Members decided to establish an Open-ended Legal Drafting Group on INC-5, to revise the language of the draft and ensure legal soundness. INC-5, expected to be the last round of negotiations, is happening in Busan, Republic of Korea, between November 25 and December 1st, 2024.

Past Events:

- **2024 Spring Webinar - Electric vehicles: an international trade perspective (by Jesse Kreier)**, held on April 12, 2024, presenting Prof. Jesse Kreier, professor at Georgetown Law Center and the Washington College of Law, Prof. Chiara Pappalardo, SJD candidate at Georgetown Law Center, and Dr. Rene Medrado, partner at Pinheiro Neto Advogados.

Concerns about climate change have driven efforts to electrify the transport sector, and the webinar sought to examine the rapidly advancing electric car sector and the industrial and trade policy measures being used by competing countries as they struggle for dominance or at least survival in this vital area.

Chiara Pappalardo began the webinar with an explanation of the commitments taken by countries to achieve their climate objectives and the role of the transport sector in achieving them. She explained the rapid rise of EVs, the need for critical minerals to produce those vehicles, and the dominant role of China in supplying them. She outlined U.S. climate objectives, and described U.S. support measures found in the Inflation Reduction Act, with a particular focus on those measures designed to encourage U.S. and allied production of the critical minerals required for the climate transition. She concluded by reflecting on the trade tensions arising out of the U.S. measures.

Jesse Kreier noted the central importance of the auto sector to advanced economies and the rapid but uneven pace with which countries are shifting from ICE vehicles to EVs. He outlined the extraordinary success of China in leading the sector and considered some of the policy measures that may have facilitated that success. He then examined the trade and industrial policy measures of three other major economies - the United States, the EU and India – in the area of tariffs, subsidies, anti-subsidy and rules of origin, and discussed China’s recent WTO challenge to the EV and other climate-related subsidies of the US Inflation Reduction Act. The recording is available [here](#).

- **ABCI XIX SYMPOSIUM ON INTERNATIONAL TRADE**, held on November 16-17, 2023, presented two current topics for discussion. In the round table on “International Trade and Artificial Intelligence: Opportunities,



Challenges, and Regulation,” Dr. Joshua Meltzer and Fabricio da Mota Alves discussed the relationship between international trade and artificial intelligence. The recording is available [here](#).

In the round table on “International Trade, Environment, and Climate Change: Can Trade Help?”, Prof. David Hunter and Dr. Heloísa Pereira discussed whether and how international trade can help address environmental and climate change issues. The recording is available [here](#).

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