

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

International trade is the exchange of goods and services across international borders.<sup>1</sup> This exchange can bring profound benefits to all states 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.<sup>2</sup> States attempt to regulate international trade by adopting a variety of regulations to balance these tradeoffs with other national priorities. These regulations can be dynamic and complex, and they tend to either promote free trade policies or advocate for more restrictive measures.<sup>3</sup>

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.<sup>4</sup> 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.<sup>5</sup>

In the United States, the Constitution grants Congress and the Executive Branch the authority to jointly regulate this complex environment.<sup>6</sup> The Executive Branch negotiates and signs treaties. As an example of the Executive Branch’s trade authority, in 2022, President Biden launched the Indo-Pacific Economic Framework for Prosperity (IPEF) with thirteen other

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<sup>1</sup> See JOHN H. JACKSON, WILLIAM J. DAVEY & ALAN O. SYKES, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT 1 (6th ed. 2013) (introducing the role of international economic relations in trade).

<sup>2</sup> See generally Marketa Trimble, *Unjustly Vilified TRIPS-Plus?: Intellectual Property Law in Free Trade Agreements*, 71 AM. U. L. REV. 1449 (2022); 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>.

<sup>3</sup> 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).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> U.S. CONST. art. I, § 8; *id.* art. II, § 2; see SHAYERAH I. AKHTAR, CONG. RSCH. SERV., IF11016, U.S. TRADE POLICY FUNCTIONS: WHO DOES WHAT? (2024) (outlining the functions of key U.S. trade agencies).

countries to create a new framework for economic engagement in the Indo-Pacific region.<sup>7</sup> As recently as June 2024, U.S. Secretary of Commerce Gina Raimondo traveled to Singapore to continue this partnership by signing the Clean Economy Agreement, Fair Economy Agreement, and the Agreement on IPEF.<sup>8</sup> 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.<sup>9</sup> A combination of domestic and international law governs international trade disputes and several U.S. courts, including the Federal Circuit, adjudicate these cases.<sup>10</sup>

## 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.<sup>11</sup> FTAs tend to promote the quasi-unrestricted movement of goods across borders, subject to certain limitations and guarantees.<sup>12</sup> FTAs almost universally include provisions guaranteeing, to some extent, that parties will enjoy access to the markets of the other participating parties.<sup>13</sup> Most FTAs include provisions mandating protections for intellectual property and fair labor practices.<sup>14</sup> Further, FTAs often have foreign direct investment limitations and guarantees, tariff regulations, methods for determining country of

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<sup>7</sup> *Indo-Pacific Economic Framework for Prosperity*, U.S. DEP'T OF COM., <https://www.commerce.gov/ipef> (last visited Sept. 6, 2024).

<sup>8</sup> *Raimondo Announces IPEF Agreements Signed in Singapore, Announces \$23B in Priority Infrastructure Projects at Inaugural Clean Economy Investor Forum*, U.S. DEP'T OF COM. (June 6, 2024), <https://www.commerce.gov/news/press-releases/2024/06/raimondo-announces-ipef-agreements-signed-singapore-announces-23b>.

<sup>9</sup> *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/>; United States-Taiwan Initiative on 21st-Century Trade First Agreement Implementation Act, Pub. L. No. 118-13, 137 Stat. 63.

<sup>10</sup> *Court Jurisdiction*, FED. CIR., <https://cafc.uscourts.gov/home/the-court/about-the-court/court-jurisdiction/> (last visited Sept. 6, 2024) (explaining the U.S. Court of Appeals for the Federal Circuit's jurisdiction over a unique variety of subject matters, including international trade, government contracts, patents, trademarks, federal personnel, and more).

<sup>11</sup> *See* ANDRES B. SCHWARZENBERG & REBECCA M. NELSON, CONG. RSCH. SERV., R45474, INTERNATIONAL TRADE AND FINANCE: OVERVIEW AND ISSUES FOR THE 116TH CONGRESS, 23 (2020); *see also* CHRISTOPHER A. CASEY, ANDRES B. SCHWARZENBERG & DANIELLE M. TRACHTENBERG, CONG. RSCH. SERV., R47484, INTERNATIONAL TRADE AND FINANCE: OVERVIEW AND ISSUES FOR THE 118TH CONGRESS, 23 (2023) (noting that FTAs have "historically been a core component of U.S. trade policy").

