

AN INTRODUCTION TO INTERNATIONAL TRADE, PROTECTIONISM, AND THE USE OF INTERNATIONAL TRADE AS A FOREIGN POLICY TOOL

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Executive Summary: This memo begins by providing a brief overview of international trade by outlining the governing bodies of law, covering relevant jurisdictional bodies, and discussing recent United States actions. This memo concludes by explaining the trend towards protectionism in international procurement during the COVID-19 pandemic as well as discussing the use of international trade, by the American government, as a foreign policy tool against Russia after its invasion of Ukraine.

I. INTRODUCTION

At its core, international trade is 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 Countries attempt to regulate international trade by adopting a variety of regulations to balance these tradeoffs with other national priorities. Though regulations can be dynamic and complex, they tend to either promote free trade policies or advocate for more restrictive measures.³

Proponents of free trade contend 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 of 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 (U.S.), the Constitution grants Congress and the Executive Branch the authority to jointly regulate this complex environment.⁶ The Executive Branch negotiates and signs treaties. As an example of the Executive Branch's trade authority, the Biden administration concluded fourth round negotiations of the Indo-Pacific Economic Framework in

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 era to World War II).

⁴ *Id.*

⁵ *Id.*

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

July 2023, which seeks to coordinate supply chains alongside thirteen other countries.⁷ Congress, on the other hand, is responsible for ratifying those treaties and creating trade policies, such as the United States-Taiwan Initiative on 21st-Century Trade First Agreement Implementation Act, which authorized the commencement of the U.S.-Taiwan deal.⁸ A combination of domestic and international law governs international trade disputes and several U.S. courts, including the federal circuit, adjudicate these cases.

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) are the primary means through which the U.S. facilitates trade.⁹ Such agreements tend to promote the quasi-unrestricted movement of goods across borders, subject to certain limitations and guarantees.¹⁰ FTAs almost universally include provisions guaranteeing, to some extent, that parties will enjoy access to the markets of the other participating parties.¹¹ Most FTAs include provisions mandating protections for intellectual property and fair labor practices.¹² Further, FTAs often have foreign direct investment limitations and guarantees, tariff regulations, methods for determining country of origin, and clauses detailing dispute settlement procedures.¹³ Currently, the U.S. is a party to fourteen FTAs, covering twenty different countries.¹⁴ Most recently, the United States-Mexico-Canada Agreement (USMCA) entered into force in 2020 replacing the North American Free Trade Agreement (NAFTA).¹⁵ Notably, the USMCA includes a rapid response labor mechanism between the U.S. and Mexico, which advances worker's rights by expediting review and enforcement of laborer complaints.¹⁶

⁷ See U.S. Dep't of Com., Indo-Pacific Econ. Framework (2023).

⁸ See Ways & Means Comm., *Bipartisan Taiwan Bill Reasserting Congress' Const. Auth. Over Trade Heads to President's Desk*, Ways & Means Comm. Blog (July 19, 2023), <https://waysandmeans.house.gov/bipartisan-taiwan-bill-reasserting-congress-constitutional-authority-over-trade-heads-to-presidents-desk/>.

⁹ See ANDRES B. SCHWARZENBERG & REBECCA M. NELSON, CONG. RSCH. SERV., R45474, INTERNATIONAL TRADE AND FINANCE: OVERVIEW AND ISSUES FOR THE 116TH CONGRESS, 23 (2020).

¹⁰ See *id.* at 26.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ See *Free Trade Agreements*, INT'L TRADE ADMIN., <https://www.trade.gov/free-trade-agreements> (last visited Sept. 1, 2023).

¹⁵ See United States-Mexico-Canada Agreement, Pub. L. 116-113, § 2, 134 Stat. 11 (2020); *United States-Mexico-Canada Agreement*, U.S. TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement> (last visited Sept. 1, 2023); North American Free Trade Agreement, 19 U.S.C. § 3311 (1993).

