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SUMMARY

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Congressional and Executive Authority Over Foreign Trade Agreements

This report examines the constitutional powers of Congress and the President to make foreign trade agreements, the respective roles the legislative and executive branches have played in recent trade agreements, and legal debates concerning the extent to which the executive branch may enter into trade agreements without congressional approval.

The Constitution grants Congress the authority to regulate foreign commerce, impose tariffs, and collect revenue, while the President holds constitutional authority to negotiate with foreign governments. Courts have only infrequently opined on the ways in which the United States may enter into foreign trade agreements based on this separation of powers. Nevertheless, it is broadly accepted that the United States may enter into trade agreements with other countries via "congressional-executive agreements," which are negotiated by the President and approved—either in advance or afterward—by Congress. By contrast, many have questioned whether the President may enter into trade agreements with other countries via "sole executive agreements," which are not approved by Congress and rest on the President's independent constitutional powers. Presidents have, however, made various nonbinding trade commitments to other countries without congressional authorization based on their asserted authority to conduct foreign policy.

Recent years have seen a shift in the means by which the United States enters into trade agreements. Traditionally, Presidents negotiated many trade agreements—including free trade agreements and other agreements affecting tariffs—as congressional-executive agreements pursuant to trade promotion authority (TPA) legislation enacted by Congress. The last TPA authorization expired in 2021, leaving this vehicle for congressional-executive agreements unavailable for the time being. Meanwhile, scholars have noted an upswing in the President's use of various trade agreements (sometimes called "mini-deals") that are not specifically approved by Congress. Some commentators have questioned whether such agreements should be considered sole executive agreements, as it is not clear to what extent they are based on the President's inherent constitutional authority versus powers Congress has delegated or ceded to executive agencies. This report refers to these agreements as "hybrid" trade agreements given their uncertain legal foundations.

Recent examples of hybrid trade agreements and initiatives include the Critical Minerals Agreement between the United States and Japan, the U.S.-led Indo-Pacific Economic Framework for Prosperity (IPEF), and the U.S.-Taiwan Initiative for 21st Century Trade. This report provides a legal overview of these agreements and initiatives, with a focus on the extent to which they create binding international obligations, the respective roles played in these agreements by Congress and the executive branch, and legal defenses and criticisms of the agreements.

Some Members of Congress have questioned whether hybrid trade agreements are constitutionally permissible and have sought to reassert Congress's role in the making of foreign trade agreements. This report evaluates some of the potential legal bases for the executive branch to enter into hybrid trade agreements without congressional approval, including powers that Congress has delegated to the U.S. Trade Representative (USTR) or to other executive agencies that may have authority to implement certain trade agreements. By including an analysis of these executive agencies' authorities, this report examines not only the President's constitutional powers with respect to trade agreement-making but also ways in which the wider executive branch may claim authority to make trade agreements as a matter of administrative law. The report also considers the extent to which possible congressional acquiescence may provide constitutional support for hybrid trade agreements.

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Introduction

The U.S. Constitution gives Congress the power to regulate foreign commerce[1] and impose tariffs,[2] and it gives the President the power to enter into treaties with the advice and consent of the Senate,[3] but it does not address whether or how the United States may enter into foreign trade agreements outside of the treaty process. Congress and the President have sometimes contested their respective roles in trade agreement-making, but they have also sometimes reached accommodations giving both the legislative and executive branches a substantial role.

Congress has periodically exercised its authority over foreign trade agreements via legislation authorizing the President to negotiate certain trade agreements—particularly agreements affecting tariffs—approving those agreements, and/or implementing those agreements via changes to U.S. domestic law.[4] In recent decades, however, the President and the U.S. Trade Representative (USTR) have increasingly entered into various trade agreements that Congress has not specifically authorized or approved.[5] Under the Biden and Trump Administrations, for instance, the United States has entered into several key trade agreements that were not submitted to Congress for approval.[6]

This report begins by surveying the relevant powers the Constitution gives Congress and the President as well as how those powers may (or may not) permit various forms of foreign trade agreements.[7] The report compares a prominent traditional model of U.S. trade agreements—free trade agreements (FTAs) and tariff proclamations authorized by Congress—with an increasingly used model of trade agreements that the President or USTR enters into without obtaining explicit congressional authorization or approval.[8] This report then provides a legal overview of selected recent U.S. trade agreements and initiatives with Japan, Taiwan, and the broader Indo-Pacific region that have prompted debate about the constitutionality of this new model.[9] Finally, the report considers various legal arguments about whether the executive branch may enter into trade agreements without congressional approval, including arguments regarding the authorities Congress has delegated to USTR, the executive branch's power to implement certain U.S. trade agreements without the need for implementing legislation, and possible congressional acquiescence to the executive branch's practice in this field.[10]

[1] *See* U.S. CONST. art. I, § 8, cl. 3.

[2] *See* U.S. CONST. art. I, § 8, cl. 1.

[3] *See* U.S. CONST. art. II, § 2, cl. 2.

[4] *See, e.g.*, TPA-2015, *infra* note 49 (legislation giving President trade promotion authority); USMCA Implementation Act, *infra* note 58 (legislation approving and implementing United States-Mexico-Canada Agreement).

[5] *See* Claussen, *infra* note 42.

[6] *See, e.g.*, U.S.-Japan CMA, *infra* note 91 (2023 agreement regarding trade in critical minerals); U.S.-Japan Digital Trade Agreement, *infra* note 114 (2019 agreement regarding digital trade).

[7] *See* "Separation of Powers Regarding Foreign Trade," *infra*.

[8] *See* "Trends in Legal Bases for Foreign Trade Agreements," *infra*.

[9] *See* "Recent Hybrid Trade Agreement Practice," *infra*.

[10] *See* "Constitutionality of Hybrid Trade Agreements," *infra*.

Separation of Powers Regarding Foreign Trade

Constitutional Framework

Congress and the President both claim broad constitutional powers that are relevant to foreign trade agreements. The Constitution gives Congress the power to regulate foreign commerce and to levy duties, or tariffs, on foreign imports.[11] Article I, Section 8 of the Constitution gives Congress the "Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."[12] It also gives Congress power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[13] As with all of its express constitutional powers, Congress has the accompanying authority to "make all Laws which shall be necessary and proper for carrying into Execution" these powers.[14]

At the same time, the President has broad authority to conduct foreign policy and to negotiate on behalf of the United States. First, the Constitution vests the President with the power to make treaties with the advice and consent of two-thirds of the Senate.[15] In addition, the Supreme Court has stated that the President has broad authority over foreign affairs that is not limited to "affirmative grants of the Constitution"[16] but also includes various powers that are inherent in his role as head of a sovereign state.[17] These inherent powers include "the power to make such international agreements as do not constitute treaties" and "the power to speak or listen as a representative of the nation," including the power to negotiate on behalf of the United States.[18] Thus, while the President's foreign affairs powers do not find "any textual detail" in the Constitution,[19] the Court has explained that the President's "executive power" includes the "vast share of responsibility for the conduct of our foreign relations."[20] Nevertheless, the Court has specified that the President "is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue"[21] and that Congress alone holds the legislative power over both domestic and foreign matters.[22]

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[11] *See* United States v. Yoshida Int'l, Inc., 526 F.2d 560, 571 (C.C.P.A. 1975) ("The people of the new United States, in adopting the Constitution, granted the power to 'lay and collect duties' and to 'regulate commerce' to the Congress, not to the Executive." (quoting U.S. CONST. art. I, § 8, cl. 1, 3)).

[12] U.S. CONST. art. I, § 8, cl. 1; *see* Cong. Rsch. Serv., Overview of Taxing Clause, Constitution Annotated, https://constitution.congress.gov/browse/essay/artI-S8-C1-1-1/ALDE_00013387/ (last visited July 26, 2024).

[13] U.S. CONST. art. I, § 8, cl. 3; *see* Cong. Rsch. Serv., Overview of Foreign Commerce Clause, Constitution Annotated, https://constitution.congress.gov/browse/essay/artI-S8-C3-8-1/ALDE_00001057/ (last visited July 26, 2024).

[14] U.S. CONST. art. I, § 8, cl. 18; *see* Cong. Rsch. Serv., Overview of Necessary and Proper Clause, Constitution Annotated, https://constitution.congress.gov/browse/essay/artI-S8-C18-1/ALDE_00001242/ (last visited July 26, 2024).

[15] U.S. CONST. art. II, § 2, cl. 2; *see* Cong. Rsch. Serv., Overview of President's Treaty-Making Power, Constitution Annotated, https://constitution.congress.gov/browse/essay/artII-S2-C2-1-1/ALDE_00012952/ (last visited July 26, 2024).

[16] United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936).

[17] *See id.* at 318–19.

[18] *Id*.

[19] American Ins. Ass'n. v. Garamendi, 539 U.S. 396, 414 (2003).

[20] *Id.* (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U. S. 579, 610–611 (1952) (Frankfurter, J., concurring)).

[21] Zivotofsky v. Kerry, 576 U.S. 1, 21 (2015).

[22] *See id*.

Executive Agreements

Binding international agreements made by the President outside of the constitutionally prescribed treaty process are known as executive agreements, and they comprise the majority of agreements the United States has made with other countries.[23] The Supreme Court has recognized that such agreements can be a constitutional alternative to treaties receiving the requisite advice-and-consent of the U.S. Senate.[24] However, the Constitution's express grant of the foreign commerce and tariff powers to Congress may constrain the President's ability to conclude foreign trade agreements via some kinds of executive agreements.

The President's power to regulate foreign commerce via executive agreement may depend on whether or not the agreement is approved by Congress. It is well established that Presidents may enter into trade agreements via "congressional-executive agreements,"[25] which Congress approves via legislation enacted through the bicameral process either before or after the President negotiates the agreements.[26] For example, as discussed below, all comprehensive U.S. FTAs—including the North American Free Trade Agreement (NAFTA) and its successor, the U.S.-Mexico-Canada Agreement (USMCA)[27]—have been entered into via congressional-executive agreements, as was the agreement establishing the World Trade Organization (WTO).[28] While at least one lawsuit argued that NAFTA was void under U.S. law because it was not ratified in the manner the Constitution requires for treaties,[29] a federal court of appeals dismissed this lawsuit, holding that "what constitutes a 'treaty' requiring Senate ratification presents a nonjusticiable political question."[30]

Since the Constitution vests Congress with the power to regulate foreign commerce and impose tariffs, it is doubtful that the President may enter into trade agreements via "sole executive agreements," which are not approved by Congress but rather are based on the President's independent powers granted expressly or inherently by the Constitution.[31] Some Members of Congress have claimed that sole executive agreements over foreign trade would be unconstitutional. For instance, a December 2022 letter from some Members of the Senate Finance Committee to the President states that "attempts to use sole executive agreements to bind the

[23] *See* CRS Report RL32528, *International Law and Agreements: Their Effect upon U.S. Law*, by Stephen P. Mulligan (2023) [hereinafter International Law and Agreements]; STAFF OF S. COMM. ON THE FOREIGN RELATIONS, 106TH CONG., REP. ON TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 38 (Comm. Print 2001); CURTIS A. BRADLEY, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM, 96 (2d ed. 2015).