<sup>12</sup> *See* SCHWARZENBERG & NELSON, *supra* note 11, at 26.

<sup>13</sup> *Id.*

<sup>14</sup> *See id.* (noting that NAFTA was the first trade agreement to include protections on intellectual property rights, labor, and the environment). *See generally* North American Free Trade Agreement, 19 U.S.C. § 3311 (repealed and replaced by the United States-Mexico-Canada Agreement on July 1, 2020).

origin, and clauses detailing dispute settlement procedures.<sup>15</sup>

Currently, the U.S. is a party to fourteen FTAs, covering twenty different countries.<sup>16</sup> Most recently, the United States-Mexico-Canada Agreement (USMCA) entered into force in 2020, replacing the North American Free Trade Agreement (NAFTA).<sup>17</sup> 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.<sup>18</sup>

### 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.<sup>19</sup> For instance, Congress can enact trade preference programs (TPPs), which provide unilateral and nonreciprocal advantages to designated beneficiary countries.<sup>20</sup> There are several trade preference programs currently in effect, including large programs that target several countries and regions, such as 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).<sup>21</sup> These programs work to bolster the trade of beneficiary countries by temporarily allowing them to export specific products to the U.S. duty-free.<sup>22</sup>

### 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.<sup>23</sup>

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<sup>15</sup> See SCHWARZENBERG & NELSON, *supra* note 11, at 26.

<sup>16</sup> See *Free Trade Agreements*, INT'L TRADE ADMIN., <https://www.trade.gov/free-trade-agreements> (last visited Sept. 6, 2024).

<sup>17</sup> 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. 6, 2024); North American Free Trade Agreement, 19 U.S.C. § 3311.

<sup>18</sup> 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-concrete-wins-workers-across-north>; see also Kathleen Claussen, *The Track Record of the USMCA Rapid Response Mechanism* (Brookings Inst., USMCA Forward 2024), <https://www.brookings.edu/articles/the-track-record-of-the-usmca-rapid-response-mechanism/> (chronicling the first four years of USMCA's rapid response mechanism).

<sup>19</sup> See generally VIVIAN C. JONES, J. F. HORNBECK, M. ANGELES VILLARREAL, CONG. RSCH. SERV. R41429, TRADE PREFERENCES ECONOMIC ISSUES AND POLICY OPTIONS 1–2 (2013).

<sup>20</sup> *Id.*

<sup>21</sup> See *id.* at 2; African Growth and Opportunity Act, 19 U.S.C. §§ 3701–3741.

<sup>22</sup> See JONES ET AL., *supra* note 11, at 2.

<sup>23</sup> See generally *Technical Information on Anti-dumping*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/adp\\_e/adp\\_info\\_e.htm](https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm) (last visited Sept. 6, 2024).

An import tariff is a tax levied against goods imported from another country.<sup>24</sup> The exact tariff rate is calculated using the Harmonized Tariff Schedule (HTS)—a database operated by the U.S. International Trade Commission (USITC)—which factors in the type of product being imported, the country of origin, and the existence of preferential trade agreements.<sup>25</sup>

Quotas place a limit on the amount or volume of certain commodities that can be imported into the U.S. over a given period.<sup>26</sup> Quotas are imposed by legislation, Presidential Proclamation, or Executive Orders.<sup>27</sup> Import quotas in the U.S. are either absolute quotas or tariff rate quotas.<sup>28</sup> U.S. Customs and Border Protection administers the majority of import quotas, but does not have the authority to change any quota.<sup>29</sup> However, the Office of the United States Trade Representative coordinates with other government agencies to set quota limits.<sup>30</sup>

The World Trade Agreement on Import Licensing Procedures requires member states to abide by certain rules in administering import licensing systems.<sup>31</sup> Import licensing systems are procedures requiring an application to be submitted to a specific administrative body prior to importation.<sup>32</sup> As a member to the Agreement, the Office of United States Trade Representative's Committee on Import Licensing administers the agreement and discusses with other member states about their licensing regimes.<sup>33</sup> 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.<sup>34</sup>

#### *D. National Security and Foreign Policy Implications*

International trade decisions are not purely an economic endeavor, rather national security and foreign policy are also often factored into U.S. international trade policies. The U.S. often utilizes export controls and sanctions for foreign policy and national security purposes.<sup>35</sup> Export controls are used to protect national security interests by preventing the proliferation of sensitive and critical technologies, such as nuclear material, defense articles and services, and

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<sup>24</sup> See generally *Import Tariffs Overview and Resources*, INT'L. TRADE ADMIN., <https://www.trade.gov/import-tariffs-fees-overview> (last visited Sept. 6, 2024).