¹⁶ Jayme White & Greta Peisch, *United States Utilizes Innovative Labor and Trade Tool to Bring Concrete Wins for Workers Across North America*, U.S. TRADE REPRESENTATIVE (Nov. 2022), <https://ustr.gov/about-us/policy-offices/press-office/blogs-and-op-eds/2022/november/united-states-utilizes-innovative-labor-and-trade-tool-bring>

B. Import Policies

Import policies are another set of important tools the U.S. utilizes to regulate international trade. Through these policies, the U.S. can provide countries with beneficial access to the U.S. market.¹⁷ For instance, Congress can enact trade preference programs (TPPs), which provide unilateral and nonreciprocal advantages to designated beneficiary countries.¹⁸ 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 Hemispheric Opportunity Through Partnership for Encouragement Act (HOPE Act).¹⁹ These programs work to bolster the trade of beneficiary countries by temporarily allowing them to export specific products to the U.S. duty-free.²⁰

C. Import Tariffs, Quotas, and Import Licenses

Import tariffs, quotas, and licenses are some of the primary ways the U.S. government regulates and limits imports from foreign entities. 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 U.S.²¹ An import tariff is a tax levied against goods imported from another country.²² The exact tariff rate is calculated using the Harmonized Tariff Schedule (HTS)—a database operated by the U.S. International Trade Commission (ITC)—which factors in the type of product being imported, the country of origin, and the existence of preferential trade agreements.²³

Quotas, on the other hand, place a limit on the quantity of a specific good that can be imported into the U.S. over a given time period.²⁴ While the U.S. does not currently impose any absolute quotas—quotas that place a hard limit on the number of specific goods that can be imported—it does impose some tariff-rate quotas that tax certain goods at higher rates after a

concrete-wins-workers-across-north.

¹⁷ See generally VIVIAN C. JONES, ET AL., CONG. RSCH. SERV. R41429, TRADE PREFERENCES ECONOMIC ISSUES AND POLICY OPTIONS 1–2 (2013).

¹⁸ *Id.*

¹⁹ See *id.* at 2.

²⁰ *Id.*

²¹ See generally *Technical Information on anti-dumping*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (last visited Sept. 1, 2023).

²² See generally *Import Tariffs Overview and Resources*, INT. TRADE ADMIN., <https://www.trade.gov/import-tariffs-fees-overview> (last visited Sept. 1, 2023).

²³ *Id.*

²⁴ *Commodities Subject to Import Quotas*, U.S. CUSTOMS AND BORDER PATROL, <https://www.cbp.gov/trade/quota/guide-import-goods/commodities> (last modified May 25, 2023).

quantity threshold has been surpassed.²⁵ Lastly, import licenses are documents issued by the U.S. that authorize international traders to import certain goods.²⁶ The U.S. imposes import licenses on a variety of products, which in turn limits the number of entities permitted to import the licensed goods.²⁷

D. National Security and Foreign Policy Implications

National security and foreign policy are often factored into U.S. international trade decisions, showing that international trade mechanisms are not purely an economic endeavor. The U.S. often utilizes export controls and sanctions when regulating international trade for foreign policy or national security purposes.²⁸ Export controls are used in attempts 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.²⁹ Sanctions are restrictive economic measures used against an individual, entity, or country.³⁰ These measures include trade embargoes, restrictions on the use of U.S. dollars, denial of foreign assistance and investments, freezing of foreign assets, and prohibiting transactions with U.S. entities.³¹

Often export controls and sanctions are used in tandem when national security risks are identified. In 2022, the U.S. enacted unilateral controls against China focused on semiconductor and supercomputer-related technologies through the Export Administration Regulations (EAR).³² These controls increased Entity List designations that require specific licenses for exports related to China and increased focus on military intelligence end-user controls for China with the purpose of “prevent[ing] sensitive technologies with military applications from being acquired by . . . China’s military.”³³ Further, the U.S. has expanded export restrictions of Nvidia artificial intelligence chips to the Middle East to prevent these chips from military end-use in China.³⁴

²⁵ *Id.*

²⁶ See *generally Import Licensing*, U.S. TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/wto-multilateral-affairs/wto-issues/import-licensing> (last visited Sept. 1, 2023).

