

AN INTRODUCTION TO INTERNATIONAL TRADE AND TECHNOLOGY
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Executive Summary: This memo begins by providing a brief overview of international trade by outlining the governing bodies of law, the jurisdictional bodies, and discussing recent United States actions and cases. This memo concludes by explaining some of the recent intersections of technology and trade, including intellectual property theft, the rise of the United States International Trade Commission Section 337 investigations, and the introduction of blockchain and alternative financial payment systems.

I. INTRODUCTION

At its core, international trade is simply the exchange of goods and services across international borders.¹ This exchange can bring profound benefits to all countries involved, but it comes with a necessary tradeoff—while it makes foreign markets available to domestic traders, it also subjects domestic firms to competition from abroad.² To balance these tradeoffs with other national priorities, countries attempt to regulate international trade by adopting a variety of regulations. While regulations can be dynamic and complex, they tend to either promote free trade policies or advocate for more restrictive measures.³

Proponents in favor of free trade argue that such policies spur economic growth, promote global efficiency and innovation, raise product standards, reduce the costs of goods, and facilitate an international exchange of ideas.⁴ Conversely, advocates for restrictive measures argue that such policies promote national security, encourage food security, limit consumer exposure to goods derived from unethical or anti-competitive practices, and insulate the country from external economic shocks such as sanctions imposed by adversarial nations.⁵

In the United States, the Constitution grants Congress and the Executive Branch the authority to jointly regulate this complex environment.⁶ The Executive Branch, for its part, negotiates and signs treaties, while Congress is responsible for and ratifying those treaties and regulating commerce with foreign countries.⁷ A combination of domestic and international laws governs international trade disputes, and several US courts, including the Federal Circuit, hear and decide these cases.

¹ See JOHN H. JACKSON, ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT 1 (6th ed. 2013) (introducing the role of international economic relations in trade).

² See generally Marketa Trimble, *Unjustly Vilified TRIPS-Plus?: Intellectual Property Law in Free Trade Agreements*, (Am. U. L. Rev Working Paper, 2021) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3918052; Kimberly Amadeo, *International Trade: Pros, Cons, and Effect on the Economy*, THE BALANCE, (Oct. 2, 2021, 7:21 PM) <https://www.thebalance.com/international-trade-pros-cons-effect-on-economy-3305579>.

³ See JACKSON, *supra* note 1, at 5–7 (providing a timeline of the growth of international trade from the mercantilist erato World War II).

⁴ *Id.*

⁵ *Id.*

⁶ U.S. CONST. art. I, § 8; *id.* art. II, § 2.

⁷ *Id.*

II. GOVERNING LAWS AND TOOLS OF INTERNATIONAL TRADE

A. Free Trade Agreements

Laws that govern international trade are derived from a variety of authorities, including bilateral, multilateral, and regional trade agreements, import policies, export controls, and sanctions. Free Trade Agreements (FTAs), though, are the primary means through which the United States facilitates trade.⁸ Such agreements tend to promote the quasi-unrestricted movement of goods across borders, subject to certain limitations and guarantees.⁹ For instance, by nature, FTAs almost universally include provisions guaranteeing to some extent that every party will enjoy access to the markets of every other participant.¹⁰ Similarly, most FTAs also include provisions mandating protections for intellectual property, promises for fair labor practices, limitations and guarantees on foreign direct investment, tariff regulations, methods for determining country of origin, and clauses detailing dispute settlement procedures, among others.¹¹ Currently, the United States is a party to fourteen FTAs, covering twenty different countries.¹² Most recently, the United States signed the U.S.-Mexico-Canada Agreement¹³ (USMCA) in 2018 to replace the North American Free Trade Agreement¹⁴ (NAFTA), and preemptively withdrew from the Trans-Pacific Partnership (TPP)—an agreement that represents over thirteen percent of global GDP *without* U.S. participation—in 2017 before the agreement came into force, but is now weighing whether to rejoin.¹⁵

B. Import Policies

Import policies are another set of important tools the United States utilizes to regulate international trade. Through these policies, the United States can provide countries with beneficial access to the United States market.¹⁶ For instance, Congress can enact Trade Preference Programs (TPPs), which provide unilateral and nonreciprocal advantages to designated beneficiary countries.¹⁷ There are several trade preference programs currently in effect, including large programs that target several countries and regions, such as the Generalized System of Preferences (GSP), the Caribbean Basin Trade Partnership Act (CBTPA), and the African Growth and Opportunity Act (AGOA), as well as narrower programs that focus on specific nations, such as the Haitian

⁸ See ANDRES B. SCHWARZENBERG & REBECCA M. NELSON, CONG. RESEARCH SERV., R45474, INTERNATIONAL TRADE AND FINANCE: OVERVIEW AND ISSUES FOR THE 116TH CONGRESS, 23 (2020).

