

The US Congress's role in the IPEF and the possibility of a US "certification" requirement before the IPEF enters into force

Jane Kelsey

Does the US Congress have authority over the IPEF?

Pillar 1 of the Indo-Pacific Economic Framework for Prosperity (IPEF) is entitled "Trade" and is expected to have binding and enforceable trade-related commitments. Historically in the United States, international trade agreements have been adopted through legislation in both chambers of the US Congress: the House of Representatives and the Senate. The US Constitution gives Congress exclusive control over the *regulation of commerce with foreign nations*. *Treaty making* is a presidential power, but is subject to the *advice and consent* of the Senate. So either way, the constitution says Congress should be involved in the adoption of the IPEF.¹ In the past 100 years, no major US trade pact has gone into effect without being sent to Congress and achieving majority support of both the House and Senate.

Has the US President tried to bypass Congress in the past?

The last few US Presidents have entered into "sole executive agreements" on trade. Not obtaining Congressional approval for such deals has become increasingly controversial as the subject matter has expanded. President Clinton used this tactic for some World Trade Organization (WTO) deals that came after Congress approved WTO entry, and President Obama used it to implement revisions to WTO procurement rules. Congress began to object when President Trump made sole executive deals for targeted tariff cuts and a digital agreement with Japan.

Why is this an issue for the IPEF?

The Biden Administration is describing the IPEF as a "sole executive agreement" that does not require Congressional approval.

Third World Network (TWN) is an independent non-profit international research and advocacy organisation involved in bringing about a greater articulation of the needs, aspirations and rights of the peoples in the South and in promoting just, equitable and ecological development.

Published by Third World Network Berhad (198701004592 (163262-P))

Address: 131 Jalan Macalister, 10400 Penang, MALAYSIA Tel: 60-4-2266728/2266159 Fax: 60-4-2264505

Email: twn@twnetwork.org Website: www.twn.my

The contents of this publication may be republished or reused for free for non-commercial purposes, except where otherwise noted. This publication is licensed under a Creative Commons Attribution-NonCommercial-NoDerivatives 4.0 International License.

Why is the attempt to bypass Congress on the IPEF especially controversial?

The IPEF has put the spotlight on the legality of the US executive branch using such agreements and whether the President can make them without the consent of Congress either before or after they are signed. To date, there is no precedent for such a far-reaching plurilateral agreement as the IPEF to be adopted without the consent of Congress. Neither is there one for a President trying to evade Congress's constitutional trade authority on a comprehensive trade agreement.

How have members of Congress responded to this?

President Biden is already on notice from senior members of Congress from both parties, including the heads of the Senate and House trade committees, that they require a vote on the IPEF. Notably:

- Senate Finance Committee Chair Ron Wyden (D-OR) and ranking member Mike Crapo (R-ID), with 19 other panel members, wrote to President Biden in December 2022 that the administration must submit the IPEF to Congress for approval and seeking to discuss the mechanisms for the submission, approval, and implementation of the agreement.²
- In September 2022, the Chair of the House Appropriations Committee Rosa DeLauro (D-CT), Senate Finance Committee member Elizabeth Warren (D-Mass) and 40 senior Democrats wrote to US Trade Representative (USTR) Katherine Tai and Commerce Secretary Gina Raimondo that the IPEF requires Congressional approval of any binding commitments.³
- In April 2023, Democratic Senators wrote to the USTR reiterating that expectation.⁴ In addition to these public letters, there have been numerous private letters to the same end.

Could Congress force the President to seek its consent to the IPEF?

That remains to be seen. But there is no sign that either party in the House or Senate intends to acquiesce in the IPEF's adoption as a sole executive agreement.

What could happen if Congress gets to vote on the IPEF?

There are two significant consequences:

- (i) The content of IPEF Pillar 1 on Trade would need to be such that a majority in both chambers support it. While there is not the same level of opposition to the IPEF as there was to the Trans-Pacific Partnership (TPP), there is growing disquiet among members of Congress, especially because the digital trade rules would stymie moves to regulate Big Tech.⁵ Their concern is compounded by the secrecy around the negotiations.
- (ii) As noted above, members of Congress are insisting on a vote to enact Pillar 1. If this succeeds, the President will need to meet the conditions that Congress lays down for approval of the IPEF. Any legislation to adopt the IPEF would likely include a requirement for US "certification" of the other parties' compliance with their obligations under the IPEF.