²⁷ See *How to get an import license or permit*, U.S. GOV’T, <https://www.usa.gov/import-license-permit#:~:text=In%20most%20cases%2C%20you%20will,and%20Exporters%20provides%20an%20overview> (last visited Sept. 1, 2023).

²⁸ See SCHWARZENBERG & NELSON, *supra* note 9, at 49 (mentioning that dual-use technologies include commodity, software, or technology that has both commercial and military applications).

²⁹ ANDRES B. SCHWARZENBERG & CHRISTOPHER A. CASEY, CONG. RSCH. SERV., R46669, INTERNATIONAL TRADE AND FINANCE: OVERVIEW AND ISSUES FOR THE 117TH CONGRESS, 23 (2021).

³⁰ Johnathan Masters, *What Are Economic Sanctions?*, COUNCIL ON FOREIGN RELS. (2019), <https://www.cfr.org/bacjgrounder/what-are-economic-sanctions>.

³¹ See *generally* SCHWARZENBERG & CASEY, *supra* note 29.

³² See 15 C.F.R. § 730-80 (2022).

³³ *Commerce Implements New Export Controls on Advanced Computing and Semiconductor Manufacturing Items to the People’s Republic of China*, U.S. DEP’T OF COM. (Oct. 7, 2022); see 15 C.F.R. § 730-80 (2022).

³⁴ Joe Middleton, *US restricts exports of Nvidia AI chips to Middle East*, THE GUARDIAN (Aug. 31, 2023), <https://www.theguardian.com/technology/2023/aug/31/us-restricts-exports-of-nvidia-ai-chips-to-middle-east>.

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 ITC.³⁵ Government agencies, however, typically attempt to settle matters involving private entities and the U.S. 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.³⁶ However, the decisions and findings of these agencies are appealable to the CIT, and decisions from the CIT are appealable to the U.S. Court of Appeals for the Federal Circuit.³⁷

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, and Sections 201 and 301 of the Trade Act of 1974.³⁸ However, U.S. presidents have tested the boundaries of their congressionally granted authority. 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 U.S. imports.³⁹ Asserting national security interests, President Biden issued Executive Order (EO) 14105 to block and regulate U.S. investments funneling towards Chinese technology industries.⁴⁰

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 U.S. national security.⁴¹ After initiating an investigation, the DOC consults with the Department of Defense

³⁵ See *About the Court*, U.S. CT. OF INT'L TRADE, <https://www.cit.uscourts.gov/about-court> (last visited Sept. 1, 2023).

³⁶ See *Understanding Anti-Dumping & Countervailing Duty Investigations*, U.S. INT'L TRADE COMM'N, https://www.usitc.gov/press_room/usad.htm (last visited Sept 1, 2023).

³⁷ *Id.*

³⁸ See 19 U.S.C. § 1862(f); 19 U.S.C. § 2251-2254; 15 U.S.C. § 2411-2416.

³⁹ See generally RACHEL F. FEFER, ET AL., CONG. RSCH. 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. RSCH. SERV. R45417, WORLD TRADE ORGANIZATION: OVERVIEW AND FUTURE DIRECTION 20 (2020).

⁴⁰ Exec. Order No. 14105, 88 Fed. Reg. 54,867 (Aug. 11, 2023); Peter Baker & David E. Sanger, *Biden Orders Ban on New Investments in China's Sensitive High-Tech Industries*, N.Y. TIMES (Aug. 9, 2023), <https://www.nytimes.com/2023/08/09/us/politics/biden-ban-china-investment.html>.

⁴¹ 19 U.S.C. § 1862(b)(1)(a).

and “other appropriate officers of the United States” to discuss specific policy and security questions relevant to the investigations.⁴² 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.⁴³ The President may then decide on necessary remedies.⁴⁴

The most notable example of Section 232 application in recent memory was former President Trump’s decision in March 2018 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 (EU), China, Mexico, and Canada, imposing retaliatory tariffs on the same products.⁴⁵ The tariffs were also met with domestic resistance, including several lawsuits heard by the CIT and the U.S. Court of Appeals for the Federal Circuit, challenging the legality of the tariffs.⁴⁶ The Biden administration has maintained the tariffs imposed by his predecessor under Section 232 yet has increased tariffs on aluminum products from Russia to 200 percent and temporarily suspended tariffs on Ukrainian steel.⁴⁷

B. Section 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.⁴⁸ The act states that when a surge in imports seriously threatens domestic industries, the affected industries may petition the ITC for a temporary safeguard.⁴⁹ The ITC then judges if an injury exists and recommends a remedy to the President

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

⁴³ *Id.* § 1862(b)(3)(a).