⁹ See *Id.* at 26.

¹⁰ *Id.*

¹¹ *Id.*

¹² See INTERNATIONAL TRADE ADMINISTRATION, <https://www.trade.gov/free-trade-agreements> (Oct. 1, 2021).

¹³ See United States-Mexico-Canada Agreement, Nov. 30, 2018, Pub. L. 116-113, § 2, 134 Stat. 19.

¹⁴ See North American Free Trade Agreement, Dec. 8, 1993, 19 U.S.C. § 3311.

¹⁵ See *The United States Officially Withdraws from the Trans-Pacific Partnership*, U.S. TRADE REP., <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/january/US-Withdraws-From-TPP>.

¹⁶ See generally VIVIAN C. JONES, ET AL., CONG. RESEARCH SERV. R41429, TRADE PREFERENCES ECONOMIC ISSUES AND POLICY OPTIONS 1–2 (2013).

¹⁷ *Id.*

Hemispheric Opportunity Through Partnership for Encouragement Act (HOPE Act).¹⁸ These programs work to bolster the trade of the beneficiary countries by temporarily allowing them to export specific products to the United States duty-free.¹⁹

C. *Import Tariffs, Quotas, and Import Licenses*

While many import policies are used to promote the exchange of goods by lowering the costs of trade, these policies can also be used to raise the barrier to entry and limit foreign traders' abilities to export goods to the United States.²⁰ Import tariffs, quotas, and licenses are some of the primary ways the United States government regulates and limits imports from foreign entities. An import tariff is a tax levied against goods imported from another country.²¹ The exact tariff rate is calculated using the Harmonized Tariff Schedule (HTS)—a database operated by the United States International Trade Commission (USITC) that determines the rate after factoring in the type of product being imported, the country of origin, and the existence of any preferential trade agreements, such as a trade preference program or FTA.²² Quotas, on the other hand, place a limit on the quantity of a specific good that can be imported into the United States over a given time period.²³ While the United States does not currently impose any absolute quotas—those quotas that place a hard limit on the number of specific goods that can be imported—it does impose some tariff-rate quotas, which tax certain goods at higher rates after a certain quantity threshold has been passed.²⁴ Lastly, import licenses are documents issued by the United States that authorize international traders to import certain goods.²⁵ The United States imposes import licenses on a variety of products, which in turn limits the number of entities that are permitted to import the related goods.²⁶

D. *National Security and Foreign Policy Implications*

While international trade issues are mostly centered around economics, there are also important national security and foreign policy implications. When attempting to regulate international trade for foreign policy or national security purposes, export controls and sanctions are some of the primary tools of the United States government.²⁷

¹⁸ *See id.* at 2.

¹⁹ *Id.*

²⁰ *See generally* *Technical Information on anti-dumping*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm.

²¹ *See generally* *Import Tariffs Overview*, INT. TRADE ADMIN., <https://www.trade.gov/import-tariffs-fees-overview>

²² *Id.*

²³ *Quota Enforcement and Administration*, CUSTOMS AND BORDER PATROL, <https://www.cbp.gov/trade/quota/guide-import-goods/commodities>.

²⁴ CUSTOMS AND BORDER PATROL, <https://www.cbp.gov/trade/quota/guide-import-goods/commodities> (last visited Oct. 1, 2021).

²⁵ *See generally* *Import Licensing*, U.S. TRADE REP., <https://ustr.gov/trade-agreements/wto-multilateral-affairs/wto-issues/import-licensing>.

²⁶ *See* *Importing and Exporting*, USAGOV, <https://www.usa.gov/import-export>, (last visited Sept. 29, 2021).

²⁷ *See* SCHWARZENBERG & NELSON, *supra* note 8, at 49 (mentioning that dual-use technologies include commodity, software, or technology that has both commercial and military applications).