<sup>25</sup> *Id.*

<sup>26</sup> *Quota Administration*, U.S. CUSTOMS AND BORDER PROTECTION, <https://www.cbp.gov/trade/quota/guide-import-goods/administration> (last modified Jan. 27, 2023).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*; see *Mission of the USTR*, U.S. TRADE REP., <https://ustr.gov/about-us/about-ustr> (last visited Sept. 6, 2024).

<sup>31</sup> See *Import Licensing*, U.S. TRADE REP., <https://ustr.gov/trade-agreements/wto-multilateral-affairs/wto-issues/import-licensing> (last visited Sept. 6, 2024); see also *Technical Information on Import Licensing*, WTO, [https://www.wto.org/english/tratop\\_e/implic\\_e/implic\\_info\\_e.htm](https://www.wto.org/english/tratop_e/implic_e/implic_info_e.htm) (last visited Sept. 6, 2024).

<sup>32</sup> *Technical Information on Import Licensing*, WTO, [https://www.wto.org/english/tratop\\_e/implic\\_e/implic\\_info\\_e.htm](https://www.wto.org/english/tratop_e/implic_e/implic_info_e.htm) (last visited Sept. 6, 2024).

<sup>33</sup> *Import Licensing*, U.S. TRADE REP., <https://ustr.gov/trade-agreements/wto-multilateral-affairs/wto-issues/import-licensing> (last visited Sept. 6, 2024).

<sup>34</sup> 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. 6, 2024).

<sup>35</sup> See SCHWARZENBERG & NELSON, *supra* note 11, at 49 (mentioning that dual-use technologies include commodity, software, or technology that has both commercial and military applications).

dual-use goods.<sup>36</sup> Sanctions are restrictive economic measures used against an individual, entity, or country.<sup>37</sup> 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.<sup>38</sup>

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).<sup>39</sup> 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.”<sup>40</sup> 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.<sup>41</sup>

### III. THE FEDERAL CIRCUIT AND OTHER JURISDICTIONAL BODIES

The U.S. Court of International Trade (CIT) has broad subject matter 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 USITC.<sup>42</sup> The CIT also has broad geographical jurisdiction, as it can hear and decide cases that arise anywhere in the U.S.<sup>43</sup> A number of quasi-judicial bodies existed prior to the CIT, but in 1956, Congress established a court to address international trade under Article III of the Constitution.<sup>44</sup> Congress enhanced and refined the court’s powers in the Customs Courts Act of 1970 and officially designated the court the United States Court of International Trade in the Customs Courts Act of 1980.<sup>45</sup> The President appoints the nine judges, with the advice and consent of Senate, to the CIT.<sup>46</sup>

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<sup>36</sup> See generally AKHTAR, *supra* note 6 (describing how certain federal agencies coordinate national security and foreign policy priorities through U.S. trade policy).

<sup>37</sup> Johnathan Masters, *What Are Economic Sanctions?*, COUNCIL ON FOREIGN RELS. (June 24, 2024), <https://www.cfr.org/backgrounder/what-are-economic-sanctions>.

<sup>38</sup> See generally ANDRES B. SCHWARZENBERG & CHRISTOPHER A. CASEY, CONG. RSCH. SERV., R46669, INTERNATIONAL TRADE AND FINANCE: OVERVIEW AND ISSUES FOR THE 117TH CONGRESS (2021).

<sup>39</sup> See 15 C.F.R. § 730-80 (2022).

<sup>40</sup> *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); see also Peter Hoskins, *US Orders Immediate Halt to Some AI Chip Exports to China, Nvidia Says*, BBC (Oct. 24, 2023), <https://www.bbc.com/news/business-67213134>.