⁴⁴ *Id.* § 1862(c)(1)(a)(i)–(ii).

⁴⁵ See *Proclamation on Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles into the United States*, NAT’L ARCHIVES (Jan. 24, 2020), <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 (Oct. 2018), <https://www.brookings.edu/research/which-us-communities-are-most-affected-by-chinese-eu-and-nafta-retaliatory-tariffs>.

⁴⁶ 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).

⁴⁷ See *A Proclamation on Adjusting Imports of Aluminum Into the United States*, THE WHITE HOUSE (Feb. 24, 2023), <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/02/24/a-proclamation-on-adjusting-imports-of-aluminum-into-the-united-states-4/>; *Secretary Raimondo Announces Presidential Proclamation Extending Temporary Suspension of 232 Tariffs on Ukraine Steel*, U.S. DEP’T OF COM. (May 31, 2023), <https://www.commerce.gov/news/press-releases/2023/05/secretary-raimondo-announces-presidential-proclamation-extending>.

⁴⁸ See *Understanding Safeguard Investigations*, U.S. INT’L TRADE COMM’N, https://www.usitc.gov/press_room/us_safeguard.htm (last visited Sept. 1, 2023).

⁴⁹ *Id.*

who then decides whether to provide relief.⁵⁰ Such relief may include tariff increases, quotas, or negotiated agreements to shield domestic entities.⁵¹ 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 be the “substantial cause” of the injury.⁵²

Most recently, the ITC undertook two investigations in 2017 addressing injuries sustained by domestic industries due to increased imports of photovoltaic cells and large residential washing machines.⁵³ Former President Trump issued a proclamation in January 2018 providing relief to the domestic industries by increasing tariffs on the imported products.⁵⁴ Soon after, Canadian solar product exporters sought an injunction against the former President’s decision.⁵⁵ The Federal Circuit denied the exporters’ request, noting that the President enjoyed substantial discretion under Section 201 to determine which measures were necessary to protect domestic entities.⁵⁶ In 2022, the Biden administration announced it would extend the Section 201 tariffs on imported solar cells for another four years, but with changes to several provisions that include doubling the tariff rate quota from two and a half to five gigawatts and excluding bifacial panels from the tariffs.⁵⁷

Section 301 of the Trade Act of 1974 allows the U.S. Trade Representative (USTR) to impose sanctions on foreign countries that violate United States’ trade agreements or engage in practices that unjustifiably burden U.S. commerce.⁵⁸ While traditionally the U.S. has used Section 301 to pressure other countries to remove trade barriers, the U.S. has recently relied on Section 301 to impose trade restrictions on imports from China.⁵⁹ Most recently, in 2021, the USTR determined that Vietnam’s practices related to currency valuation and excessive foreign

⁵⁰ *Id.*; 19 U.S.C. § 2252(b).

⁵¹ *Understanding Safeguard Investigations*, *supra* note 48.

⁵² *Id.*

⁵³ *See Section 201—Imported Solar Cells and Modules*, U.S. TRADE REPRESENTATIVE, <https://ustr.gov/issue-areas/enforcement/section-201-investigations/investigation-no-ta-201-75-cspv-cells> (last visited Sept. 1, 2023); *Section 201—Imported Large Residential Washing Machines (Washers)*, U.S. TRADE REPRESENTATIVE, <https://ustr.gov/issue-areas/enforcement/section-201-investigations/section-201-imported-large-residential-washing-machines-washers> (last visited Sept. 1, 2023).