Export controls seek to protect national security interests by preventing the proliferation of sensitive and critical technologies, such as nuclear material, defense articles and services, and dual-use goods.²⁸ Sanctions, conversely, are restrictive economic measures used against an individual, entity, or country.²⁹ These measures can include trade embargoes, restrictions on the use of United States dollars, denial of foreign assistance and investments, freezing of foreign assets, and prohibiting transactions with United States entities.³⁰

Throughout its tenure, the former Administration used both of these tools in tandem. For instance, in August 2020, the former Administration announced that it was restricting Huawei, a major Chinese telecommunications provider, from buying computer chips made or designed with American equipment or software—an expansion of a sanction enacted earlier in the year that prohibited companies globally from using American owned software or machines to produce chips designed by Huawei.³¹ Huawei has taken a massive financial hit from these sanctions, and the new administration has reiterated that it may take further action against the company, if needed.³²

III. THE FEDERAL CIRCUIT AND OTHER JURISDICTIONAL BODIES

The U.S. Court of International Trade (CIT) has jurisdiction over customs and international trade cases and hears claims from both private parties and other government agencies, such as the Department of Commerce (DoC), the Department of Homeland Security (DHS), and the International Trade Commission (ITC). However, government agencies typically try to settle matters involving private entities and the United States government before filing a claim with the CIT. In such instances, several agencies participate and have specialized roles. The DoC investigates issues involving dumping or anti-competitive subsidizing, Customs and Border Patrol (CBP) enforces antidumping and countervailing duty orders, and the ITC looks at whether a substantial injury to a domestic industry exists.³³ However, the decisions and findings of these agencies are appealable to the CIT, and decisions from the CIT are, in turn, appealable to the United States Court of Appeals for the Federal Circuit.

²⁸ ANDRES B. SCHWARZENBERG & CHRISTOPHER A. CASEY, CONG. RESEARCH SERV., R46669, INTERNATIONAL TRADE AND FINANCE: OVERVIEW AND ISSUES FOR THE 117TH CONGRESS, 23 (2021).

²⁹ Jonathan Masters, *What Are Economic Sanctions?*, COUNCIL ON FOREIGN RELATIONS, (2019) <https://www.cfr.org/background/what-are-economic-sanctions>.

³⁰ See generally ANDRES B. SCHWARZENBERG & CHRISTOPHER A. CASEY, *supra* note 28.

³¹ 85 Fed. Reg. 29849 (May 19, 2020) (adding Huawei to the entity list); 85 Fed. Reg. 51596 (Aug. 20, 2020) (expanding the sanction against Huawei).

³² See David Kirton, *Huawei Smartphone Revenue to Fall at least \$30-40 Billion in 2021-Chairman, YAHOO!* (Sept. 24, 2021) <https://www.yahoo.com/now/huawei-2021-smartphone-revenue-drop-091225061.html>.

³³ See *Understanding Anti-Dumping & Countervailing Duty Investigations*, U.S. INT'L TRADE COMM'N, https://www.usitc.gov/press_room/usad.html.

IV. PRESIDENTIAL POWER TO REGULATE TRADE

Congress has enacted several laws that delegate its foreign commerce power to the President, including Section 232 of the Trade Expansion Act of 1962,³⁴ and Sections 201³⁵ and 301 of the Trade Act of 1974.³⁶ However, Presidents have pushed the boundaries of the authorities granted by these acts. Notably, the previous administration unilaterally imposed tariffs to address perceived national security concerns with China’s anti-competitive trade practices, impacting approximately sixteen percent of United States imports.³⁷ To date, the new administration has kept in effect most of the trade related actions instigated by its predecessor.

A. Section 232 and the Trade Expansion Act of 1962

Section 232 of the Trade Expansion Act of 1962 allows any department, agency head, or “interested party” to request that the DoC investigate the effect of certain imports on United States national security.³⁸ After initiating an investigation, the DoC consults with the Department of Defense (DoD) and “other appropriate officers of the United States” to discuss the specific policy and security questions relevant to the investigation.³⁹ From there, the DoC has 270 days from the initiation date to produce a report advising the President on the threat to national security posed by the imported product and provide recommendations based on the findings.⁴⁰ The President may then decide on necessary remedies.⁴¹

The most notable example of the application of Section 232 in recent memory is then-President Trump’s decision in March 2018 to use the section to impose a twenty-five percent tariff on steel imports and a ten percent tariff on aluminum imports, resulting in several international bodies, including the European Union, China, Mexico, and Canada, imposing retaliatory tariffs on the same products.⁴² The tariffs were also met with domestic resistance, including several lawsuits heard by the U.S. Court of International Trade and the U.S. Court of Appeals for the Federal Circuit, challenging the legality of

³⁴ 19 U.S.C. § 1862(f).