<sup>41</sup> 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>.

<sup>42</sup> See *About the Court*, CT. INT’L TRADE, <https://www.cit.uscourts.gov/about-court> (last visited Sept. 6, 2024).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*; see Act of July 14, 1956, 28 U.S.C. § 251(a).

<sup>45</sup> *About the Court*, CT. INT’L TRADE, <https://www.cit.uscourts.gov/about-court> (last visited Sept. 6, 2024); see Customs Courts Act of 1970, Pub. L. No. 91-271, § 110, 84 Stat. 274; Customs Courts Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727.

<sup>46</sup> *About the Court*, CT. INT’L TRADE, <https://www.cit.uscourts.gov/about-court> (last visited Sept. 6, 2024).

Prior to filing a claim with the CIT, government agencies typically attempt to settle matters involving private entities and the U.S. government. In such instances, several agencies participate and have specialized roles. The DoC investigates issues involving dumping or anti-competitive subsidizing, Customs and Border Protection (CBP) enforces antidumping and countervailing duty orders, and the USITC looks at whether a substantial injury to a domestic industry exists.<sup>47</sup> 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.<sup>48</sup>

#### 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.<sup>49</sup> However, U.S. presidents have tested the boundaries of their congressionally granted authority. Notably, President Trump’s 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.<sup>50</sup> Asserting national security interests, President Biden issued Executive Order (EO) 14105 to block and regulate U.S. investments funneling toward Chinese technology industries.<sup>51</sup>

##### 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.<sup>52</sup> After initiating an investigation, the DoC consults with the Department of Defense

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<sup>47</sup> See *Understanding Anti-Dumping & Countervailing Duty Investigations*, USITC, [https://www.usitc.gov/press\\_room/usad.htm](https://www.usitc.gov/press_room/usad.htm) (last visited Sept 6, 2024). The Supreme Court recently overruled *Chevron U.S.A. v. National Resources Defense Council* in deciding *Loper Bright Enterprises v. Raimondo* and *Relentless v. Department of Commerce*. See *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024). The *Loper Bright* decision ended the “*Chevron* deference” doctrine, and now claimants have new opportunities to challenge administrative agency positions previously upheld on deference grounds. See *The Supreme Court’s Double Hammer to Agencies: Loper Bright and Corner Post Set New Precedents for Challenging Federal Agency Action*, CROWELL (July 11, 2024), [https://www.crowell.com/en/insights/client-alerts/the-supreme-courts-double-hammer-to-agencies-loper-bright-and-corner-post-set-new-precedents-for-challenging-federal-agency-action#\\_ftn2](https://www.crowell.com/en/insights/client-alerts/the-supreme-courts-double-hammer-to-agencies-loper-bright-and-corner-post-set-new-precedents-for-challenging-federal-agency-action#_ftn2).

<sup>48</sup> *Id.*; see, e.g., *Pro-Team Coil Nail Enter. Inc. v. United States*, No. 2022-2241, 2024 WL 3824005, at \*1 (Fed. Cir. Aug. 15, 2024) (reviewing a case on appeal from the CIT affirming the DoC’s determination in an administration review of an antidumping order).

<sup>49</sup> See 19 U.S.C. § 1862(f); 19 U.S.C. §§ 2251–2254; 15 U.S.C. §§ 2411–2416.

<sup>50</sup> See generally RACHEL F. FEFER, KEIGH E. HAMMOND, VIVIAN C. JONES, BRANDON J. MURRILL, MICHAELA D. PLATZER & BROCK R. WILLIAMS, 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 & RACHEL F. FEFER, CONG. RSCH. SERV. R45417, WORLD TRADE ORGANIZATION: OVERVIEW AND FUTURE DIRECTION 20 (2020).

<sup>51</sup> Exec. Order No. 14105, 88 Fed. Reg. 54,867 (Aug. 11, 2023); PETER S. 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>.