⁵⁴ *See Section 201 Cases: Imported Large Residential Washing Machines and Imported Solar Cells and Modules*, U.S. TRADE REPRESENTATIVE, <https://ustr.gov/sites/default/files/files/Press/fs/201%20Cases%20Fact%20Sheet.pdf> (last visited Sept. 1, 2023).

⁵⁵ *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).

⁵⁶ *Silfab Solar, Inc. v. United States*, 892 F.3d 1340, 1349 (Fed. Cir. 2018).

⁵⁷ *A Proclamation to Continue Facilitating Positive Adjustment to Competition From Imports of Certain Crystalline Silicon Photovoltaic Cells (Whether or Not Partially or Fully Assembled Into Other Products)*, THE WHITE HOUSE (Feb. 4, 2022), <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/02/04/a-proclamation-to-continue-facilitating-positive-adjustment-to-competition-from-imports-of-certain-crystalline-silicon-photovoltaic-cells-whether-or-not-partially-or-fully-assembled-into-other-product/>.

⁵⁸ 19 U.S.C. § 2411(a)(1).

⁵⁹ ANDRES B. SCHWARZENBERG, CONG. RSCH. SERV., IF11346, SECTION 301 OF THE TRADE ACT OF 1974 1–2 (May 26, 2022).

exchange market interventions were unreasonable and burdened U.S. commerce.⁶⁰ Another USTR investigation in 2021 ended in an agreement between the U.S. and Vietnam, where Vietnam committed to keep illegally harvested or traded timber out of the supply chain.⁶¹

V. INTERNATIONAL PROCUREMENT AND INTERNATIONAL TRADE AS A FOREIGN POLICY TOOL

There are no shortage of issues and controversies surrounding international trade, but, over the past couple of years, a few topics merit special consideration. First, the shift towards protectionism in international procurement was exacerbated by the COVID-19 pandemic.⁶² With this rise of protectionism and promotion of U.S. domestic production, it is important to keep in mind that the U.S. must maintain its commitments to the varying international trade agreements of which it is a part. Second, the Russian invasion of Ukraine has disrupted international trade, caused inflationary pressures, and developed security concerns—putting pressure on a complex global supply chain.⁶³ The U.S. has used international trade measures as a foreign policy tool against Russia to precipitate an end to the conflict.^{64,65}

A. *Protectionism in International Procurement*

Government procurement has been an objective of U.S. trade policy, as the U.S. has attempted to offer opportunities for U.S. goods, services, and suppliers to transcend borders and compete for foreign government procurement.⁶⁶ Government procurement typically comprises ten to fifteen percent of most countries' GDP.⁶⁷ Thus, the creation of the 1979 World Trade Organization (WTO) Agreement on Government Procurement (GPA) is critical to the global economy, as it created transparent and nondiscriminatory rules, which served to protect and promote procurement amongst the parties to the GPA.⁶⁸ The GPA covers forty-eight parties that

⁶⁰ Notice of Determination Pursuant to Section 301: Vietnam's Acts, Policies, and Practices Related to Currency Valuation, 86 Fed. Reg. 6732 (Jan. 22, 2021).

⁶¹ *USTR Announces Agreement Between the United States and Vietnam to Resolve Timber Section 301 Investigation*, U.S. TRADE REPRESENTATIVE (Oct. 1, 2021), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/october/ustr-announces-agreement-between-united-states-and-vietnam-resolve-timber-section-301-investigation>.

⁶² Q3 2022 Overview: Limited Targeting of Essential Goods Essential Goods Initiative: October 2022 data release, GLOBAL TRADE ALERT, <https://www.globaltradealert.org/reports> (last visited Sept. 5, 2023).

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⁶⁵ Alan Wm. Wolff, *Paradigm Lost? U.S. Trade Policy as an Instrument of Foreign Policy*, **Law Wire** (Feb. 2, 2018), <https://www.wcl.american.edu/impact/lawwire/paradigm-lost-us-trade-policy-as-an-instrument-of-foreign-policy/>.

⁶⁶ *Government Procurement*, U.S. TRADE REPRESENTATIVE, <https://ustr.gov/issue-areas/government-procurement> (last visited Sept. 5, 2023).