What if the IPEF is not put to Congress?

If the President is able to hold off Congress and keep the IPEF as a sole executive agreement, that would avoid a requirement for formal certification. But the President can still withhold the instrument of acceptance or ratification until the US gets the implementation that it demands, even if the consent of Congress is not required. If all the other parties have sunk political capital into the IPEF and desperately need the US to ratify the agreement, the President will still have leverage to require them to implement the US interpretation of their obligations.

What is certification?

For many decades, the US Trade Representative has used the Congressional requirement for certification of the implementation of free trade agreements (FTAs) as leverage to require other parties to adopt the US's interpretation of those texts, and in some cases to rewrite those countries' obligations. Certifying to Congress that the other party/ies have complied with their obligations under an FTA has been a prerequisite before the President can formally notify those party/ies that the necessary US processes to bring the agreement into force have been completed. This approval process is known as "certification". It was an issue that concerned many negotiating parties during the TPP negotiations until the US withdrew.⁶

How is the certification requirement mandated?

Certification language has been included as a legally binding obligation on the President in legislation adopted by Congress to implement each US free trade agreement over the past 26 years. It was first used for the Canada-United States Free Trade Agreement (CUSFTA) in 1988, and the North American Free Trade Agreement (NAFTA) in 1993.⁷ The language of the certification provision has remained largely the same since then. For example, the implementing legislation for the US-Korea FTA specified:

Conditions for entry into force of the agreement: At such time as the President determines that Korea has taken measures necessary to comply with those provisions of the Agreement that are to take effect on the date on which the Agreement enters into force, the President is authorized to exchange notes with the Government of Korea providing for the entry into force, on or after January 1, 2012, of the Agreement with respect to the United States.⁸

What would certification mean for the IPEF?

Even if the other party has satisfied its own domestic approval processes, the IPEF won't come into force between the US and that country unless and until the US certifies the other country's implementation as part of the US's own domestic approval process.

The US President could decline to notify the other party/ies that the US has completed its domestic processes because the other party has not altered its domestic laws and policies to meet *US expectations* of what it needs to do to comply with the IPEF.

This potentially gives the US leverage to rewrite the bargain the parties reached during the IPEF negotiations and to secure additional concessions after the agreement has been signed.

What if the IPEF text is vague and open to different interpretations?

It is common for parties to agree to FTA provisions precisely because they are vague and provide opaque compromises on matters that were heavily contested that allow each party some room to interpret them in its favour. The US insists that its interpretation of such provisions and terminology must prevail.

Has the US made demands that go beyond the actual text?

The US has required other parties to comply with what it says it believes was agreed, even if it is not written in the text. In the case of the Central America Free Trade Agreement (CAFTA), the US forced Guatemala to adopt three years of data exclusivity that Guatemala had certainly never agreed to.⁹ It does not seem that the US needs to produce any corroborating evidence to support its professed expectations or claims that there were additional oral agreements and commitments that extend beyond the FTA texts. US officials can just decide unilaterally that a commitment was made.

What if the other country rejects the US position?

Every state party to the IPEF retains its sovereign right to decide its own laws and policies and stand by its interpretation. But exercising its sovereignty may come at a price. If the US refuses to certify compliance, the other

country may not get whatever benefits it is expecting from the US in the IPEF (although it remains unclear what those might be).

How has certification worked in practice?

The US officials transmit a list of the changes to the other country's domestic laws and policies that the US government requires before it will allow the pact to go into force. US government officials then monitor compliance, and pressure the government of the trade partner country to alter its laws and policies until they satisfy the US view of the changes required.

What happens if the other party's legislature refuses to pass the law or adopt the policy that the US requires?

The US President could then refuse to certify compliance as part of US domestic processes and the IPEF would not go into effect between that country and the US.

What are some examples of how the US used certification?

There has been a pattern that the US requires the other country to send the US government all its proposed implementing laws so it can scrutinise and comment on them. That is followed by months of negotiations with the US government on the implementing laws. These rounds of negotiations take place in the home country and in the US.