[24] *See, e.g.*, *Garamendi*, 539 U.S. at 415 ("[O]ur cases have recognized that the President has authority to make 'executive agreements' with other countries, requiring no ratification by the Senate . . . this power having been exercised since the early years of the Republic."); United States v. Belmont, 301 U.S. 324, 330 (1937) ("[A]n international compact . . . is not always a treaty which requires the participation of the Senate.").

[25] Harold Hongju Koh, *Triptych's End: A Better Framework to Evaluate 21st Century International Lawmaking*, 126 YALE L.J. F. 338, 339 (2017) ("It was long ago settled that congressional-executive agreements should be treated as instruments legally interchangeable with Article II treaties . . . .").

[26] *See* International Law and Agreements, *supra* note 23.

[27] Agreement between the United States of America, the United Mexican States, and Canada, OFF. U.S. TRADE REPRESENTATIVE: FREE TRADE AGREEMENTS (July 1, 2020), https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between [hereinafter USMCA].

[28] *See* Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (Dec. 8, 1994).

[29] Made in the USA Found. v. United States, 242 F.3d 1300, 1302 (11th Cir. 2001).

[30] *Id.* at 1302.

[31] *See, e.g.*, U.S. DEPARTMENT OF STATE, 11 FOREIGN AFFAIRS MANUAL (F.A.M.) § 732.2-2 (Sept. 25, 2006), https://fam.state.gov/fam/11fam/11fam0720.html.

United States on broad matters of international trade . . . interfere with congressional authority under the Constitution."[32]

There is scant case law regarding the acceptability of sole executive agreements to regulate foreign trade. In a 1953 decision, the U.S. Court of Appeals for the Fourth Circuit invalidated an executive agreement intended to prevent the importation of foreign potatoes for domestic consumption as part of an effort to maintain U.S. potato prices.[33] The court reasoned that "the power to regulate interstate and foreign commerce is not among the powers incident to the presidential office, but is expressly vested by the Constitution in the Congress."[34] This reasoning was arguably *dicta*, however, because the court held that the executive order did not comply with a statutorily prescribed procedure for investigating economically harmful food imports.[35] It is uncertain whether the court would have invalided the executive agreement if Congress had not already mandated a different procedure.[36] In addition, some observers have criticized the Fourth Circuit's reasoning.[37]

Nonbinding Instruments

Even if Presidents lack constitutional authority to enter into sole executive agreements regarding foreign trade, they may have authority to enter into "nonbinding instruments" regarding foreign trade without congressional authorization. A nonbinding instrument makes so-called "political commitments" or "soft law pacts"[38] to other countries but does not create legal rights or obligations under international or domestic law.[39] Although the Constitution does not expressly give the President authority to make nonbinding instruments, some scholars argue that the President's power to negotiate and conduct diplomacy logically entails the power to make nonbinding instruments.[40] Similarly, some scholars have claimed that international agreements that merely commit the United States to take some action that is already required under U.S. domestic law should be treated, essentially, as nonbinding instruments that do not require congressional approval.[41]

[32] Letter from Members of the Senate Finance Committee to President Joseph R. Biden (Dec. 1, 2022), https://www.finance.senate.gov/imo/media/doc/Letter%20to%20POTUS%20on%20IPEF%20Authority%20FINAL%2012.1.22.pdf [hereinafter Senate Finance Letter].

[33] United States v. Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955).

[34] *Id.* at 659.

[35] *See id.* at 658–59 ("There was no pretense of complying with the requirements of the statute.").

[36] *See id.* at 659–60 ("[W]hatever the power of the executive with respect to making executive trade agreements regulating foreign commerce in the absence of action by Congress, it is clear that the executive may not through entering into such an agreement avoid complying with a regulation prescribed by Congress.").

[37] *See, e.g.*, L. HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 225 (2d ed. 1996).

[38] *See* International Law and Agreements, *supra* note 23. As used in this report, the term *commitment* refers broadly both to legally binding and nonbinding agreements or undertakings.

[39] *See* International Law and Agreements, *supra* note 23; U.S. Department of State, Guidance on Non-Binding Documents, https://2009-2017.state.gov/s/l/treaty/guidance/index.htm (last visited July 26, 2024); Curtis Bradley et al., *The Rise of Nonbinding International Agreements: An Empirical, Comparative, and Normative Analysis*, 90 U. CHI. L. REV. 1281, 1289–91 (2023).

[40] *See* University of California, Berkeley, School of Law, Podcast Transcript on Non-Binding Agreements (Nov. 10, 2021) (Jack Goldsmith arguing nonbinding agreements are "a function of the president's diplomatic power"), https://www.law.berkeley.edu/podcast-episode/non-binding-agreements/.

[41] *See* Koh, *supra* note 25, at 346.

In the trade context, Presidents have entered into various nonbinding instruments that "form cooperative or non-binding obligations" without congressional approval.[42] Some case law supports the constitutionality of these instruments. In 1974, for example, the U.S. Court of Appeals for the District of Columbia declined to strike down certain "voluntary import restraint undertakings" that the executive branch had negotiated with foreign steel producer associations.[43] These undertakings specified maximum quantities of imported steel but "d[id] not purport to be enforceable."[44] Since the import restrictions were nonbinding, the court held that they were lawful.[45] By contrast, the court noted in *dicta*, Congress would have needed to "delegate legislative power to the President" for him to impose enforceable quotas.[46]

Trends in Legal Bases for Foreign Trade Agreements

This section discusses trends regarding how the legal authorities undergirding U.S. trade agreements may have shifted during the late 20th and early 21st centuries. During this period, the United States entered into a number of trade agreements expressly authorized or approved by Congress, thus fitting the traditional model of congressional-executive agreements described in the preceding section. At the same time, the United States entered into an increasing number of foreign trade agreements on various nontariff matters without express congressional authorization.

Trade Promotion Authority: A Traditional Model

The United States has often entered into foreign trade agreements via congressional-executive agreements.[47] Many of these congressional-executive trade agreements concern tariffs and have taken the form of either FTAs or presidential proclamations to reduce tariffs within limits established by Congress. Congress at various times in the last 50 years granted the President trade promotion authority (TPA), also known as "fast-track" trade authority, which established a comprehensive framework providing for both FTAs and tariff-reducing proclamations.[48] The most recent TPA, known as TPA-2015,[49] expired in July 1, 2021, leaving this framework for congressional-executive trade agreements unavailable unless Congress chooses to reauthorize it.

Free Trade Agreements (FTAs)

FTAs, which substantially eliminate tariffs between two or more countries,[50] proliferated in part due to international rules established by the General Agreement on Tariffs and Trade (GATT) and its successor body, the WTO. The GATT and WTO are largely intended to lower barriers to (or

[42] Kathleen Claussen, *Trade's Mini-Deals*, 62 VA. J. INT'L L. 315, 329 (2022).

[43] Consumers Union of U.S., Inc. v. Kissinger, 506 F.2d 136, 138 (D.C. Cir. 1974).

[44] *Id.* at 138, 143.

[45] *Id.* at 143–44.

[46] *Id.* at 142.

[47] *See* BRADLEY, *supra* note 23, at 79–80.

[48] For background on TPA, *see* CRS Report RL33743, *Trade Promotion Authority (TPA) and the Role of Congress in Trade Policy*, by Cathleen D. Cimino-Isaacs and Christopher A. Casey (2015); CRS In Focus IF10038, *Trade Promotion Authority (TPA)*, by Christopher A. Casey and Cathleen D. Cimino-Isaacs (2024).

[49] *See* Bipartisan Congressional Trade Priorities and Accountability Act of 2015, Pub. L. No. 114-26, 129 Stat. 319 (codified at 19 U.S.C. §§ 4201–4210) [hereinafter TPA-2015].

[50] *See* Claussen, *supra* note 42, at 325 n.27 (noting the term *FTA* is "typically reserved" for those agreements that "bring substantially all tariffs on goods between two or more countries down to zero").

"liberalize") international trade, including via tariff reduction.[51] GATT permits FTAs via a provision allowing two or more countries to form a "free trade area" in which "duties and other restrictive regulations of commerce [with some exceptions] are eliminated on substantially all the trade between the constituent territories."[52] This allowance for free trade areas is an exception to GATT's "most-favoured nation" (MFN) rule, which generally prohibits member states from extending preferential tariff reductions to some but not all member countries.[53] FTAs thus became the primary vehicle by which the United States and other WTO member countries extended preferential tariff treatment to one another.

Under TPA, Congress established rules committing both the House and Senate to approve or reject implementing legislation for U.S. FTAs without amendment or filibuster, using expedited procedures, if the executive branch adhered to certain requirements.[54] The TPA framework allowed Congress to set negotiating objectives for FTAs and established a process for Congress simultaneously to give *ex post* approval for agreements meeting the objectives and to implement them into domestic law.

The United States used the TPA framework to negotiate, approve, and implement several bilateral and regional FTAs. Between 1985 and 2020, the United States entered into 16 FTAs, including all 14 U.S. FTAs currently in force.[55] Congress approved and implemented all but one of these agreements via legislation passed under TPA.[56] The sole exception, the FTA between the United States and Jordan, was also approved and implemented via legislation passed by Congress, although not under TPA's fast-track procedures.[57] Thus, all 16 of the "comprehensive" FTAs the United States has entered into have taken the form of congressional-executive agreements.[58] Congress approved and implemented the most recent comprehensive FTA, the USMCA, pursuant to the last iteration of TPA, which expired shortly thereafter.[59]

[51] *See* World Trade Org., What Is the World Trade Organization? (2023) (describing WTO as, in part, "an organization for liberalizing trade"), https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm.

[52] General Agreement on Tariffs and Trade, art. XXIV, Oct. 30, 1947, 61 Stat. pt. 5 U.N.T.S. 194.