⁶⁷ *Id.*

⁶⁸ ANDRES B. SCHWARZENBERG, CONG. RSCH. SERV., R47243, U.S. GOVERNMENT PROCUREMENT AND INTERNATIONAL TRADE (Jan. 10, 2023).

have chosen to open their procurement markets.⁶⁹ The procurement market covered by the GPA is estimated to be worth around 1.7 trillion dollars.⁷⁰ Additionally, GPA market access is negotiated in a reciprocal manner; thus, the procurement coverage in different markets and sectors varies.⁷¹

The GPA and other international agreements that the U.S. is involved in create opportunities for foreign suppliers to compete in the U.S. market, just as they do for domestic goods, services, and suppliers. A study by the Government Accountability Office (GAO) found that in 2017, the U.S. had opened nearly eighty percent of its federal contracts to suppliers around the world.⁷² Despite being one of the most open markets across the globe, the U.S. has historically attempted to ensure that some of its laws restrict foreign sourcing.⁷³ The two main laws that regulate domestic sourcing are the Buy American Act of 1933 (BAA) and the Trade Agreements Act of 1979 (TAA).⁷⁴ The BAA is a domestic price preference statute for U.S. products that controls federal government procurement.⁷⁵ The statute requires that agencies favor domestic end products, yet it does not completely prohibit agencies from choosing a foreign product if the agency determines that the foreign product is equivalent and less costly after a comparative price evaluation test.⁷⁶ The TAA, on the other hand, serves to enforce different trade agreements to ensure that products and services of designated countries do not receive discriminatory treatment for procurements covered by the TAA.⁷⁷

The COVID-19 pandemic had a massive impact on trade, causing several global supply chain issues that governments have addressed through varying protectionist policies.⁷⁸ The COVID-19 pandemic exposed the U.S. government's reliance on the procurement of goods in certain industrial sectors from foreign manufacturers and suppliers.⁷⁹ Congressional members quickly explored options that would promote U.S. domestic production by prioritizing domestic goods in procurement and strengthening government procurement requirements set for foreign suppliers.⁸⁰ The Executive Branch also worked to favor domestic goods; for example, the Trump administration raised the domestic content threshold to upwards of fifty-five percent in 2019, altering what qualifies as a domestic end product under the BAA.⁸¹

The current administration has maintained protectionist measures of international procurement. A slew of measures, including the American Rescue Plan Act, the Infrastructure Investment and Jobs Act, the CHIPS and Science Act, and the Inflation Reduction Act (IRA),

⁶⁹ *Id.* at 1.

⁷⁰ *Id.*

⁷¹ *Id.* at 3.

⁷² *Id.*

⁷³ SCHWARZENBERG, *supra* note 59, at 3.

⁷⁴ 41 U.S.C. §§8301–8305; 19 U.S.C. §§ 2501-2581.

⁷⁵ 41 U.S.C. §§8301–8305

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ SCHWARZENBERG, *supra* note 59, at 14.

⁷⁹ *See id.*

⁸⁰ *See id.*

⁸¹ *Id.* at 7.

reflect this drive.⁸² Most notably, in January 2021, the Biden administration signed EO 14005, commonly known as the “Buy America” EO.⁸³ This EO seeks to shift almost 600 billion dollars (about one dollar per person in the U.S.) of government procurement spending from foreign to domestic manufacturers.⁸⁴ Extending beyond his predecessor’s policies, Biden’s Buy America policy aims to have a threshold of sixty percent, a five percent increase to what can be considered a domestic end product.⁸⁵ While the U.S. has historically relied heavily on foreign supply chains, recent policy has refocused on protecting U.S. manufacturers, especially those relating to clean energy. Additionally, the Biden administration has promised to review past and current actions to ensure that they are consistent with “Made in America Laws,” including review of agency actions inconsistent with administration policy, updates and centralization of the “Made in America” waiver process, promotion of transparency in federal procurement, and promotion of BAA enforcement.⁸⁶ As supply chain issues continue to dampen national economies, U.S. trade policy has turned inward to protect domestic manufacturers.