<sup>52</sup> 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.<sup>53</sup> 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.<sup>54</sup> The President may then decide on necessary remedies.<sup>55</sup>

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.<sup>56</sup> 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.<sup>57</sup> The Biden administration maintained the tariffs imposed by President Trump under Section 232. Additionally, the Biden administration increased tariffs on aluminum products from Russia to 200 percent and temporarily suspended tariffs on Ukrainian steel.<sup>58</sup>

### 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.<sup>59</sup> The Act states that when a surge in imports seriously threatens domestic industries, the affected industries may petition the USITC for a temporary safeguard.<sup>60</sup> The USITC then judges if an injury exists and recommends a remedy to the

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<sup>53</sup> *Id.* § 1862(b)(1)(b)–(2)(a)(ii).

<sup>54</sup> *Id.* § 1862(b)(3)(a).

<sup>55</sup> *Id.* § 1862(c)(1)(a)(i)–(ii).

<sup>56</sup> 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 INST. (Oct. 2018), <https://www.brookings.edu/research/which-us-communities-are-most-affected-by-chinese-eu-and-nafta-retaliatory-tariffs>.

<sup>57</sup> 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. Int’l Trade 2019) (holding the additional Section 232 tariffs on Turkish steel violated statutorily mandated procedures).

<sup>58</sup> 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>; see also *A Proclamation on Adjusting Imports of Steel Into the United States*, THE WHITE HOUSE (May 31, 2024), <https://www.whitehouse.gov/briefing-room/presidential-actions/2024/05/31/a-proclamation-on-adjusting-imports-of-steel-into-the-united-states-6/> (continuing the suspension of tariffs on Ukrainian steel).

<sup>59</sup> See *Understanding Safeguard Investigations*, USITC, [https://www.usitc.gov/press\\_room/us\\_safeguard.htm](https://www.usitc.gov/press_room/us_safeguard.htm) (last visited Sept. 6, 2024).

<sup>60</sup> *Id.*

President who then decides whether to provide relief.<sup>61</sup> Such relief may include tariff increases, quotas, or negotiated agreements to shield domestic entities.<sup>62</sup> 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.<sup>63</sup>

Most recently, the USITC undertook two investigations in 2017 addressing injuries sustained by domestic industries due to increased imports of photovoltaic cells and large residential washing machines.<sup>64</sup> Former President Trump issued a proclamation in January 2018 providing relief to the domestic industries by increasing tariffs on the imported products.<sup>65</sup> Soon after, Canadian solar product exporters sought an injunction against the former President’s decision.<sup>66</sup> 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.<sup>67</sup> 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.<sup>68</sup>

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.<sup>69</sup> 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.<sup>70</sup> Most recently, in 2021, the USTR determined that Vietnam’s practices related to currency valuation and excessive foreign exchange market interventions were unreasonable and burdened U.S. commerce.<sup>71</sup> Another

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<sup>61</sup> *Id.*; 19 U.S.C. § 2252(b).

<sup>62</sup> *Understanding Safeguard Investigations*, *supra* note 48.

<sup>63</sup> *Id.*

<sup>64</sup> *See 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 Sept. 6, 2024); *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 Sept. 6, 2024).

<sup>65</sup> *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 Sept. 6, 2024).

<sup>66</sup> *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).

<sup>67</sup> *Silfab Solar, Inc. v. United States*, 892 F.3d 1340, 1349 (Fed. Cir. 2018).

<sup>68</sup> *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/>.

<sup>69</sup> 19 U.S.C. § 2411(a)(1).

<sup>70</sup> ANDRES B. SCHWARZENBERG, CONG. RSCH. SERV., IF11346, SECTION 301 OF THE TRADE ACT OF 1974 1–2 (May 13, 2024).

<sup>71</sup> Notice of Determination Pursuant to Section 301: Vietnam’s Acts, Policies, and Practices Related to Currency Valuation, 86 Fed. Reg. 6732 (Jan. 22, 2021).



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.<sup>72</sup>

## 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.<sup>73</sup> 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.<sup>74</sup> The U.S. has used international trade measures as a foreign policy tool against Russia to precipitate an end to the conflict.<sup>75</sup>

### 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.<sup>76</sup> Government procurement typically comprises ten to fifteen percent of most countries' GDP.<sup>77</sup> 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.<sup>78</sup> The GPA covers forty-nine parties that have chosen to open their procurement markets.<sup>79</sup> The procurement market covered by the GPA is estimated to be worth around several trillion dollars.<sup>80</sup> Additionally, GPA market access is

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<sup>72</sup> *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>.