[53] *See id.*, art. I.

[54] *See* Trade Act of 1974, Pub. L. No. 93-618, title I, § 151, 88 Stat. 1978 (1975) (codified at 19 U.S.C. § 2191) (establishing such fast-track procedures "as an exercise of the rulemaking power of the House of Representatives and the Senate"); *see also* TPA-2015, *supra* note 49, § 103(b) (codified at 19 U.S.C. § 4202) (applying "trade authority procedures from" Trade Act of 1974, 19 U.S.C. § 2191, to qualifying agreements under TPA-2015).

[55] *See* CRS Report R45846, *Major Votes on Free Trade Agreements and Trade Promotion Authority*, by Keigh E. Hammond (2023) (identifying 12 bilateral and 2 regional U.S. FTAs currently in force).

[56] *See id*.

[57] *See id*.; United States-Jordan Free Trade Area Implementation Act, Pub. L. No. 107-43, 115 Stat. 243 (2001) (codified at 19 U.S.C. § 2112 note).

[58] *See* Office of the U.S. Trade Representative, Free Trade Agreements, https://ustr.gov/trade-agreements/free-trade-agreements (last visited July 26, 2024) (listing "comprehensive" FTAs separately from the more recent trade agreement with Japan, discussed *infra* "United States-Japan Trade Agreements"). Sometimes Congress enacted legislation that simultaneously gave *ex post* approval to an FTA and implemented that agreement into federal law. *See, e.g.*, United States-Mexico-Canada Agreement Implementation Act, Pub. L. No. 116-113, 134 Stat. 11 (2020) (codified in 19 U.S.C. §§ 4501–4732) [hereinafter USMCA Implementation Act].

[59] *See* USMCA Implementation Act, *supra* note 58.

It is well settled that the United States may enter into FTAs via congressional-executive agreements, including under TPA.[60] In addition to being supported by long-standing practice,[61] congressional-executive FTAs find support in the Constitution's text, which gives Congress—not only the Senate—power over foreign commerce, tariffs, and revenue. Further, congressional-executive trade agreements might be seen as preferable to treaties to the extent that a treaty might circumvent the authority of the House of Representatives with respect to foreign commerce, tariffs, or revenue.[62] Consistent with this view, some Members of Congress contend that congressional-executive agreements are the *only* permissible form for FTAs.[63] As a practical matter, courts are unlikely to entertain claims that congressional-executive FTAs are an unconstitutional alternative to treaties, as at least one appellate court has dismissed such a lawsuit as presenting a "political question" to be decided by Congress and the President.[64]

Tariff Proclamation Authority

In addition to creating a procedure for Congress to give *ex post* approval to FTAs negotiated by the President, TPA legislation has sometimes given the President limited *ex ante* authority to enter into and implement agreements making certain limited adjustments to tariffs by proclamation. TPA-2015, for example, authorized the President to enter into and implement trade agreements with foreign countries to reduce "duties or other import restrictions" if the President determined that they were "unduly burdening and restricting."[65] TPA-2015 permitted the President to reduce such tariffs in effect as of June 29, 2015, by up to 50%, subject to certain limitations.[66] TPA-2015 required that the President notify Congress of his "intention to enter into an agreement" under this proclamation authority,[67] but it did not require Congress to approve such agreements or tariff reductions. The previous version of TPA, the Bipartisan Trade Promotion Authority Act of 2002,[68] gave the President similar authority to enter into and implement limited tariff reduction agreements without further congressional action.[69]

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[60] *See* Koh, *supra* note 25, at 340 (stating that debates around NAFTA established that "congressional-executive agreements should be treated as instruments legally interchangeable with Article II treaties . . . particularly where Congress is exercising its foreign commerce power.").

[61] *Cf.* Kathleen Claussen & Tim Meyer, *The President's (and USTR's) Trade Agreement Authority: From Fisheries to IPEF*, INT'L ECON. L. & POLICY BLOG (July 18, 2022), https://ielp.worldtradelaw.net/2022/07/the-presidents-and-ustrs-trade-agreement-authority-from-fisheries-to-ipef-.html ("[E]very presidential administration has likewise sought congressional consent to enter into significant bilateral, plurilateral, or multilateral trade agreements since at least the 1970s").

[62] *Cf.* U.S. Department of Justice, Office of Legal Counsel, Memorandum Opinion for the U.S. Trade Representative, Whether the Uruguay Round Agreements Required Ratification as a Treaty, 18 U.S. Op. Off. Legal Counsel 232 (Nov. 22, 1994) (noting potential tension between the Constitution's treaty and foreign commerce provisions), https://www.justice.gov/media/631341/dl?inline#page=242.

[63] *See* Senate Finance Letter, *supra* note 32 ("There is no question that comprehensive free trade agreements that include reciprocal tariff reductions and dispute resolution mechanisms must be approved and implemented by Congress.").

[64] *See* Made in the USA Found. v. United States, 242 F.3d 1300, 1302 (11th Cir. 2001) (dismissing action challenging constitutionality of NAFTA on the basis that "what constitutes a 'treaty' requiring Senate ratification presents a nonjusticiable political question").

[65] TPA-2015, *supra* note 49, § 103(a) (codified at 19 U.S.C. § 4202(a)). *See generally* CRS In Focus IF11400, *Presidential Authority to Address Tariff Barriers in Trade Agreements*, by Christopher A. Casey and Brandon J. Murrill (2023).

[66] 19 U.S.C. § 4202(a)(1), (3).

[67] 19 U.S.C. § 4202(a)(2).

[68] Trade Act of 2002, Pub. L. 107-210, 116 Stat. 933 (codified at 19 U.S.C. § 3801 *et seq.*).

[69] 19 U.S.C. § 3803(a).

The most recent use of the President's proclamation authority came in December 2020, when President Trump entered into and implemented a trade agreement with the European Union to reduce certain tariffs pursuant to his authority under TPA-2015.[70] President Trump also invoked this proclamation authority to enter into and implement the U.S.-Japan Trade Agreement in 2019.[71] The President currently lacks such statutory proclamation authority following the expiration of TPA-2015 in 2021.

USMCA Joint Review Provision

Chapter 34 of the USMCA contains a "joint review" provision that requires the parties to confer periodically about whether they wish to extend the term of the agreement. Stakeholders have expressed differing views regarding what role Congress should play in this joint review process.

The joint review (or sunset) provision states that the USMCA terminates after 16 years (i.e., in 2036) "unless each Party confirms it wishes to continue this Agreement for a new 16-year term." The parties are to meet on the sixth anniversary of the USMCA's entry into force (i.e., on July 1, 2026) for a joint review of "any recommendations for action" submitted by the parties. During the joint review, each party "shall confirm, in writing, through its head of government, if it wishes to extend the term" of the USMCA. If each party confirms it wishes to extend the term, the term is "automatically" extended. Otherwise, the parties meet again annually for additional joint reviews until either the agreement terminates or the parties decide to extend its term. If the parties unanimously confirm they wish to extend the agreement, the process resets, and the next joint review occurs six years thereafter.

Although the USMCA provides that the "head of government" of each party (e.g., the U.S. President) communicates that party's intention whether or not to extend the agreement, it does not specify what role if any other branches of government must play in that decision, a question left to the domestic law of each country. In the United States, the USMCA Implementation Act requires the President and USTR to engage in certain consultations with Congress, including reporting in advance of the joint review "the position of the United States with respect to whether to extend the term of the USMCA," but it does not require congressional approval of this decision.

Some commentators interpret the USMCA Implementation Act as leaving to the President's discretion what position the United States will take regarding the USMCA's extension. The Senate Finance Committee, by contrast, stated in a committee report on the USMCA Implementation Act that it "does not change the constitutional structure of the United States with respect to the conduct of trade policy" and that "the United States cannot withdraw from a congressionally approved trade agreement without the consent of Congress." The debate over Congress's proper role in the USMCA joint review process thus intersects with a wider, unsettled debate over whether the President has legal authority to withdraw from various international agreements without congressional approval.

Sources: USMCA, *supra* note 27, Art. 34.7; USMCA Implementation Act, *supra* note 58, Sec. 611; S. REP. NO. 116-283, at 18 (2020).

Trade Agreements Not Approved by Congress: A Potential New Model

While the expiration of TPA-2015 has made the prospects for future congressional-executive trade agreements uncertain, recent scholarship has highlighted the degree to which Presidents in recent decades have entered into trade deals without specific congressional approval or authorization. These trade deals have sometimes been referred to as "mini" or "skinny" trade

[70] *See* Press Release, Joint Statement of the United States and the European Union on a Tariff Agreement (Aug. 21, 2020), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/august/joint-statement-united-states-and-european-union-tariff-agreement.

[71] *See* Proclamation No. 9974, 84 Fed. Reg. 72,187 (Dec. 26, 2019); U.S. Japan Trade Agreement Text (Oct. 7, 2019), https://ustr.gov/countries-regions/japan-korea-apec/japan/us-japan-trade-agreement-negotiations/us-japan-trade-agreement-text.

deals or "trade executive agreements," as distinguished from more comprehensive agreements such as FTAs.[72] While these agreements do not alter tariff rates, they can create internationally binding obligations, as discussed in this section.

This report refers to these agreements as "hybrid" trade agreements because they are difficult to classify according to the traditional categories of congressional-executive and sole executive agreements. Unlike congressional-executive agreements, they are entered into without specific *ex ante* or *ex post* congressional approval. On the other hand, unlike sole executive agreements, they are not necessarily based on the President's independent constitutional powers, but purport to rest at least partly on powers Congress has delegated by statute to the executive branch. Thus, one former State Department legal advisor claims that the United States enters into a "plethora" of agreements that are not truly sole executive agreements (which are, he claims, "extremely rare").[73] Similarly, one former USTR counsel argues that, although these agreements are not approved by Congress, "they are not sole executive agreements"[74] because they "do not rely solely on executive authority in most instances" but rather "are typically negotiated pursuant to delegated authority, even if stretching its limits."[75]

Some commentators contend that hybrid trade agreements are assuming a larger role in U.S. trade policy compared with traditional FTAs.[76] According to one study, the use of these agreements has increased over time, especially since the 1990s.[77] These agreements have also expanded in scope in recent years.[78] Some reasons for these shifts may include political resistance to reauthorizing TPA or approving new FTAs, as illustrated by the United States not entering into the proposed Trans-Pacific Partnership (TPP);[79] procedural challenges in obtaining congressional approval for trade deals;[80] and the United States' ability to fulfill its obligations under some hybrid trade agreements without Congress having to pass new legislation. Hybrid trade agreements may also be able to reduce nontariff barriers to trade, which the Biden Administration argues have assumed greater relative importance given already-low tariff rates on many goods.[81]

A possible advantage of hybrid trade agreements is that they may be able to address numerous specific circumstances in U.S. trade relations that Congress cannot easily anticipate or address as a practical matter.[82] Some Members of Congress have taken a different view and criticized these

[72] Claussen, *supra* note 42, at 318, 320, 325.