³⁵ 19 U.S.C. § 2251–2254.

³⁶ 19 U.S.C. § 2411–2416.

³⁷ See generally RACHEL F. FEFER, ET AL., CONG. RESEARCH SERV., R45249, SECTION 232 INVESTIGATIONS: OVERVIEW AND ISSUES FOR CONGRESS 25–28 (2020) (detailing former President Trump’s use of Section 232 tariffs); CATHLEEN D. CIMINO-ISAACS, ET AL., CONG. RESEARCH SERV. R45417, WORLD TRADE ORGANIZATION: OVERVIEW AND FUTURE DIRECTION 20 (2020).

³⁸ 19 U.S.C. § 1862(b)(1)(a).

³⁹ 19 U.S.C. § 1862(b)(1)(b)–(2)(a)(ii).

⁴⁰ *Id.* § 1862(b)(3)(a).

⁴¹ *Id.* § 1862(c)(1)(a)(i)-(ii).

⁴² See *Proclamation on Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles into the United States*, NATIONAL ARCHIVES, <https://trumpwhitehouse.archives.gov/presidential-actions/proclamation-adjusting-imports-derivative-aluminum-articles-derivative-steel-articles-united-states/>; Joseph Parilla & Max Bouchet, *Which US communities are most affected by Chinese, EU, and NAFTA retaliatory tariffs?*, BROOKINGS INSTITUTE (2018) <https://www.brookings.edu/research/which-us-communities-are-most-affected-by-chinese-eu-and-nafta-retaliatory-tariffs>.

the tariffs.⁴³ The Biden administration has maintained the tariffs imposed his predecessor, and is considering instigating new Section 232 investigations as part of his supply chain review under EO 14017.⁴⁴

B. Sections 201 & 301 of the Trade Act of 1974

Section 201 of the Trade Act of 1974 concerns global safeguard investigations and import relief for domestic industries.⁴⁵ The act states that when a surge in imports seriously threatens domestic industries, the affected industries may petition the ITC for a temporary safeguard.⁴⁶ The ITC then judges if an injury exists, and recommends a remedy to the President who then decides whether to provide relief.⁴⁷ Such relief may include tariff increases to shield the domestic entities, quotas, or negotiated agreements.⁴⁸ It is important to note that Section 201 does not require a finding of unfair trade practices on the part of the importers, but only that the injury be “serious” and that increased imports must be the “substantial cause” of the injury.⁴⁹

Most recently, the ITC undertook two investigations in 2017 addressing injuries sustained by domestic industries due to increased imports of photovoltaic cells⁵⁰ and large residential washing machines.⁵¹ Former President Trump issued a proclamation in January 2018 providing relief to the domestic industries by increasing tariffs on the imported products.⁵² Immediately following, Canadian solar product exporters sought an injunction against the former President’s decision.⁵³ The Federal Circuit denied the exporter’s request, noting that the President enjoyed “substantial discretion” under

⁴³ See, e.g., *Am. Inst. for Int’l Steel, Inc. v. United States*, 415 F. Supp. 3d. 1267, 1269 (Ct. Int’l Trade 2019) (holding that Congress acted constitutionally when it delegated tariff authority to the executive branch in Section 232 of the Trade Expansion Act of 1962); *Severstal Exp. GmbH v. United States*, 374 F. Supp. 3d. 1368, 1370 (Ct. Int’l Trade 2019) (denying Severstal’s challenge for a preliminary injunction that would have stopped the imposition of the President’s Section 232 tariff); *Transpacific Steel LLC v. United States*, 415 F. Supp. 3d 1267, 1276 (Ct. of Int’l Trade 2019) (holding the additional Section 232 tariffs on Turkish steel violated statutorily mandated procedures).