The experience with CAFTA is well documented:

- El Salvador had to hold at least three rounds of negotiations (two in the US) on its implementation of CAFTA. That included sending a high-level delegation, plus the agriculture and economic ministers, to the US over a demand to accept US meat and poultry inspections that was not included in the text.¹⁰
- The US government approved the language of seven laws before they were adopted by Costa Rica. The laws related to intellectual property rights, copyright, telecommunications, customs, agriculture, penal procedure, and distribution arrangements for foreign companies. The US reviewed the final versions to ensure there were no changes.¹¹
- Nicaragua sent the law that implemented CAFTA to the US for review before Nicaragua's President signed it. The US demanded that the law be published to ensure that Nicaragua had completed the entire implementation process. The US apparently sought clarification on a number of administrative measures in the bill.¹²
- For the Dominican Republic's CAFTA certification, the US government pre-approved the language of seven CAFTA implementing laws and then reviewed the final legislation again to ensure no changes had been made before agreeing to certification.¹³
- Guatemala passed its legislation to implement CAFTA in late May 2006 after intensive consultations with the USTR but waited for months to receive an assurance from the USTR that the legislation met US conditions.¹⁴

Have US officials really been involved in drafting other parties' laws?

The best documented example involved Peru. Media coverage reports that the Deputy USTR travelled to Peru in 2008 "to help the administration finalize 35 new laws" that the US required. In addition, two teams of US government lawyers assisted Peru on drafting environmental and business laws.¹⁵ The 35 laws reportedly included laws on data protection for pharmaceuticals, investor arbitration, changes to indigenous land ownership and the education system.¹⁶

What areas of law or policy might the US do this for in the IPEF?

In the past, intellectual property laws have been the most common target of certification. The most obvious target for the IPEF is digital trade. The US produces a special report that identifies what it considers other countries' unfair digital trade practices. It has already launched Section 301 investigations on digital services taxes.¹⁷ It is possible that the US will seek to insert its own version of the OECD/G20 Inclusive Framework on tax as part of

the IPEF's Pillar 4 ("Fair Economy", which covers tax, among other issues) and insist that other parties sign away the right to ever use digital services taxes, although that is also likely to be part of Pillar 1. There are many other potential areas where the US might seek to pressure other parties, including biotech and genetically modified organisms (GMOs), labour practices and export restraints.

What role have US corporations played in the certification process?

Media reports show that US corporate interests have driven US government demands during the certification process. These interests have included the US rice and pork industries,¹⁸ National Council of Textile Organizations,¹⁹ Chevron,²⁰ alcohol industry,²¹ International Intellectual Property Alliance,²² Pharmaceutical Research and Manufacturers of America,²³ and the National Cattlemen's Beef Association, National Pork Producers Council and poultry exporters.²⁴

Does US civil society also influence the process?

US unions sought additional changes to Peru's labour laws beyond what US officials considered was necessary to comply with the FTA. Both the unions and environmental non-governmental organisations (NGOs) argued against the granting of certification until the laws were changed to meet their interpretation of the FTA.²⁵

Is the US's intervention in drafting other countries' laws made public?

It is difficult to find formal records. Most of the information available is in the media, principally *Inside US Trade*. They report comments either from US industry or from officials and politicians in the US or the target country.

Communications between the US and another government could also fall within the secrecy provisions that prevent the release of background documents, in the case of the IPEF until five years after any agreement comes into force.

In some IPEF countries, communications between governments are subject to strict confidentiality and protected even from disclosure under freedom of information laws. It may therefore be impossible even for other legislators in that other IPEF country, let alone the public, to know that the US is and has been involved in writing their laws and policies, what different interpretations were proposed, and whether their government gave way.

How long can the certification process take?

Certification can extend for years after each country has fulfilled its own constitutional requirements for ratification. Panama's legislature approved the US-Panama FTA in 2007, and the US Congress eventually approved it more than four years later. But the US withheld notification for another year because Panama had not changed all of its laws and policies on patents, copyright, finance, telecommunications, procurement, customs, and trade remedies, among others, to the satisfaction of the US. Potentially, US certification could be withheld indefinitely.

Does certification apply only to formal legislation?

No, it applies to a much broader range of measures. Examples that have been reported also relate to regulations,²⁶ institutional and regulatory arrangements,²⁷ and executive decrees.²⁸

How does certification address different systems for receiving treaties into domestic law?

With great difficulty. In 2006 the ranking Democratic member of the House Ways and Means Committee Charles Rangel pointed out that the delay in implementing CAFTA

hinges partially on a fundamental difference in legal interpretation between the USTR and CAFTA countries. USTR insists that signatory countries must change their domestic laws to reflect the obligations of the deal on a range of issues from IPR [intellectual property rights] to agriculture market access. In contrast, the CAFTA signatory countries have argued that the agreement is a treaty which trumps domestic law under their legal system.²⁹

The USTR's position varied according to the issue: it demanded that CAFTA countries change their domestic law in areas such as intellectual property, but said that merely ratifying international labour conventions was enough to incorporate them into the CAFTA countries' domestic laws.³⁰

Would the US still get the benefits of the IPEF without the US's ratification?