[73] Koh, *supra* note 25, at 341–42.

[74] Claussen, *supra* note 42, at 325.

[75] *Id.* at 325 n.28.

[76] *See Rumours of the Trade Deal's Death Are Greatly Exaggerated*, THE ECONOMIST, June 13, 2024.

[77] *See generally* Claussen, *supra* note 42.

[78] *See id.* at 345.

[79] *See* David J. Lynch, *Biden's Course for U.S. on Trade Breaks with Clinton and Obama*, WASH. POST, Aug. 27, 2023; CRS In Focus IF12078, *CPTPP: Overview and Issues for Congress*, by Cathleen D. Cimino-Isaacs (2023).

[80] Koh, *supra* note 25, at 340 (arguing that "the number of Senators needed to block consideration of such an agreement has declined" due to use of the filibuster and other practices).

[81] The White House, On-the-Record Press Call on the Launch of the Indo-Pacific Economic Framework (May 23, 2022), https://www.whitehouse.gov/briefing-room/press-briefings/2022/05/23/on-the-record-press-call-on-the-launch-of-the-indo-pacific-economic-framework/ [hereinafter IPEF Press Call] (noting that "non-tariff barriers . . . can be . . . more expensive than tariffs," while the "average bound tariff MFN for the United States right now is 2.4 percent . . . very low").

[82] *See* Claussen, *supra* note 42, at 357–58 ("Congress sweeps in broad strokes and cannot be expected to anticipate every cross-border issue that may arise.").

agreements as not falling within constitutionally permitted forms of treaties, congressional-executive agreements, or sole executive agreements.[83]

Some commentators have criticized hybrid trade agreements for their seeming lack of transparency. One study identified 1,225 such agreements and noted that some were not publicly available or were otherwise hard to find.[84] The extent to which the executive branch has used these agreements has only recently been revealed through scholarly research and Freedom of Information Act requests.[85] Another criticism from some commentators is that the executive branch often does not identify the source of its authority to enter into these agreements, with some agreements apparently lacking or exceeding authority that Congress has delegated to the executive branch.[86] The enactment of the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023 (2023 NDAA),[87] which expanded requirements for the executive branch to disclose international agreements and its purported legal authority to enter into them,[88] may increase transparency surrounding hybrid trade agreements.[89]

Recent Hybrid Trade Agreement Practice

This section summarizes legal characteristics of selected recent and potential hybrid trade agreements and congressional responses to those agreements. The agreements discussed below may be considered hybrid trade agreements since the executive branch's authority to enter into them was unclear or debatable, although Congress did give *ex post* approval for one of these agreements (with Taiwan).[90]

United States-Japan Trade Agreements

U.S.-Japan Critical Minerals Agreement

On March 28, 2023, the United States and Japan entered into an agreement on "Strengthening Critical Minerals Supply Chains" (CMA).[91] According to USTR, this agreement establishes several commitments and "areas for joint cooperation" regarding critical minerals supply chains

[83] *See* Senate Finance Letter, *supra* note 32 ("There are only three constitutional mechanisms for binding the United States to an international agreement: invocation of the Treaty Clause of the Constitution; a 'congressional-executive agreement,' which requires approval of the majority of both houses of Congress; and a sole executive agreement covering matters reserved by Article II of the Constitution to the President.").

[84] *See* Claussen, *supra* note 42, at 322.

[85] *See id.* at 378–81; Oona A. Hathaway, Curtis A. Bradley, & Jack L. Goldsmith, *The Failed Transparency Regime for Executive Agreements: An Empirical and Normative Analysis*, 134 HARV. L. REV. 629, 635 (2020).

[86] Claussen, *supra* note 42, at 326 & n.36.

[87] 2023 NDAA, § 5947 (codified at 1 U.S.C. §§ 112a–112b).

[88] *See* CRS Legal Sidebar LSB11050, *International Agreements (Part III): Transparency Measures*, by Steve P. Mulligan (2023).

[89] *See* U.S. Dep't of State, Information Relating to International Agreements, *available at* https://foia.state.gov/Search/IRIA.aspx (last accessed July 24, 2024) (providing information pursuant to 1 U.S.C. § 112b on a monthly basis since October 2023).

[90] *See infra* "U.S.-Taiwan Initiative on 21st Century Trade."

[91] *See* Agreement Between the Government of the United States of America and the Government of Japan on Strengthening Critical Minerals Supply Chains (Mar. 28, 2023), https://ustr.gov/sites/default/files/2023-03/US%20Japan%20Critical%20Minerals%20Agreement%202023%2003%2028.pdf [hereinafter U.S.-Japan CMA]; CRS In Focus IF12517, *U.S.-Japan Critical Minerals Agreement*, by Kyla H. Kitamura (2024).

for electric vehicle batteries.[92] Many provisions of the agreement either confirm existing obligations or require the parties to "confer" or "cooperate," as opposed to making specific new commitments.[93]

The CMA provides a useful point of comparison to the congressional-executive FTAs discussed in the preceding section. USTR characterizes the CMA as "an agreement focusing on free trade in critical minerals," in contrast to what it calls "comprehensive" FTAs in force with 20 other countries.[94] Unlike those "comprehensive" FTAs, the CMA was not negotiated pursuant to TPA legislation, it was not submitted to Congress for approval, and it does not create a free trade area or otherwise reduce import tariffs between the partner countries.[95]

In May 2024, the U.S. Department of the Treasury (Treasury) finalized regulations[96] under which the CMA is deemed a "free trade agreement" under Section 30D of the Internal Revenue Code[97] as amended by P.L. 117-169, commonly referred to as the Inflation Reduction Act of 2022 (IRA).[98] The IRA conditions certain tax credits for electric vehicles on whether a requisite percentage of specific "critical minerals" in the vehicle battery were "extracted or processed" either in the United States or in a "country with which the United States has a free trade agreement in effect," but it does not define the term "free trade agreement."[99] The May 2024 regulations list Japan among those "countries with which the United States currently has free trade agreements in effect,"[100] thus qualifying critical minerals extracted or processed in Japan toward this percentage.

It is questionable whether the CMA should be considered an FTA within the meaning of the IRA, given that, unlike all prior U.S. FTAs, it does not create a "free trade area" under GATT (i.e., eliminating tariffs on substantially all trade between the partner countries).[101] Some Members of Congress have argued that "the Administration does not have the authority to unilaterally enter

[92] Press Release, United States and Japan Sign Critical Minerals Agreement (Mar. 28, 2023), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2023/march/united-states-and-japan-sign-critical-minerals-agreement.

[93] *See* U.S.-Japan CMA, *supra* note 91. The agreement contains a specific commitment that the parties "maintain" their practice of not imposing export duties on critical minerals, although U.S. export duties are already prohibited by the U.S. Constitution. *See* U.S. CONST. art. I, § 9, cl. 5; Cong. Rsch. Serv., Export Clause and Taxes, Constitution Annotated, https://constitution.congress.gov/browse/essay/artI-S9-C5-1/ALDE_00013596/#:~:text=Article%20I%2C%20Section%209%2C%20Clause,Articles%20exported%20from%20any%20State (last visited July 26, 2024)

[94] *See* Office of the U.S. Trade Representative, Free Trade Agreements, https://ustr.gov/trade-agreements/free-trade-agreements (last visited July 26, 2024).

[95] *Cf. id.* (characterizing the CMA as "an agreement focusing on free trade in critical minerals," as opposed to "comprehensive free trade agreements" with other countries).

[96] Clean Vehicle Credits Under Sections 25E and 30D; Transfer of Credits; Critical Minerals and Battery Components; Foreign Entities of Concern, 89 Fed. Reg. 37706 (May 6, 2024) (codified at 26 C.F.R. §§ 1, 301) [hereinafter IRA Regulations].

[97] 26 U.S.C. § 30D.

[98] Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat. 1818.

[99] *Id.* § 13401; *see* CRS In Focus IF12600, *Clean Vehicle Tax Credits*, by Donald J. Marples and Nicholas E. Buffie (2024).

[100] IRA Regulations, *supra* note 96, 89 Fed. Reg. at 37758 (codified at 26 C.F.R. § 1.30D–2(b)(13)).

[101] *See supra* "Free Trade Agreements (FTAs)." For illustration, the first U.S. FTA, between the United States and Israel, was formally titled an "agreement on the establishment of a free trade area." *See* Agreement on the Establishment of a Free Trade Area between the Government of Israel and the Government of the United States of America, OFF. U.S. TRADE REPRESENTATIVE: FREE TRADE AGREEMENTS (Aug. 19, 1985), https://ustr.gov/trade-agreements/free-trade-agreements/israel-fta.

into free trade agreements."[102] During its rulemaking, Treasury received comments arguing that its broader classification of FTAs "undercuts Congressional intent," "impermissibly expand[s] the Secretary's authority to define 'free trade agreement,'" and "departs from [the] accepted meaning" of the term.[103] Treasury argued, in response, that its broader definition of FTAs is consistent with the IRA's "statutory purposes," including expanding incentives for taxpayers to purchase clean vehicles and for manufacturers to increase their reliance on supply chains "in countries with which the United States has reliable and trusted economic relationships."[104]

Congress has multiple options to override Treasury's classification of the Japan CMA as an FTA if it seeks to do so. One bill introduced in the House of Representatives in April 2024, titled "Stop Executive Overreach on Trade Agreements," would amend Section 30D to define "free trade agreement" as "an international agreement approved by Congress that eliminates duties and other restrictive regulations of commerce on substantially all the trade between the United States and 1 or more other countries."[105] This definition equates FTAs with the establishment of a free trade area and would thus exclude the CMA.