⁴⁴ SECTION 232 OF THE TRADE EXPANSION ACT OF 1962, CONG. RESEARCH SERV., IF10667 (Aug. 17, 2021).

⁴⁵ See *Understanding Safeguard Investigations*, U.S. INT’L TRADE COMM’N, https://www.usitc.gov/press_room/us_safeguard.htm (last visited Sept. 28, 2021).

⁴⁶ *Id.*

⁴⁷ *Id.*; 19 U.S.C. § 2252(b).

⁴⁸ *Understanding Safeguard Investigations*, *supra* note 45.

⁴⁹ *Id.*

⁵⁰ *Section 201—Imported Solar Cells and Modules*, U.S. TRADE REP., <https://ustr.gov/issue-areas/enforcement/section-201-investigations/investigation-no-ta-201-75-cspv-cells> (last visited Oct. 5, 2021).

⁵¹ *Section 201—Imported Large Residential Washing Machines (Washers)*, U.S. TRADE REP., <https://ustr.gov/issue-areas/enforcement/section-201-investigations/section-201-imported-large-residential-washing-machines-washers> (last visited Oct. 5, 2021).

⁵² See *Section 201 Cases: Imported Large Residential Washing Machines and Imported Solar Cells and Modules*, U.S. TRADE REP., <https://ustr.gov/sites/default/files/files/Press/fs/201%20Cases%20Fact%20Sheet.pdf> (last visited Oct. 5, 2021).

⁵³ *Silfab Solar, Inc. v. United States*, 296 F.Supp.3d 1295, 1297 (Ct. Int’l Trade 2018), *aff’d* 892 F.3d. 1340 (Fed. Cir. 2018).

Section 201 to determine which measures were necessary to protect domestic entities. To date, the tariffs have not been lifted or otherwise altered by the new administration.

Section 301 of the Trade Act of 1974 allows the United States Trade Representative (USTR) to impose sanctions on foreign countries that violate United States trade agreements or engage in practices that unjustifiably burden United States commerce.⁵⁴ While traditionally the United States has used section 301 to pressure other countries to remove trade barriers, thus facilitating a more open international market, in recent years it has relied on Section 301 to impose trade restrictions on imports from China.⁵⁵ Most recently, USTR found that digital tax services (DSTs) of Austria, India, Italy, Spain, Turkey, and the United Kingdom discriminated against major United States digital companies, and unilaterally imposed a twenty-five percent tariff on \$2.1 billion worth of combined goods—though the tariff was suspended and due to come into effect in November of 2021.⁵⁶

V. TECHNOLOGY AND EMERGING ISSUES IN INTERNATIONAL TRADE

There are no shortage of issues and controversies surrounding international trade, but a few topics merit special consideration. First, intellectual property (IP) theft remains a global challenge despite the adoption of international protection and enforcement standards. The rise of global connectivity and proliferation of cyber intrusion methods has created new means through which nefarious actors can acquire and utilize stolen IP in ways that undercut the original owner. Second, there have been a handful of recent rulings by the ITC on IP-related issues that have had substantial impacts on United States industries, including the recent dispute between South Korean firms LG Chem. Ltd. and SK Innovation Co Ltd. Third, the introduction of blockchain technology to the global marketplace may have important consequences for financial payment systems and supply chain logistics.

A. Intellectual Property Theft

Intellectual property is commonly defined as “creations of the mind,” and covers intangibles such as inventions, literary and artistic works, logos, and company names.⁵⁷ Intellectual property (IP) rights are typically divided into two categories: copyright and

⁵⁴ 19 U.S.C. § 2411(a)(1).

⁵⁵ ANDRES B. SCHWARZENBERG, CONG. RESEARCH SERV., IF11346, SECTION 301 OF THE TRADE ACT OF 1974 1–2 (June 15, 2021).

⁵⁶ *Id.*; USTR Announces, and Immediately Suspends, Tariffs in Section 301 Digital Services Taxes Investigations, U.S. TRADE REP., <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/june/ustr-announces-and-immediately-suspends-tariffs-section-301-digital-services-taxes-investigations> (last visited Oct. 5, 2021).