If the IPEF entered into force for a party with countries other than the US, they would still be required to change their domestic laws and policies as between them. Most of those laws and policies will be generally applicable – the new law of the land or practice – so the US would *de facto* still get the benefits.

How would certification of individual parties work for a plurilateral agreement like the IPEF?

The US certified compliance with CAFTA at different times for different countries, depending on their willingness to accede to US demands. The same could happen with the IPEF.

Could other parties apply their own version of certification to the US?

Technically another IPEF party could refuse to bring the agreement into force in relation to the US by challenging the US interpretation of the US's obligations. But the US will not agree to anything that is not US law already.

What power would the US Congress have over other IPEF parties in an executive agreement?

If the US agrees to anything in the IPEF that requires a change to US laws, then Congress will become involved and exercise political leverage over what the US executive can approve. It may also move legislation that has a certification provision. That's why the US will insist that nothing in the IPEF requires it to change its current laws and practices – only the other IPEF parties will have to do so. That might work for Pillar 1, even if it restricts what Congress might do in the future, say on digital regulation. But if Pillar 4 requires parties to adopt certain tax rules, such as those linked to the OECD/G20 Inclusive Framework, the Administration may not be able to bypass Congress.

What can non-US parties to the IPEF do to avoid the problems posed by certification?

Politically, nothing, except be aware that an agreement with the US is never final until the US says it is happy with the other party's implementation, and weigh up the vague anticipated benefits of the IPEF against the well-documented risks.

Does the US's leverage depend on the entry-into-force provisions in the IPEF?

US refusal to bring an agreement into force is especially powerful when the agreement's entry-into-force provision is weighted to require US participation (as existed in the TPP). No one knows yet what the IPEF rules on entry into force might be. But even without that weighting, the IPEF's geo-strategic purpose, and promises made by the US to support investment etc, would still give the USTR major leverage.

Jane Kelsey is *Emeritus Professor at the Faculty of Law, University of Auckland, Aotearoa New Zealand.*