<sup>73</sup> 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. 6, 2023).

<sup>74</sup> PHILIP BLENKINSOP, *Global Trade Rift Widening as Ukraine War Passes Two-Year Mark*, REUTERS (Feb. 22, 2024), <https://www.reuters.com/markets/global-trade-rift-widening-ukraine-war-passes-two-year-mark-2024-02-22/>.

<sup>75</sup> 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/>.

<sup>76</sup> *Government Procurement*, U.S. TRADE REPRESENTATIVE, <https://ustr.gov/issue-areas/government-procurement> (last visited Sept. 6, 2023).

<sup>77</sup> *Id.*

<sup>78</sup> ANDRES B. SCHWARZENBERG, CONG. RSCH. SERV., R47243, U.S. GOVERNMENT PROCUREMENT AND INTERNATIONAL TRADE (Aug. 9, 2024).

<sup>79</sup> *Id.* at 1.

<sup>80</sup> *Id.*

negotiated in a reciprocal manner; thus, the procurement coverage in different markets and sectors varies.<sup>81</sup>

The GPA and other international agreements that the U.S. is engaged 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.<sup>82</sup> 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.<sup>83</sup> The two main laws that regulate domestic sourcing are the Buy American Act of 1933 (BAA) and the Trade Agreements Act of 1979 (TAA).<sup>84</sup> The BAA is a domestic price preference statute for U.S. products that controls federal government procurement.<sup>85</sup> 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.<sup>86</sup> 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.<sup>87</sup>

The COVID-19 pandemic had a profound impact on trade, leading to several global supply chain issues that governments have addressed through varying protectionist policies.<sup>88</sup> 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.<sup>89</sup> 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.<sup>90</sup> 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.<sup>91</sup>

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 Creating Helpful Incentives to Produce Semiconductors Act (CHIPS Act), the Research and Development, Competition, and Innovation Act, and the Inflation Reduction Act (IRA), reflect this drive.<sup>92</sup> Most notably, in January 2021, the Biden

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<sup>81</sup> *Id.* at 3.

<sup>82</sup> *Id.*

<sup>83</sup> SCHWARZENBERG, *supra* note 38, at 3.

<sup>84</sup> 41 U.S.C. §§ 8301–8305; 19 U.S.C. §§ 2501-2581.

<sup>85</sup> 41 U.S.C. §§ 8301–8305.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> SCHWARZENBERG, *supra* note 38, at 14.

<sup>89</sup> *See id.*

<sup>90</sup> *See id.*

<sup>91</sup> *Id.* at 7.

<sup>92</sup> *See* JEFFREY ANDERSON, *The Silver Lining of Biden's 'New Protectionism,'* FOREIGN POLICY (Mar. 2, 2023),

administration signed EO 14005, commonly known as the “Buy America” EO.<sup>93</sup> 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.<sup>94</sup> 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.<sup>95</sup> 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, and promotion of transparency in federal procurement and of BAA enforcement.<sup>96</sup> 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.<sup>97</sup> 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.<sup>98</sup> 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.<sup>99</sup> 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.<sup>100</sup> The Executive Branch has imposed trade restrictions to limit Russian access to American-made technologies.<sup>101</sup> The sanctions imposed by the Biden administration on Russia stem from authority delegated to the President in the International Emergency Economic Powers Act (IEEPA) and the National

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<https://foreignpolicy.com/2023/03/02/biden-protectionism-us-eu-economy-investment-green-industry/>; see also SIMON SCHROPP, *International Trade Policy Under Biden: The “New” Washington Consensus and Its Discontents*, WASHINGTON INTERNATIONAL TRADE ASSOCIATION (June 19, 2024), <https://www.wita.org/atp-research/trade-biden/> (noting that the President’s industrial policy maintains many of his predecessor’s protectionist trade policies, though it is less aggressive, being termed as “polite protectionism” by commentators).

<sup>93</sup> Exec. Order No. 14005, 86 F.R. 7475 (2021).

<sup>94</sup> 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>.

<sup>95</sup> See *id.*; SCHWARZENBERG, *supra* note 38, at 14 (noting that former President Trump’s EO 13881 raised the domestic content threshold to fifty-five percent).