⁵⁷ *See generally Protect Intellectual Property*, INT’L TRADE REP., <https://www.trade.gov/protect-intellectual-property> (last visited Oct. 5, 2021).

related rights and industrial property.⁵⁸ Copyright and related rights refer to the rights of authors and artists in their works, including the exclusive rights to create and distribute copies of the work, and decide when and how to display the work.⁵⁹ Industrial property refers to a variety of IP, including distinctive signs, such as trademarks, as well as inventions (through patents) and trade secrets.⁶⁰ Today, IP-intensive industries account for over \$6.6 trillion in United States GDP, and either directly or indirectly support over 45.5 million jobs.⁶¹

Between 1989 and 1990, member-states of the World Trade Organization (WTO) negotiated the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which sought to establish minimum standards for regulating various forms of intellectual property.⁶² The agreement requires member-states of the WTO to provide several IP protections, including copyright rights to authors, performers, and other artistic workers, as well as protections for trademarks, trade secrets, and patents.⁶³ TRIPS came into force in 1995, and member countries of the WTO were afforded transition periods to implement the agreement—for least-developed countries, the transition period ended in July 2013.⁶⁴

While TRIPS is relatively unique among multinational agreements because it specifies enforcement procedures and remedies, the agreement understandably does not address new developments that came to prominence in the last two decades—such as the rise of the internet—and the issues that accompany them—most prominently IP theft through cybercrime and digital exploitations.⁶⁵ Consequently, IP theft facilitated by global online connectivity has become a major concern for countries across the globe in the last few decades, and particularly important for major IP producers, such as the United States.⁶⁶

The United States has attempted to protect IP originated in the United States from cybercrime and digital exploitation through a variety of mechanisms. In an effort to establish international standards that ensure some level of protection for United States IP abroad, the United States Department of State has attempted to promote United State

⁵⁸ See *What are intellectual property rights?*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/trips_e/intell_e.htm (last visited Oct. 5, 2021); Agreement on Trade Related Aspects of Intellectual Property Rights, WORLD TRADE ORG. (1995) [Hereinafter TRIPS Agreement].

⁵⁹ 17 U.S.C. § 106.

⁶⁰ *What are intellectual property rights?*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/trips_e/intell_e.htm (last visited Oct. 5, 2021).

⁶¹ Justin Antonipillai et al., *Intellectual Property and the U.S. Economy: 2016 Update*, U.S. PAT. & TRADEMARK OFF., ii (2016).

⁶² TRIPS Agreement, *supra* note 58, at 321–22.

⁶³ See *Id.* at 321–23.

⁶⁴ *Trade Related Aspects of Intellectual Property Rights*, U.S. PAT. & TRADEMARK OFF., <https://www.uspto.gov/ip-policy/patent-policy/trade-related-aspects-ip-rights> (last visited Oct. 5, 2021).

⁶⁵ *Id.*; TRIPS Agreement, *supra* note 58, at 338–39.

⁶⁶ See *Cybercrime and Intellectual Property Crime*, DEPT. OF STATE, <https://www.state.gov/cybercrime-and-intellectual-property-crime> (last visited Oct. 4, 2021). For a thorough overview and analysis of TRIPS, FTAs, and their increasing role in international intellectual property protections, See Trimble, *supra* note 2.

policies on cybercrime and IP theft internationally.⁶⁷ On the enforcement side, the Department of Homeland Security established the National Intellectual Property Rights Coordination Center (NIPRCC) to coordinate global investigation and enforcement efforts with United States federal agencies as well as international partners, including INTERPOL, EUROPOL, the Mexican Revenue Service, and the Royal Canadian Mounted Police.⁶⁸ Despite these efforts, though, IP theft facilitated through digital exploitation and cybercrime remains a formidable challenge for countries across the globe—an issue exacerbated by the lack of an international set of governing standards.

B. Section 337 Investigations

Section 337 investigations are another tool to protect and enforce the intellectual property rights and claims of United States firms. To provide some context, Section 337 of the Tariff Act of 1930⁶⁹ broadly states that unfair practices in the importation of goods to the United States, and the subsequent sale of those goods, are unlawful.⁷⁰ This Act originally afforded some protection to domestic firms from anti-competitive tactics from foreign sellers, but was amended by the Omnibus Trade and Competitiveness Act of 1988⁷¹ to expand its coverage over intellectual property infringements by making it easier for domestic industries to show that imported goods infringed on an IP right. Currently, Section 337 investigations mostly relate to cases where a foreign seller creates a good using United States IP and attempts to import and sell that good in the United States market. The ITC is responsible for investigating, hearing, and adjudicating section 337 claims, and its findings are appealable to the Federal Circuit.⁷²