As an alternative to normal legislation overturning some or all of the May 2024 regulations, the Congressional Review Act (CRA)[106] provides special procedures for Congress to consider a joint resolution of disapproval to overturn final agency rules within a limited time.[107] Some Members of Congress have introduced joint resolutions to disapprove the May 2024 regulations.[108] To become effective, a joint resolution under the CRA must be signed by the President, or else Congress must override a presidential veto.[109]

The May 2024 regulations could potentially also be subject to judicial challenges, particularly in light of the U.S. Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*,[110] which overruled precedent that had afforded some deference to executive agencies to interpret ambiguous statutory terms in the exercise of their regulatory authority.[111]

Some commentators note that the CMA may set a precedent for similar agreements with other trading partners with which the United States does not yet have an FTA.[112] For instance, the

[102] Press Release, Rep. Richard Neal, Ranking Member, House Ways and Means Committee, Statement on Biden Administration's Go-It-Alone Trade Action (Mar. 28, 2023), https://democrats-waysandmeans.house.gov/media-center/press-releases/neal-wyden-statement-biden-administration-go-it-alone-trade-action. These Members further criticize the agreement for lacking "enforceable environmental or labor protections" which could have been included with greater congressional engagement. *Id*.

[103] IRA Regulations, *supra* note 96, 89 Fed. Reg. at 37725.

[104] *Id*.

[105] H.R. 7983, 118th Cong. (2024).

[106] 5 U.S.C. §§ 801–808.

[107] *See* CRS In Focus IF12386, *Defining Final Agency Action for APA and CRA Review*, by Valerie C. Brannon (2023); CRS Report R43992, *The Congressional Review Act (CRA): Frequently Asked Questions*, by Maeve P. Carey and Christopher M. Davis (2021).

[108] *See* H.J. Res. 148, 118th Cong. (2024); H.J. Res. 179, 118th Cong. (2024); S.J. Res. 87, 118th Cong. (2024).

[109] *See* CRS In Focus IF10023, *The Congressional Review Act (CRA): A Brief Overview*, by Maeve P. Carey and Christopher M. Davis (2023).

[110] No. 22-451, 603 U.S. __ (2024).

[111] *See* CRS Legal Sidebar LSB11189, *Supreme Court Overrules Chevron Framework*, by Benjamin M. Barczewski (2024).

[112] Minwoo Kim, Jay Smith & Jamin Koo, *Threading the Needle with the Narrow U.S.-Japan Critical Minerals Agreement to Expand the Availability for EV Credits of the Inflation Reduction Act*, GLOBAL POLICY WATCH (Apr. 12, 2023), https://www.globalpolicywatch.com/2023/04/threading-the-needle-with-the-narrow-u-s-japan-critical-minerals-agreement-to-expand-the-availability-for-ev-credits-of-the-inflation-reduction-act/.

United States has entered into negotiations that may lead to similar critical minerals agreements with the European Union and the United Kingdom.[113]

U.S.-Japan Digital Trade Agreement

On October 7, 2019, the United States entered into the U.S.-Japan Digital Trade Agreement.[114] This agreement contained bilateral commitments regarding several aspects of digital trade, including customs duties and nondiscrimination, cross-border data flows and data localization, consumer protection and privacy, source code and technology transfer, liability for interactive computer services, cybersecurity, government data, and cryptography.[115]

The Trump Administration did not identify the source of its authority for the Digital Trade Agreement, simply referring to it as an "executive agreement."[116] Some Members of the House of Representatives requested that USTR identify "the authority the Administration is relying on to enter" the agreement.[117] Based on publicly available sources, it is unclear whether USTR provided a formal response.

Indo-Pacific Economic Framework for Prosperity (IPEF)

IPEF, an initiative launched in May 2022,[118] is a United States-led negotiating framework that has resulted in multiple international agreements, although it is uncertain as yet whether the parties will reach a dedicated trade agreement. IPEF is divided into four issue areas, or "pillars," comprising trade; supply chains; clean economy (clean energy, decarbonization, and infrastructure); and fair economy (tax and anticorruption).[119] USTR has led U.S. efforts on the trade pillar, while the Department of Commerce has led on the other three pillars.[120]

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[113] *See* CRS In Focus IF12517, *U.S.-Japan Critical Minerals Agreement*, by Kyla H. Kitamura (2024); CRS Insight IN12145, *Proposed U.S.-EU Critical Minerals Agreement*, by Shayerah I. Akhtar and Andres B. Schwarzenberg (2024).

[114] *See* Agreement Between the United States of America and Japan Concerning Digital Trade (Oct. 7, 2019), https://ustr.gov/sites/default/files/files/agreements/japan/Agreement_between_the_United_States_and_Japan_concerning_Digital_Trade.pdf [hereinafter U.S.-Japan Digital Trade Agreement].

[115] *See id*.; *see also* CRS Report R46140, *"Stage One" U.S.-Japan Trade Agreements*, by Cathleen D. Cimino-Isaacs and Anita Regmi (2019) (summarizing components of 2019 United States-Japan agreements).

[116] Press Release, White House, Presidential Message to Congress Regarding the Notification of Initiation of United States-Japan Trade Agreement (Sept. 16, 2019), https://trumpwhitehouse.archives.gov/briefings-statements/presidential-message-congress-regarding-notification-initiation-united-states-japan-trade-agreement/. By contrast, as noted above, the contemporaneous U.S.-Japan Trade Agreement purportedly rested on the President's TPA Section 103(a) authority to proclaim limited tariff reductions. *See* Proclamation No. 9974, 84 Fed. Reg. 72187 (Dec. 26, 2019).

[117] Press Release, Rep. Bill Pascrell, Member, House Ways and Means Committee, Pascrell and Kildee Seek Answers on Japan Trade Agreements (Nov. 27, 2019), https://pascrell.house.gov/news/documentsingle.aspx?DocumentID=4085.

[118] *See generally* CRS In Focus IF12373, *Indo-Pacific Economic Framework for Prosperity (IPEF)*, by Cathleen D. Cimino-Isaacs, Kyla H. Kitamura, and Mark E. Manyin (2023). The other participating countries are Australia, Brunei Darussalam, Fiji, India, Indonesia, Japan, the Republic of Korea, Malaysia, New Zealand, the Philippines, Singapore, Thailand, and Vietnam.

[119] Office of the U.S. Trade Representative, Indo-Pacific Framework for Economic Prosperity (IPEF), https://ustr.gov/trade-agreements/agreements-under-negotiation/indo-pacific-economic-framework-prosperity-ipef (last visited July 26, 2024).

[120] Press Release, U.S. Trade Representative, Ambassador Katherine Tai and Secretary of Commerce Gina Raimondo Virtual Indo-Pacific Economic Framework Ministerial Readout (July 27, 2022), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/july/ambassador-katherine-tai-and-secretary-commerce-gina-raimondo-virtual-indo-pacific-economic.

In November 2023, the United States and its partners signed an agreement regarding the IPEF supply chain pillar, the first agreement to result from IPEF.[121] The supply chain agreement entered into force on February 24, 2024.[122] In disclosures required by the 2023 NDAA, the executive branch claimed that its legal authority to enter into this agreement was provided by "Article II of the United States Constitution, section 2 (Conduct of foreign relations)."[123] In June 2024, the United States and IPEF partners signed three additional agreements, on the clean economy pillar, the fair economy pillar, and the collective operation of the IPEF agreements.[124]

IPEF partner countries have yet to reach an agreement on the trade pillar,[125] which encompasses many issues involving labor, environment, digital economy, agriculture, transparency and good regulatory practices, competition policy, trade facilitation, inclusivity, and technical assistance and economic cooperation.[126] USTR has stated that this agreement would not be a "traditional free trade agreement"[127] and would not involve tariff liberalization.[128] The Biden Administration indicated that the trade pillar could result in binding, enforceable commitments,[129] although some items in the trade pillar instead describe building on or implementing existing commitments—for example, "climate change solutions that build on existing commitments," "implementation of our respective obligations under multilateral environmental agreements," and "effective implementation of the WTO's Agreement on Trade Facilitation."[130]

[121] Press Release, U.S. Department of Commerce, Raimondo Announces Substantial Conclusion of IPEF Pillars III & IV, Signs Landmark Pillar II Supply Chain Agreement (Nov. 16, 2023), https://www.commerce.gov/news/press-releases/2023/11/raimondo-announces-substantial-conclusion-ipef-pillars-iii-iv-signs; Indo-Pacific Economic Framework for Prosperity Agreement Relating to Supply Chain Resilience, DEP'T OF COMMERCE (Sept. 7, 2023), https://www.commerce.gov/sites/default/files/2023-09/2023-09-07-IPEF-Pillar-II-Final-Text-Public-Release.pdf.

[122] *See* Press Release, U.S. Department of Commerce, U.S. Department of Commerce Announces Upcoming Entry into Force of the IPEF Supply Chain Agreement (Jan. 31, 2024), https://www.commerce.gov/news/press-releases/2024/01/us-department-commerce-announces-upcoming-entry-force-ipef-supply-chain.

[123] Information Relating to International Agreements Reported to Congress (March 2024), https://foia.state.gov/_docs/CaseAct/2024.03.29%20-%201%20USC112b.a.1.%20information%20-%20International%20Agreements.pdf.

[124] *See* Press Release, U.S. Department of Commerce, Raimondo Announces IPEF Agreements Signed in Singapore, Announces $23B in Priority Infrastructure Projects at Inaugural Clean Economy Investor Forum (June 6, 2024), https://www.commerce.gov/news/press-releases/2024/06/raimondo-announces-ipef-agreements-signed-singapore-announces-23b; Indo-Pacific Economic Framework for Prosperity Agreement Relating to Clean Economy, DEP'T OF COMMERCE (Mar. 2023), https://www.commerce.gov/sites/default/files/2024-03/IPEF-PIII-Clean-Economy-Agreement.pdf; Indo-Pacific Economic Framework for Prosperity Agreement Relating to Fair Economy, DEP'T OF COMMERCE (Mar. 2023), https://www.commerce.gov/sites/default/files/2024-03/IPEF-PIV-Fair-Economy-Agreement.pdf.

[125] *See* Erin L. Murphy, *IPEF: Three Pillars Succeed, One Falters*, CTR. FOR STRATEGIC AND INT'L STUDIES, Nov. 18, 2023.

[126] Ministerial Text for Trade Pillar of the Indo-Pacific Economic Framework for Prosperity, https://ustr.gov/sites/default/files/2022-09/IPEF%20Pillar%201%20Ministerial%20Text%20(Trade%20Pillar)_FOR%20PUBLIC%20RELEASE%20(1).pdf (last visited July 26, 2024) [hereinafter Ministerial Text for IPEF Trade Pillar].