<sup>96</sup> SCHWARZENBERG, *supra* note 38, at 29-30.

<sup>97</sup> CORY WELT, CONG. RSCH. SERV., IN11869, RUSSIA’S 2022 INVASION OF UKRAINE: OVERVIEW OF U.S. SANCTIONS AND OTHER I (July 6, 2022).

<sup>98</sup> SCHWARZENBERG, *supra* note 38, at 34.

<sup>99</sup> See WELT, *supra* note 86, at 1.

<sup>100</sup> REBECCA M. NELSON, CHRISTOPHER A. CASEY & ANDRES B. SCHWARZENBERG, CONG. RSCH. SERV., IF12062, NEW FINANCIAL AND TRADE SANCTIONS AGAINST RUSSIA (Mar. 17, 2022).

<sup>101</sup> *Id.*

Emergencies Act (NEA).<sup>102</sup> Biden administration sanctions have focused on export controls, export and import restrictions, and the revocation of Russia's permanent normal trade relations (PNTR) on April 8, 2022.<sup>103</sup> President Biden proclaimed his administration's commitment to levying these trade sanctions and actions against Russia on February 24, 2023.<sup>104</sup>

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.<sup>105</sup> 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.<sup>106</sup> Furthermore, the U.S. has targeted oil refining, industrial and commercial items, chemical and biological weapons, and luxury goods by denying these industries' exports.<sup>107</sup> 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.<sup>108</sup> 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.<sup>109</sup> 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.<sup>110</sup>

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.<sup>111</sup> President Biden signed into a law a bill, HR 7108, that suspended Russia's PNTR status and allowed the Biden administration to increase the duty rates on Russian and Belarusian products

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<sup>102</sup> See Russia – Country Com. Guide, INT'L TRADE ADMIN., <https://www.trade.gov/country-commercial-guides/russia-sanctions-framework> (last visited Sept. 10, 2024) (explaining that under the IEEPA, the President issues executive orders declaring national emergency under the NEA).

<sup>103</sup> See REBECCA M. NELSON, CHRISTOPHER A. CASEY & ANDRES B. 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).

<sup>104</sup> Proclamation No. 10523, 88 Fed. Reg. 13,277 (Feb. 24, 2023).

<sup>105</sup> See U.S. Dep't of Com. Bureau of Indus. & Sec., Russia Exp. Controls – List of Common High-Priority Items (2023).

<sup>106</sup> *Commerce-Treasury-State Alert: Impact of Sanctions and Export Controls on Russia's Military-Industrial 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> (last visited Sept. 11, 2024).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> See Press Release, U.S. DEP'T OF COM. BUREAU OF INDUS. AND 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>.

<sup>111</sup> *Key Principles*, WASHINGTON INTERNATIONAL TRADE ASSOCIATION, [https://www.wita.org/ustrade/basics-of-trade/keyprinciples/#:~:text=%E2%80%9CMost%2Dfavored%20nation%E2%80%9D%20,\(treatment%20of%20a%20trading%20partner](https://www.wita.org/ustrade/basics-of-trade/keyprinciples/#:~:text=%E2%80%9CMost%2Dfavored%20nation%E2%80%9D%20,(treatment%20of%20a%20trading%20partner) (last visited Sept. 10, 2024).

through January 1, 2024.<sup>112</sup> 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.<sup>113</sup> Additionally, duty rates for most Russian petroleum oil also doubled, delivering a severe blow to Russian exports.<sup>114</sup> 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 \$2.3 billion annually.<sup>115</sup> 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 on February 5, 2023, respectively.<sup>116</sup> 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 Russia.<sup>117</sup> 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.

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<sup>112</sup> Suspending Normal Trade Relations with Russia and Belarus Act, Pub. L. No. 117-110, 136 Stat. 1159 (2022).

<sup>113</sup> *See id.*

<sup>114</sup> *See id.*

<sup>115</sup> 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>.

<sup>116</sup> PETER FLANAGAN, KIMBERLY STROSNIDER PETER LICHTENBAUM, STEPHEN RADEMAKER, CORRINE 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>.

<sup>117</sup> *Id.*