When determining if an act by a foreign entity violates section 337, the ITC first must determine if a domestic industry exists and if the act in question destroys or substantially injures same.⁷³ The ITC then evaluates whether a valid and enforceable IP right exists and if that right was infringed upon.⁷⁴ If the ITC finds a violation, it can impose two types of remedies—exclusion orders and cease and desist orders.⁷⁵ Exclusion orders stop infringing imports from entering the United States and are enforced by

⁶⁷ *Cybercrime and Intellectual Property Crime*, DEPT. OF STATE, <https://www.state.gov/cybercrime-and-intellectual-property-crime> (last visited Oct. 4, 2021).

⁶⁸ *See About Us*, NAT'L INTELL. PROP. RTS. COORDINATION CTR., <https://www.iprcenter.gov/about> (last visited Oct 6, 2021).

⁶⁹ 19 U.S.C. § 1337.

⁷⁰ *Id.* § 1337(a) (1).

⁷¹ 19 U.S.C. § 2901.

⁷² H. Mark Lyon & Sarah E. Piepmeier, *ICT Section 337 Investigations: Patent Infringement Claims*, PRAC. L. CO., <https://www.gibsondunn.com/wp-content/uploads/documents/publications/Lyon-ITCSection337InvestigationsPatentInfringementClaims.pdf> (last visited Oct. 7, 2021).

⁷³ *A Brief Overview of Practice Under Section 337*, FINDLAW, <https://corporate.findlaw.com/litigation-disputes/a-brief-overview-of-practice-under-section-337.html> (last visited Oct. 6, 2021).

⁷⁴ *Id.*

⁷⁵ SHAYERAH ILIAS AKHTAR ET AL., CONG. RESEARCH SERV., RL34292, INTELLECTUAL PROPERTY RIGHTS AND INTERNATIONAL TRADE 24 (2020).

Customs and Border Patrol.⁷⁶ Cease and desist orders require the violating firm to cease the sale of infringing goods in the United States, and are enforced by the ITC itself.⁷⁷

While most IP infringement cases heard by the ITC concern only those parties involved, occasionally the ITC rules on issues that substantially affect large swaths of the economy. Perhaps the most notable example this year was the ITC's ruling in February over an IP dispute between two South Korean manufacturers of electric vehicle (EV) batteries, LG Chem. Ltd. and SK Innovation Co Ltd. The issue centered on SK Innovation's misappropriation of trade secret information.⁷⁸ The ITC entered judgement in favor of LG Chem and imposed a limited exclusion order that prohibited SK Innovation from importing certain battery components, as well as a cease and desist order.⁷⁹ Recognizing that the limited exclusion order would place significant strain on domestic electric vehicle production supply chain, the ITC allowed SK Innovation to continue to import certain components for a limited period to give domestic EV producers an opportunity to find new suppliers.⁸⁰ The two parties later agreed to a settlement which lifted the limited exclusion order.⁸¹

C. Blockchain

A blockchain is a decentralized digital record-keeping system that distributes transaction information among all participants and is secured via encryption.⁸² The technology allows parties, even complete strangers, to engage in reliable and secure transactions without a need for intermediaries or a central authority, like a bank or government.⁸³ There can be many different types of blockchains, typically classified as public versus private with various subtypes.⁸⁴ Blockchain technology's first real-life application was being behind the cryptocurrency Bitcoin, but its use has considerably widened since then, including the creation of other cryptocurrencies like Ethereum and its application beyond financial technology to other sectors and industries.⁸⁵

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Matthew T. Lin, *LG Chem's Win In \$1 Billion Electric Vehicle Trade Secret Dispute Upheld by International Trade Commission*, 11 NAT. L. REV. 54. (2021) <https://www.natlawreview.com/article/lg-chem-s-win-1-billion-electric-vehicle-trade-secret-dispute-upheld-international>.

⁷⁹ See U.S. INT'L TRADE COMM'N, NOTICE OF THE COMMISSION'S FINAL DETERMINATION FINDING A VIOLATION OF SECTION 337; ISSUANCE OF A LIMITED EXCLUSION ORDER AND CEASE AND DESIST ORDERS; TERMINATION OF THE INVESTIGATION (Feb. 10, 2021).