B. Russia/Ukraine Conflict: International Trade as a Foreign Policy Tool

The Russian invasion of Ukraine in February 2022, and continued occupation and violence against Ukraine, has caused a global upheaval to international trade and investment.⁸⁷ This conflict pushed governments across the globe to recognize the importance of maintaining a healthy domestic supply chain as well as acknowledge the dependencies on certain countries for specific products.⁸⁸ Beyond acknowledging their own trade setbacks, the U.S. and the EU have decided to use international trade as a foreign policy tool against Russia.⁸⁹ The U.S. and its allies have set sanctions and other actions aimed at marring Russian economic engagement and trade in addition to its access to financial instruments and resources.⁹⁰ The Executive Branch has imposed trade restrictions to limit Russian access to American-made technologies.⁹¹ The sanctions imposed by the Biden administration on Russia come from authority delegated to the President in the International Emergency Economic Powers Act (IEEPA) and the National Emergencies Act (NEA).⁹² Biden administration sanctions have

⁸² See Jeffrey Anderson, *The Silver Lining of Biden’s ‘New Protectionism,’* Foreign Policy (Mar. 2, 2023), <https://foreignpolicy.com/2023/03/02/biden-protectionism-us-eu-economy-investment-green-industry/>.

⁸³ Exec. Order No. 14005, 86 F.R. 7475 (2021).

⁸⁴ Conor Nolan, *‘Buy America’: Protectionist Peril or Politically Practical?*, GEO. PUB. POL’Y REV., (Oct. 31, 2021) <http://gppreview.com/2021/10/31/buy-america-protectionist-peril-politically-practical>.

⁸⁵ SCHWARZENBERG, *supra* note 59, at 14 (noting that former President Trump’s EO 13881 raised the domestic content threshold to fifty-five percent). *See id.*

⁸⁶ SCHWARZENBERG, *supra* note 59, at 29-30.

⁸⁷ CORY WELT, CONG. RSCH. SERV., IN11869, RUSSIA’S 2022 INVASION OF UKRAINE: OVERVIEW OF U.S. SANCTIONS AND OTHER I (July 6, 2022).

⁸⁸ SCHWARZENBERG, *supra* note 59, at 34.

⁸⁹ *See* WELT, *supra* note 86, at 1.

⁹⁰ REBECCA M. NELSON, CHRISTOPHER A. CASEY, & ANDRES B. SCHWARZENBERG, CONG. RSCH. SERV., IF12062, NEW FINANCIAL AND TRADE SANCTIONS AGAINST RUSSIA (Mar. 17, 2022).

⁹¹ *Id.*

⁹² *See* Russia – Country Com. Guide, INT’L TRADE ADMIN., <https://www.trade.gov/country-commercial->

focused on export controls, export and import restrictions, and the revocation of Russia's permanent normal trade relations (PNTR) on April 8, 2022.⁹³ President Biden proclaimed his administration's commitment to levying these trade sanctions and actions against Russia on February 24, 2023.⁹⁴

The DOC's Bureau of Industry and Security (BIS) have spearheaded certain American export controls. For instance, the BIS announced rules that would restrict the transfer of U.S. origin technologies to Russia and its ally, Belarus.⁹⁵ Since February 2022, the BIS has focused on degrading Russia's military capability by limiting exports and reexports to Russia of items on the Commerce Control List (CCL) that are unilaterally controlled.⁹⁶ Furthermore, the U.S. has targeted oil refining, industrial and commercial items, chemical and biological producers, and luxury goods by denying these industries' exports.⁹⁷ Additionally, the U.S. has added foreign direct product rules (FDPRs) targeted at Russia and Belarus to ensure that U.S. hardware and software is not used to produce foreign items that may support Russia's military capabilities.⁹⁸ These measures are having severe and protracted consequences on Russia's defense industrial base; this has been particularly evident as Russia has suffered from major supply shortages, forcing it to look to less technologically advanced countries, such as Iran and North Korea, for these supplies and equipment.⁹⁹ As of May 2023, the BIS intensified its restrictions on Russia by implementing additional sanctions under the EAR, refining existing controls, and adding dozens of new entities to the Entity List.¹⁰⁰