[127] Rozanna Latiff & Liz Lee, *U.S. Says New Indo-Pacific Economic Framework Not Typical Trade Deal*, REUTERS, Nov. 18, 2021.

[128] IPEF Press Call, *supra* note 81.

[129] IPEF Press Call, *supra* note 81.

[130] Ministerial Text for IPEF Trade Pillar, *supra* note 126.

While the Administration indicated a desire to consult with Congress on IPEF,[131] it has not submitted any IPEF agreements to Congress for approval or committed to do so.[132] Some Members of Congress contend that such agreements require congressional approval, as they "regulate foreign commerce and reshape international trade flows."[133]

U.S.-Taiwan Initiative on 21st Century Trade

In June 2022, USTR launched the U.S.-Taiwan Initiative on 21st Century Trade (the Taiwan Initiative) to "advance mutual trade priorities based on shared values."[134] Like IPEF—of which Taiwan is not a member—the Taiwan Initiative is not an agreement in and of itself but is potentially a framework for multiple trade agreements covering different subject matters. At launch, the parties described the Taiwan Initiative as a "roadmap" for "reaching agreements with high-standard commitments."[135] The Taiwan Initiative includes a number of "trade areas."[136] Some of these areas overlap with those in the IPEF trade pillar, such as trade facilitation, good regulatory practices, agriculture, digital trade, labor, and environment.[137] Other Taiwan Initiative trade areas include anticorruption, small and medium-sized enterprises (SMEs), standards, state-owned enterprises, and nonmarket policies and practices.[138]

On June 1, 2023, the United States and Taiwan signed their first agreement under the Taiwan Initiative (the First Taiwan Agreement).[139] The First Taiwan Agreement includes chapters on customs administration and trade facilitation, regulatory practices, services regulation, anticorruption, and SMEs.[140] It contains a mixture of binding and nonbinding commitments on these subjects.[141] In spring 2024, USTR held negotiations on a potential second agreement[142] and published summaries of U.S. proposals for such an agreement on agricultural, environmental, and labor issues.[143]

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[131] Latiff & Lee, *supra* note 127.

[132] IPEF Press Call, *supra* note 81 ("Let's see where these negotiations take us, and let's see where the discussions go.").

[133] *See* Senate Finance Letter, *supra* note 32.

[134] Press Release, U.S. Trade Representative, United States and Taiwan Announce the Launch of the U.S.-Taiwan Initiative on 21st-Century Trade (June 1, 2022), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/june/united-states-and-taiwan-announce-launch-us-taiwan-initiative-21st-century-trade.

[135] *Id*. Similarly, in Aug. 2022, the parties released a Negotiating Mandate "to commence formal negotiations for the purpose of reaching agreements with high-standard commitments." U.S.-Taiwan Initiative on 21st Century Trade: Negotiating Mandate (Aug. 17, 2022), https://ustr.gov/sites/default/files/2022-08/US-Taiwan%20 Negotiating%20Mandate%20(Final).pdf [hereinafter Negotiating Mandate].

[136] Negotiating Mandate, *supra* note 135.

[137] *Id*.

[138] *Id*.

[139] Agreement Between the American Institute in Taiwan and the Taipei Economic and Cultural Representative Office in the United States Regarding Trade Between the United States of America and Taiwan (June 2023), https://ustr.gov/sites/default/files/uploads/US-Taiwan%20Initiative%20on%2021st%20Century%20Trade%20First%20Agreement%20-%20June%202023.pdf.

[140] *See id*.

[141] *Compare, e.g.*, *id.* Art. 2.2 (providing that each party "shall" publish certain information online) *with id.* Art. 2.6.1. (providing that the parties "are encouraged" to eliminate paper forms).

[142] Press Release, U.S. Trade Representative, Readout of Negotiating Round Under the U.S.-Taiwan Initiative on 21st-Century Trade (May 3, 2024), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2024/may/readout-negotiating-round-under-us-taiwan-initiative-21st-century-trade.

[143] Press Release, U.S. Trade Representative, USTR Releases Summaries from U.S.-Taiwan 21st Century Trade

(continued...)

Although the executive branch did not submit the First Taiwan Agreement for congressional approval, Congress responded by enacting the United States-Taiwan Initiative on 21st-Century Trade First Agreement Implementation Act (the Taiwan Agreement Implementation Act).[144] This legislation provided *ex post* approval for the First Taiwan Agreement, effectively converting it into a congressional-executive agreement. The Taiwan Agreement Implementation Act permits the First Taiwan Agreement to enter into force subject to the President conducting certain consultations with Congress and making certain certifications,[145] and it requires USTR to provide Congress with a report on the implementation of the agreement. The act states that "[t]he President lacks the authority to enter into binding trade agreements absent approval from Congress."[146]

The Taiwan Agreement Implementation Act also asserts various forms of congressional control over the process of making any further agreements with Taiwan relating to the Taiwan Initiative. The act provides that any such further agreement may not take effect unless Congress enacts legislation "expressly approving" the agreement and it is published on a publicly available website at least 60 days before the President enters into it.[147] The act also requires USTR to provide texts of any such further agreement and accompanying briefings to certain congressional committees according to specified timelines.[148] The act provides time for those committees to review any U.S. negotiating text before it is shared with Taiwan and allows certain Members of Congress to request up to 15 additional days for that review.[149] Finally, the act provides for certain Members of Congress and their designees to be accredited as members of the U.S. delegation negotiating any such further agreement with Taiwan.[150]

In signing the Taiwan Agreement Implementation Act into law, President Biden released a signing statement claiming that the act's requirements to provide negotiating texts to congressional committees, not to transmit proposed texts to Taiwan during congressional review, and to include Members of Congress in the U.S. negotiating delegation raised "constitutional concerns."[151] The President stated that he would disregard these provisions in cases where they would "impermissibly infringe upon [the President's] constitutional authority to negotiate with a foreign partner."[152] The President further stated that the act's provision allowing certain Members of Congress to increase the waiting period before negotiating texts could be shared with Taiwan violated Supreme Court precedent regarding the separation of legislative and executive powers.[153]

Initiative Negotiations (April 5, 2024), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2024/april/ustr-releases-summaries-us-taiwan-21st-century-trade-initiative-negotiations.

[144] United States-Taiwan Initiative on 21st-Century Trade First Agreement Implementation Act, Pub. L. No. 118-13, 137 Stat. 63 (2023).

[145] *Id.* § 6(b)–(c).

[146] *Id.* § 2(7).

[147] *Id.* § 7(e).

[148] *See id*. § 7(c).

[149] *See id*.

[150] *See id.* § 7(d) (referring to provisions of 19 U.S.C. § 4203(c)).

[151] Press Release, White House, Statement from President Joe Biden on H.R. 4004, the United States-Taiwan Initiative on 21st-Century Trade First Agreement Implementation Act (Aug. 7, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/08/07/statement-from-president-joe-biden-on-h-r-4004-the-united-states-taiwan-initiative-on-21st-century-trade-first-agreement-implementation-act/.

[152] *Id*.

[153] *Id.* (citing INS v. Chadha, 462 US 919 (1983) (holding that provision of immigration statute allowing one-house veto of certain executive actions was unconstitutional)). On the other hand, Congress may argue that a statutory provision allowing certain Members of Congress to increase the length of a required waiting period does not violate (continued...)

The President did not, however, appear to dispute the act's prohibition on entering into any further Taiwan Initiative agreements without congressional approval.

The Taiwan Agreement Implementation Act provides that the First Taiwan Agreement "does not constitute a free trade agreement for purposes of section 30D(e)(1)(A)(i)(II) of the Internal Revenue Code."[154] The act thus prevents the Treasury Department from treating the agreement similarly to the U.S.-Japan CMA for purposes of IRA electric vehicle tax credits, as discussed above.[155]

Constitutionality of Hybrid Trade Agreements

As described in the preceding sections, the proliferation of hybrid trade agreements has sparked debate about whether or not they are constitutional. Commentators, Members of Congress, and executive branch officials have advanced various arguments for and against the legality of these trade agreements. This section considers three arguments that proponents have advanced to support the constitutionality of hybrid trade agreements: (1) trade authorities that Congress has purportedly delegated to USTR; (2) existing laws that allow the executive branch to implement certain trade agreements without the need for new legislation; and (3) possible congressional acquiescence to these agreements.

Examination of these arguments may illuminate where hybrid trade agreements fall in the tripartite *Youngstown* framework the Supreme Court has sometimes used to determine the scope of executive power.[156] Under this framework, presidential power is considered to be at its broadest where "the President acts pursuant to an express or implied authorization of Congress"; is less broad where there is neither "a congressional grant or denial of authority"; and is narrowest where the President acts contrary to "the expressed or implied will of Congress."[157] The Court has explained that executive action does not always fit neatly into one of these categories but rather may fall along "a spectrum running from explicit congressional authorization to congressional prohibition."[158]

U.S. Trade Representative Authorities

USTR typically plays a leading role in negotiating U.S. trade agreements.[159] The Biden Administration has argued that Congress gave USTR the authority to enter into trade agreements by enacting USTR's organic statute, 19 U.S.C. § 2171 (Section 2171), and that, "[f]or at least the last 30 years, USTR has negotiated and entered into numerous agreements pursuant solely to this authority."[160] For instance, USTR has taken the position that a November 2023 trade agreement

Chadha. *See* Lear Siegler, Inc., Energy Prods. Div. v. Lehman, 842 F.2d 1102, 1110 (9th Cir. 1988) (holding that a temporary stay provision that did not give a "legislative agent . . . control or ultimate authority in the disposition of a particular issue" did not violate *Chadha*).

[154] Pub. L. No. 118-13, 137 Stat. 63, § 8(a)(2) (2023).

[155] *See supra* "United States-Japan Trade Agreements".

[156] *See* Zivotofsky v. Kerry, 576 U.S. 1, 10 (2015) (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–638 (1952) (Jackson, J., concurring)).

[157] *Zivotofsky*, 576 U.S. at 10 (quoting *Youngstown*, 343 U.S. at 635–37).

[158] Dames & Moore v. Regan, 453 U.S. 654, 669 (1981).

[159] Claussen, *supra* note 42, at 333–36.

[160] United States Trade Representative Katherine Tai and Secretary of Commerce Gina M. Raimondo, Letter to Chairman Ron Wyden, Committee on Finance, United States Senate (May 30, 2023),
(continued...)

with Israel "was concluded under USTR's general authority to negotiate and conclude agreements, including 19 U.S.C. § 2171 and relevant Executive Orders."[161] If the executive branch's interpretation of Section 2171 is correct, presidential power in this area might be at its maximum extent under the *Youngstown* framework.