⁸⁰ *Id.*

⁸¹ Heekyong Yang, *U.S. ITC says SK Innovations didn't infringe LG Energy Solution patents*, REUTERS, (Mar. 23, 2021, 9:23 PM) <https://www.reuters.com/article/us-lg-chem-sk-innovation/u-s-itc-says-sk-innovation-didnt-infringe-lg-energy-solution-patents-idUSKBN2BO3TW>; Chris Randall, *SK Innovation & LG Energy Solution settle US legal battle*, ELECTRIVE (Apr. 12, 2021, 11:31 AM) <https://www.electrive.com/2021/04/12/sk-innovation-lg-chem-settle-us-legal-battle>.

⁸² Rachel F. Fefer, CONG. RSCH. SERV., *IF10810, Blockchain and International Trade* (2018); Emmanuelle Ganne, *Can Blockchain revolutionize international trade?* 5 (2018).

⁸³ Fefer, *supra* note 82. See generally Ganne, *supra* note 82, at 5–7.

⁸⁴ Ganne, *supra* note 82, at 8–11, 12 tbl.1.

⁸⁵ *Id.* at 14.

As the use of blockchain technology spreads, its impact on international trade remains largely speculative, and efforts in this area are in their infancy.⁸⁶ Blockchain's impact on finance through the establishment of efficient payment systems using cryptocurrencies like Bitcoin is a tempting answer to the traditional paper-reliant international trade transaction processes.⁸⁷ Financial services firms are experimenting with the technology to cut down on the transaction time for cross-border transactions, and banks are testing trade finance platforms to enable international trade.⁸⁸ This includes the use of "smart contracts," computer programs that self-execute without third-party intervention when certain conditions are met (e.g. funds are transferred automatically upon receipt of delivery).⁸⁹ Such tools may also be used to cut down on other transaction costs, such as more efficient customs processes and increased logistics and supply chain management.⁹⁰ A move towards more automated and less costly transactions is particularly appealing and relevant for developing countries.⁹¹ Finally, blockchain's impact in certain areas, like IP rights, is particularly interesting: since data monitoring is at the heart of blockchain, it can help with proving creation, ownership, and first use, as well as registering and managing IP rights.⁹²

The success of blockchain in international trade, however, remains to be seen. The limited scalability of public blockchains, in particular, raise concerns over the wide use of such processes.⁹³ Furthermore, blockchains, Bitcoin in particular, notoriously require a high level of energy to operate, raising concerns over global carbon emissions.⁹⁴ And while blockchains are highly resilient and secure, they are not completely immune from traditional security concerns.⁹⁵ A unique problem for international trade is also inoperability: different existing blockchains do not necessarily communicate with each other, an acute problem when dealing with international transactions that could touch different systems around the world.⁹⁶

Legally, blockchain creates substantial uncertainty. Few international initiatives exist to clarify the legal status of blockchain transactions and processes; domestic legislative developments are also in their infancy.⁹⁷ The anonymous nature of public blockchains, furthermore, creates problems of applicable law, and the liability framework for blockchain transactions is also unclear.⁹⁸ What is clear, however, is that despite being a maturing technology with many challenges and risks, there is tremendous excitement concerning blockchain and its potential role in international trade.⁹⁹

⁸⁶ *Id.* at 17; Fefer, *supra* note 82.

⁸⁷ Ganne, *supra* note 82, at 17; Fefer, *supra* note 82.

⁸⁸ Fefer, *supra* note 82.

⁸⁹ Ganne, *supra* note 82, at 13.

⁹⁰ *Id.* at 30; Fefer, *supra* note 82.

⁹¹ Fefer, *supra* note 82; Ganne, *supra* note 82, at 83–84.

⁹² Ganne, *supra* note 82, at 57–58.

⁹³ *Id.* at 90 (comparing Bitcoin's and Visa's transactions per second).

⁹⁴ *Id.* at 92.

⁹⁵ *Id.* at 93–94.

⁹⁶ *Id.* at 94–95.

⁹⁷ *Id.* at 98–99; Fefer, *supra* note 82.

⁹⁸ Ganne, *supra* note 82, at 100.

⁹⁹ *See id.* at 2 (noting the growing rate of investment into blockchain companies and the rise of blockchain-related patents).