The PNTR, or most favored nation (MFN) status, is a cornerstone of the WTO as it guarantees that members provide other members lowest tariffs or best trade concessions.¹⁰¹ President Biden signed into a law a bill, HR 7108, that suspended Russia's PNTR status and allowed the Biden administration to ¹⁰² through January 1, 2024. By revoking Russia's PNTR status, Russia is subject to higher duty rates; an example of this is the increase of duty rates from fifteen percent to forty-five ¹⁰³. Additionally, duty rates for most Russian petroleum oil also

guides/russia-sanctions-framework (last visited Oct. 17, 2022) (explaining that under the IEEPA, the President issues executive order's declaring national emergency under the NEA).

⁹³ See NELSON, CASEY, & SCHWARZENBERG, *supra* note 89; CATHLEEN D. CIMINO-ISAACS, BRANDON J. MURRILL, LIANA WONG, & NINA M. HART, CONG. RSCH. SERV., IF12071, RUSSIA'S TRADE STATUS, TARIFFS, AND WTO ISSUES (APR. 11, 2022).

⁹⁴ Proclamation No. 10523, 88 Fed. Reg. 13,277 (Feb. 24, 2023).

⁹⁵ See U.S. Dep't of Com. Bureau of Indus. & Sec., Russia Exp. Controls – List of Common High-Priority Items (2023).

⁹⁶ *Com.-Treasury-State Alert: Impact of Sanctions and Export Controls on Russia's Military-Indus. Complex*, BUREAU OF INDUS. AND SEC. <https://www.bis.doc.gov/index.php/Documents/about-bis/newsroom/press-releases/3172-2022-10-14-impacts-of-sanctions-and-export-controls-on-russian-military-industrial-complex/file>.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ See Press Release, U.S. Dep't of Com. Bureau of Indus. & Sec. (May 19, 2023),

<https://www.bis.doc.gov/index.php/Documents/about-bis/newsroom/press-releases/3273-2023-05-19-bis-press-release-russia-rules-and-joint-bis-fincen-alert/file>.

¹⁰¹ RUSSIA'S TRADE STATUS, *supra* note 92.

¹⁰² *Id.*

¹⁰³ See *id.*

doubled¹⁰⁴severe blow to Russian exports.^[REDACTED] On June 27, 2022, President Biden issued Presidential Proclamation 10420, which allowed the U.S. to further increase tariffs on certain Russian imports that are worth nearly 2.3¹⁰⁵.^[REDACTED] The U.S. sanction regime does not seem like it will wane in the foreseeable future. As an example, the Office of Foreign Assets Control (OFAC), on September 9, 2022, issued preliminary guidance regarding a ban on maritime transportation of Russian crude oil and petroleum products on December 5, 2022, and February 5, ¹⁰⁶ respectively.^[REDACTED] The U.S. is gearing itself towards a more aggressive stance with sanctions as it looks to go after entities and individuals outside of Russian jurisdiction who provide material support to ¹⁰⁷ Russia.¹⁰⁸ As exhibited above, in addition to protecting domestic industries, the U.S. has largely engaged international trade mechanisms to weaken the Russian economy in retaliation for Russia's aggression against Ukraine.

¹⁰⁴ *See id.*

¹⁰⁵ Kate McNulty, Shara Aranoff, & Alexander Chinoy, *Increased Tariffs on Certain U.S. Imports from Russia Effective July 27, 2022: What Companies Need to Know*, COVINGTON (July 25, 2022), <https://www.globalpolicywatch.com/2022/07/increased-tariffs-on-certain-u-s-imports-from-russia-effective-july-27-2022-what-companies-need-to-know>.

¹⁰⁶ Peter Flanagan, Kimberly Strosnider, Peter Lichtenbaum, Stephen Rademaker, Corinne Goldstein, Stephen Bartenstein, et al., *The U.S. Imposes Additional Sanctions and Export Controls Against Russia and Belarus*, COVINGTON (Oct. 13, 2022), <https://www.globalpolicywatch.com/2022/10/the-united-states-imposes-additional-sanctions-and-export-controls-against-russia-and-belarus>.

¹⁰⁸ *Id.*