Section 2171(c)(1) states in part that USTR "shall . . . have primary responsibility for developing, and for coordinating the implementation of, United States international trade policy."[162] It also provides that USTR "shall . . . have lead responsibility for the conduct of, and shall be the chief representative of the United States for, international trade negotiations, including all negotiations on any matter considered under the auspices of the World Trade Organization."[163] This language does not expressly give USTR authority to enter into trade agreements, prompting some commentators to claim that "nothing about § 2171 gives the USTR the authority to enter into or bring into force trade-related agreements."[164] USTR, however, appears to contend that Section 2171 implicitly gives it such authority.[165]

Separation of powers considerations may cut against interpreting Section 2171(c)(1) as implicitly giving USTR authority to enter into trade agreements without congressional approval. In giving USTR "responsibility" for "international trade policy" and "international trade negotiations," the statute may simply give USTR responsibility for powers already held by the President—namely, the conduct of foreign policy and negotiations with foreign governments. In other words, Section 2171(c)(1) may be read simply as an administrative provision allocating responsibilities within the executive branch.[166] Thus, it is unclear whether a court would view the statute's assignment of these responsibilities to USTR as including an implicit authorization for USTR to enter into trade agreements.

The legislative history and statutory context of Section 2171(c)(1) might provide additional reason to doubt that the statute gives USTR authority to enter into trade agreements. Section 2171

https://insidetrade.com/sites/insidetrade.com/files/documents/2023/jun/wto2023_0452a.pdf; *Biden Administration's 2023 Trade Policy Agenda with United States Trade Representative, Ambassador Tai: Hearing Before the H. Comm. on Ways and Means*, 118th Cong. (2023) (USTR citing Section 2171 as authority to enter into U.S.-Japan CMA and certain potential IPEF agreements in response to questions for the record), http://waysandmeans.house.gov/wp-content/uploads/2023/07/FINAL-Website-Tai-Transcript.pdf.

[161] Information Relating to International Agreements Reported to Congress (December 2023), https://foia.state.gov/_docs/CaseAct/2023.12.29%20-%201%20USC112b.a.1.%20information%20-%20International%20Agreements.pdf (stating legal authority for "Agreement Between the United States of America and Israel Extending the Agreement on Certain Aspects of Trade in Agricultural Products of July 27, 2004, as extended").

[162] 19 U.S.C. § 2171(c)(1)(A).

[163] *Id.* § 2171(c)(1)(C).

[164] Kathleen Claussen & Tim Meyer, *The New U.S.-Taiwan Trade Agreement and Its Approval*, INT'L ECON. L. & POLICY BLOG (July 5, 2023), https://ielp.worldtradelaw.net/2023/07/the-new-us-taiwan-trade-agreement-and-its-approval.html.

[165] *See* Claussen & Meyer, *supra* note 61 ("Relying on this statute to justify USTR's approach concedes that Congress must consent, but rather than referring to Congress's silence, proponents here point to the organic statute as an implicit delegation not only to negotiate, but also to conclude agreements.").

[166] Other parts of the Trade Act of 1974 expressly limit the President's authority to make changes to domestic law without either new implementing legislation or existing statutory authority. *See* Pub. L. No. 93-618, title I, § 121, 88 Stat. 1978 (1975) ("If the President enters into a trade agreement which establishes rules or procedures . . . and if the implementation of such agreement will change any provision of Federal law (including a material change in an administrative rule), such agreement shall take effect with respect to the United States only if the appropriate implementing legislation is enacted by the Congress unless implementation of such agreement is effected pursuant to authority delegated by Congress.").

was first enacted by the Trade Act of 1974,[167] and most of its current language was enacted by the Omnibus Trade and Competitiveness Act of 1988.[168] Both of these acts also authorized (or reauthorized) TPA,[169] which—as explained above—required congressional approval to enter into any FTAs and gave the President limited *ex ante* authority to proclaim tariff reductions. Thus, interpreting Section 2171(c)(1) to give USTR broad yet implicit authority to enter into trade agreements without any congressional approval would appear to conflict with the statutes' other provisions and overall scheme, which strictly delineated the scope of the President's authority to enter into certain kinds of trade agreements with and without further congressional action.

Certain constitutional doctrines might also caution against interpreting Section 2171(c)(1) as implicitly giving USTR authority to enter into trade agreements.[170] In recent years, the Supreme Court has increasingly employed one such doctrine—the major questions doctrine—in refusing to interpret statutes as implicitly granting agencies regulatory authority.[171] Under this doctrine, the Supreme Court has rejected agency claims of regulatory authority when (1) the underlying claim of authority concerns an issue of "vast 'economic and political significance,'" and (2) Congress has not clearly empowered the agency with authority over the issue.[172] Although this doctrine more commonly arises in cases of domestic regulation, it might weigh against interpreting Section 2171(c)(1) as giving USTR implicit authority to enter into trade agreements, given the economic and political significance of these agreements.

A related doctrine, the so-called nondelegation doctrine, might also weigh against such an interpretation of Section 2171(c)(1). Under this doctrine, Congress may not delegate its legislative function to other branches of government.[173] In practice, the nondelegation doctrine typically requires that, when Congress authorizes federal agencies to carry out certain functions, it must provide an "intelligible principle" to guide the executive branch's implementation of those functions.[174] In the case of Section 2171(c)(1), construing the statute to give USTR the authority to enter into foreign trade agreements might result in an unconstitutional delegation of Congress's foreign commerce power, since Section 2171(c)(1) does not appear to provide guidance as to how or for what purpose USTR is supposed to exercise that authority. On the other hand, the Supreme

[167] *See* Pub. L. No. 93-618, title I, § 141, 88 Stat. 1978 (1975) (stating, *inter alia*, that USTR shall "be the chief representative of the United States for each trade negotiation under this title"). The office of USTR—then called the Special Representative for Trade Negotiations—was established earlier, in 1962. *See* Trade Expansion Act of 1962, Pub. L. No. 87-794, § 271, 76 Stat. 872 (1962). The Trade Expansion Act of 1962 created USTR to replace the State Department as "the lead agency for trade lawmaking in the United States." Claussen, *supra* note 42, at 333.

[168] *See* Pub. L. No. 100-418, title I, § 1601(a)(1) (1988) (amending Section 2171(c)(1) to state that USTR has "primary responsibility for developing, and for coordinating the implementation of, United States international trade policy" and that USTR shall "have lead responsibility for the conduct of, and shall be the chief representative of the United States for, international trade negotiations").

[169] *See* Pub. L. No. 93-618, title I, §§ 101, 124 (presidential authority to enter into certain agreements and proclaim implementing tariff reductions without congressional approval), §§ 102, 151–154 (provisions concerning TPA); CRS Report R43491, *Trade Promotion Authority (TPA): Frequently Asked Questions*, by Cathleen D. Cimino-Isaacs, Christopher A. Casey, and Christopher M. Davis (2019) ("Trade promotion authority was first enacted on January 1, 1975, under the Trade Act of 1974.").

[170] *Cf.* Claussen & Meyer, *supra* note 61 ("Constitutional scholars may find that construing that language to permit USTR to enter into trade agreements poses nondelegation doctrine or major questions doctrine problems.").

[171] *See generally* CRS In Focus IF12077, *The Major Questions Doctrine*, by Kate R. Bowers (2022).

[172] Utility Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014).

[173] *See generally* CRS In Focus IF12292, *Recurring Constitutional Issues in Federal Legislation*, by Valerie C. Brannon, Victoria L. Killion, and Sean M. Stiff (2022).

[174] Gundy v. United States, 139 S. Ct. 2116, 2129 (2019).

Court has allowed Congress to delegate broader authority to the President in the area of foreign affairs, reasoning that the President requires greater latitude in this field.[175]

For the time being, there does not appear to be any published case law discussing the scope of USTR's powers under Section 2171(c)(1). It is possible that courts would decline to adjudicate the question of whether Section 2171 authorized USTR to enter into trade agreements without congressional approval, as courts have sometimes declined to decide cases involving the permissibility of international agreements on grounds that they present as a political question.[176] On the other hand, courts might be willing to decide the scope of USTR's powers under Section 2171(c)(1) on the basis that doing so would resolve a question of statutory interpretation and not simply a constitutional debate.[177]

Existing Laws and Regulatory Authorities

Some trade agreements may place binding obligations on the United States but do not require Congress to pass new legislation in order for the United States to fulfill those obligations. To the extent existing laws enacted by Congress allow the executive branch to implement a trade agreement without the need for new legislation, proponents argue that those existing laws may provide some support for presidential power to enter into the agreement under the *Youngstown* framework.[178]

One example of such trade agreements and the debate surrounding them is the Anti-Counterfeiting Trade Agreement (ACTA), an agreement regarding enforcement of intellectual property rights signed by the United States and other countries in October 2011.[179] The Obama Administration argued that the United States would be able to fulfill all of its obligations under ACTA using existing U.S. copyright and trademark statutes.[180] Since it was unnecessary for Congress to pass legislation to implement ACTA, the Administration argued, the United States could enter into the agreement without congressional approval.[181] The Administration argued that ACTA was consistent with "a long line" of "many" trade-related agreements that "required no implementing legislation" and thus did not require congressional approval.[182]

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[175] U.S. v. Curtiss-Wright Export Corp., 299 U.S. 304, 320–21 (1936) ("[C]ongressional legislation . . . which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.").

[176] *See, e.g.*, Made in the USA Found. v. United States, 242 F.3d 1300, 1310–19 (11th Cir. 2001) (declining to decide whether NAFTA was properly entered into via congressional-executive agreement rather than by treaty).

[177] *Cf.* Japan Whaling Ass'n v. Am. Cetacean Soc.'y, 478 U.S. 221, 229–30 (1986) (holding that political question doctrine did not prevent the Court from adjudicating a controversy requiring it to use "no more than the traditional rules of statutory construction," notwithstanding that the case involved an international agreement).

[178] *See* Koh, *supra* note 25, at 345–49 (arguing that constitutionality of executive agreements under *Youngstown* framework may hinge in part on the "degree of congressional approval"); *cf.* Dames & Moore v. Regan, 453 U.S. 654, 678 (1981) (upholding executive agreement that was not "directly authorize[d]" by Congress in part due to "general tenor of Congress's legislation in this area").

[179] Office of the U.S. Trade Representative, The Anti-Counterfeiting Trade Agreement, https://ustr.gov/acta (last visited July 26, 2024).

[180] OFFICE OF THE LEGAL ADVISER, UNITED STATES DEPARTMENT OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 95 (2012), https://2009-2017.state.gov/documents/organization/211955.pdf.

[181] OFFICE OF THE LEGAL ADVISER, UNITED STATES DEPARTMENT OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 110 (2011), https://2009-2017.state.gov/documents/organization/194113.pdf.

[182] *Id*.

Another variation on trade agreements that do not require implementing legislation are agreements that commit the U.S. government to use existing rulemaking or regulatory authorities that Congress has already established.[183] Such hybrid trade agreements often serve a "problem solving" function, addressing discrete issues involving specific products or industries.[184] For instance, in early 2023, the U.S. Alcohol and Tobacco Tax and Trade Bureau issued a labeling rule to implement a 2020 agreement between the United States and Bolivia regarding certain alcoholic beverages produced by each country.[185] As another example, a 2013 agreement between the United States and Japan requires the U.S. Department of Agriculture to take specified measures if Japan gives notice of U.S. noncompliance with certain beef export requirements.[186] Neither of these agreements was submitted to Congress for approval.

Some advocates of these hybrid trade agreements contend that congressional approval is unnecessary if a previous congressional enactment has already given the President domestic implementation authority and the agreement otherwise requires no changes to domestic law.[187] Some Members of Congress have criticized this paradigm, arguing that it "confuses the *implementation of an agreement*—which may not require congressional action because no domestic laws need to be altered—and the *ability to enter into a binding agreement* with other sovereign nations without congressional approval."[188] Thus, some Members have argued that, because Article I of the Constitution commits power over foreign trade to Congress, congressional approval of foreign trade agreements is necessary regardless of whether the agreements require any new implementing legislation.[189]

Some Members contend that, even if Congress has already conferred regulatory authority on an executive agency, Congress should retain the power to decide whether the United States will commit itself to exercising that authority in a specific way as a matter of international law. One Member, for example, noted that, under customary international law, an agreement such as ACTA can create binding obligations for the United States even if the agreement lacks congressional approval.[190] These obligations can usurp Congress's ability to regulate foreign trade and place potential future congressional enactments at odds with U.S. international obligations.[191] On the other hand, executive branch officials have argued that, in the event Congress later passes legislation inconsistent with such trade agreements, the United States may be able to resolve such

[183] Claussen, *supra* note 42, at 330.

[184] *See id.* at 354–57.

[185] *See* Addition of Singani to the Standards of Identity for Distilled Spirits, 88 Fed. Reg. 9 (Jan. 13, 2023).

[186] *See* Requirements for Beef and Beef Products to be Exported to Japan from the United States of America (Jan. 25, 2013), https://ustr.gov/sites/default/files/Requirements%20for%20Beef%20and%20Beef%20Products%20to%20be%20Exported%20to%20Japan%20from%20the....pdf.

[187] Koh, *supra* note 25, at 345–48; Daniel Bodansky & Peter Spiro, Executive Agreements, 49 VAND. J. TRANSNAT'L L. 885, 927 (2016).

[188] Senate Finance Letter, *supra* note 32; *see also* Letter from Sen. Ron Wyden to President Barack Obama (Oct. 12, 2011), https://www.wyden.senate.gov/imo/media/doc/Wyden%20Letter%20to%20Obama%20ACTA%20Oct%202011.pdf (claiming the argument "confuses the issue by conflating two separate stages . . . : entry and implementation") [hereinafter Wyden Letter].

[189] Wyden Letter, *supra* note 188.

[190] *See id.*

[191] *See id.*

conflicts either by withdrawing from or by persuading other countries to amend the agreements.[192]

Congressional Acquiescence

The executive branch might argue that congressional acquiescence has made hybrid trade agreements constitutionally permissible.[193] When there is a "systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned," the Supreme Court sometimes treats the historical practice as a "gloss" that informs the scope of presidential power under the *Youngstown* framework.[194] In *Dames & Moore v. Regan*, for example, the Supreme Court upheld the constitutionality of an international agreement terminating certain claims against the Iranian government based, in part, on long-standing executive practice and congressional acquiescence.[195]

In 2008, the Supreme Court stated that congressional acquiescence supports only those assertions of executive power that fall in the second *Youngstown* category, where Congress has neither granted nor denied authority to the executive.[196] Seven years later, the Court considered historical congressional acquiescence in upholding an assertion of presidential authority in the third *Youngstown* category, holding that the President has unilateral authority to recognize foreign sovereigns despite the fact that Congress had more recently enacted a statute to the contrary.[197]

Given the volume of hybrid trade agreements in existence today, the executive branch might argue that Congress has implicitly acquiesced to these agreements as a "consistent executive practice" that Congress "has essentially accepted."[198] On the other hand, the Supreme Court has suggested that the *Dames & Moore* analysis regarding congressional acquiescence might be relevant only to a "narrow set of circumstances" where presidential action is supported by a "particularly longstanding practice" of congressional acquiescence.[199] Hybrid trade deals are largely a modern phenomenon and might not satisfy the "longstanding practice" standard.[200]

Relatedly, due to the lack of transparency surrounding hybrid trade agreements, Congress might not know about many of these agreements and thus might not be in a position to acquiesce to them.[201] As noted above, the disclosure requirements in the 2023 NDAA,[202] which took effect in September 2023, may give Congress greater visibility into—and ability to influence—these agreements.[203]

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[192] *See* OFFICE OF THE LEGAL ADVISER, UNITED STATES DEPARTMENT OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 95 (2012), https://2009-2017.state.gov/documents/organization/211955.pdf.

[193] *Cf.* Claussen, *supra* note 42, at 353 ("Speaking broadly, [trade executive agreements] operate in a zone of congressional approval verging on congressional acquiescence.").

[194] *See* Dames & Moore v. Regan, 453 U.S. 654, 686 (1981) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–611 (1952) (Jackson, J., concurring)).

[195] 453 U.S. 654, 686 (1981).

[196] *See* Medellín v. Texas, 552 U.S. 491, 528 (2008).

[197] *Zivotofsky*, 576 U.S. at 23–28.

[198] Koh, *supra* note 25, at 343.

[199] *Medellín*, 552 U.S. at 531–32.

[200] For background on the role of congressional acquiescence, see Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012).

[201] *See* Claussen & Meyer, *supra* note 61.

[202] 2023 NDAA, § 5947 (codified at 1 U.S.C. §§ 112a–112b).

[203] *See* International Law and Agreements, *supra* note 23.

Another potential response to the acquiescence argument is that Congress has *not* consistently acquiesced to hybrid trade agreements. As discussed above, Congress enacted the Taiwan Agreement Implementation Act, asserting that Congress has a constitutional role to approve or disapprove trade agreements. Individual Members of Congress have also publicly registered their criticism of these agreements.[204] Further, by periodically enacting TPA legislation—most recently in 2015—Congress maintained a high degree of control over FTAs and tariff proclamations, potentially implying that Congress did *not* acquiesce to the conclusion of at least some kinds of trade agreements without its approval.[205] Even if these actions did not expressly prohibit hybrid trade agreements, they arguably amount to implicit disapproval that could place these trade agreements in the third *Youngstown* category, where executive power is at its lowest ebb and alleged congressional acquiescence might not support the practice in question.[206] In any event, a court's view of the strength of a congressional acquiescence argument in favor of hybrid trade agreements will likely continue to depend on the actions Congress decides to take or not to take.

Considerations for Congress

Congress has broad powers that allow it to assert greater control over foreign trade agreement-making should it choose to do so. These powers include its authority to pass laws regulating foreign commerce and tariffs as well as its appropriations and oversight powers.[207] Some of the specific tools that Congress could use to control or influence trade agreement-making include laws delineating under what conditions the executive branch may enter into trade agreements and when they must be submitted to Congress for approval, "report-and-wait" laws that require the executive branch to submit proposed trade agreements to Congress before the agreement can take effect, additional transparency requirements, and various oversight and accountability mechanisms.[208]

The current lack of TPA authorization has arguably frustrated the pursuit of congressional-executive trade agreements, foreclosing a potential alternative to hybrid trade agreements. Since the expiration of TPA-2015 in 2021, some Members of Congress have introduced legislation that would reauthorize some form of TPA. One such bill would have established fast-track authority for plurilateral agreements among the United States and other WTO member countries;[209] another would have provided fast-track authority for congressional approval of a possible FTA with the United Kingdom.[210] Such legislation could channel trade agreement-making through procedures over which Congress has greater control.

Another option is that Congress could consider further legislation, such as the Taiwan Agreement Implementation Act, that gives or withholds approval for agreements that the executive branch has already entered into or places conditions on future agreements. Congress could also consider

[204] *See, e.g.*, Senate Finance Letter, *supra* note 32; Wyden Letter, *supra* note 188; H.R. 4004, 118th Cong. (2023).

[205] *See* Claussen & Meyer, *supra* note 61 ("The acquiescence argument carries even less weight in the context of far-reaching plurilateral or multilateral trade agreements: there are no examples of agreements of that sort coming into force without congressional consent.").

[206] *See Medellín*, 552 U.S. at 528.

[207] *See* CRS Report R45442, *Congress's Authority to Influence and Control Executive Branch Agencies*, by Todd Garvey and Sean M. Stiff (2023).

[208] *See* International Law and Agreements, *supra* note 23.

[209] S. 446, 118th Cong. (2023); *see Portman, Coons bill would expand U.S. authority in plurilateral WTO talks*, INSIDE TRADE (Mar. 1, 2022), https://insidetrade.com/daily-news/portman-coons-bill-would-expand-us-authority-plurilateral-wto-talks.

[210] S. 4450, 117th Cong. (2022).

passing legislation clarifying USTR's authority with respect to making foreign trade agreements or withholding funding for the implementation of agreements that are not submitted for approval to Congress.[211]

Courts have sometimes declined to decide cases presenting political questions about the constitutionality of international agreements,[212] making it possible that at least some of the legal and constitutional debates surveyed in this report may unfold in the political sphere rather than being resolved by litigation. Nonetheless, Congress may use its powers to help shape the political answers to such political questions.

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[211] *See*, *e.g.*, Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, Pub. L. No. 100-204, 101 Stat. 1331 § 139 (1987).

[212] *See* Made in the USA Found. v. United States, 242 F.3d 1300, 1302 (11th Cir. 2001).