Endnotes

- 1 Kathleen Claussen and Timothy Meyer, “The President’s (and USTR’s) Trade Agreement Authority: From Fisheries to IPEF”, Lawfare Blog, 18 June 2022, <https://www.lawfareblog.com/presidents-and-ustrs-trade-agreement-authority-fisheries-ipef>
- 2 Senator Ron Wyden and Senator Michael Crapo to President Joseph Biden, 1 December 2022, <https://www.finance.senate.gov/imo/media/doc/Letter%20to%20POTUS%20on%20IPEF%20Authority%20FINAL%2012.1.22.pdf>
- 3 Rosa DeLauro and others to Amb. Katherine Tai and Hon. Gina Raimondo, 6 September 2022, https://delauro.house.gov/sites/evo-subsites/delauro-evo.house.gov/files/DeLauro_Warren%20IPEF%20letter_v2%209.6.22.pdf
- 4 Senator Elizabeth Warren and others to Amb. Katherine Tai and Hon. Gina Raimondo, 21 April 2023, <https://subscriber.politicopro.com/f/?id=00000187-af27-dfb1-a5df-ef2f03a30000>
- 5 Gavin Base, “Dems urge tough-on-trade stance in trade talks”, Politico, 24 April 2023, <https://www.politico.com/newsletters/weekly-trade>
- 6 Jane Kelsey and Sanya Reid Smith, “Q&A on US ‘certification’ of compliance with trade agreements”, Third World Network Briefing Paper, October 2014, https://www.twn.my/title2/briefing_papers/No73.pdf. A website was developed as a repository for information on certification during the TPP negotiations. See: <https://web.archive.org/web/20151021163657/http://tpnncertification.org/>
- 7 See, e.g., the North American Free Trade Agreement Implementation Act Sec. 101(b): “CONDITIONS FOR ENTRY INTO FORCE OF THE AGREEMENT — The President is authorized to exchange notes with the Government of Canada or Mexico providing for the entry into force, on or after January 1, 1994, of the Agreement for the United States with respect to such country at such time as—
 - (1) the President—
 - (A) determines that such country has implemented the statutory changes necessary to bring that country into compliance with its obligations under the Agreement and has made provision to implement the Uniform Regulations provided for under article 511 of the Agreement regarding the interpretation, application, and administration of the rules of origin, and
 - (B) transmits a report to the House of Representatives and the Senate setting forth the determination under subparagraph (A) and including, in the case of Mexico, a description of the specific measures taken by that country to—
 - (i) bring its laws into conformity with the requirements of the Schedule of Mexico in Annex 1904.15 of the Agreement, and
 - (ii) otherwise ensure the effective implementation of the binational panel review process under chapter 19 of the Agreement regarding final antidumping and countervailing duty determinations; and
 - (2) the Government of such country exchanges notes with the United States providing for the entry into force of the North American Agreement on Environmental Cooperation and the North American Agreement on Labor Cooperation for that country and the United States” (H.R. 3450 (103rd), signed by the President on 8 December 1993).Similar language was included in the 1988 Canada-United States Free Trade Agreement Implementation Act Sec. 102(b).
- 8 United States-Korea Free Trade Agreement Implementation Act, Section 101(b) (H.R. 3080 (112th), signed by the President on 21 October 2011)
- 9 “U.S. Demands on SPS Pose New Obstacles to CAFTA Implementation”, *Inside US Trade*, 20 January 2006
- 10 “U.S. Demands on SPS Pose New Obstacles to CAFTA Implementation”, *Inside US Trade*, 20 January 2006; “Grassley Backs USTR in SPS Fight with CAFTA Countries”, *Inside US Trade*, 27 January 2006
- 11 “Dominican Republic Moves Closer to CAFTA Implementation”, *Inside US Trade*, 1 December 2006
- 12 “Honduras, Nicaragua May Implement CAFTA Next Month as Guatemala Lags”, *Inside US Trade*, 31 March 2006
- 13 “Dominican Republic Moves Closer to CAFTA Implementation”, *Inside US Trade*, 1 December 2006
- 14 “USTR Calls for Further Steps After Guatemala Approves CAFTA Bill”, *Inside US Trade*, 26 May 2006
- 15 “New Peru FTA Decrees Anger Civil Society over Labor, Investment”, *Inside US Trade*, 4 July 2008
- 16 “New Peru FTA Decrees Anger Civil Society over Labor, Investment”, *Inside US Trade*, 4 July 2008
- 17 Jane Kelsey, John Bush, Manuel Montes and Joy Ndubai, *How ‘Digital Trade’ Rules Would Impede Taxation of the Digital Economy in the Global South*, Third World Network, 2021, <https://www.twn.my/title2/latestwto/general/News/Digital%20Tax.pdf>
- 18 “U.S., Guatemala Fight on CAFTA TRQ Allocations for Rice, Pork Exports”, *Inside US Trade*, 3 February 2006
- 19 “NCTO Steps Up Pressure for Legislation Implementing CAFTA Fixes”, *Inside US Trade*, 26 May 2006; “U.S., Dominican Republic Fail to Agree on New CAFTA Pocketing Concessions”, *Inside US Trade*, 2 February 2007
- 20 “Dominican Republic Continues to Work for CAFTA Implementation”, *Inside US Trade*, 12 January 2007
- 21 “Dominican Republic Continues to Work for CAFTA Implementation”, *Inside US Trade*, 12 January 2007
- 22 “Industry Highlights CAFTA Implementation Problems in Costa Rica, DR”, *Inside US Trade*, 16 February 2007
- 23 “Industry Highlights CAFTA Implementation Problems in Costa Rica, DR”, *Inside US Trade*, 16 February 2007
- 24 “U.S. Demands on SPS Pose New Obstacles to CAFTA Implementation”, *Inside US Trade*, 20 January 2006
- 25 “Democrats Urge Caution on Implementing FTA After Peru Passes Legislation”, *Inside US Trade*, 16 January 2009
- 26 “New Peru FTA Decrees Anger Civil Society Over Labor, Environment”, *Inside US Trade*, 4 July 2008
- 27 “USTR Calls for Further Steps After Guatemala Approves CAFTA Bill”, *Inside US Trade*, 26 May 2006
- 28 “Panama Moves Ahead with FTA Implementation as October Goal Nears”, *Inside US Trade*, 7 September 2012
- 29 “USTR Announces Delay in CAFTA Implementation”, *Inside US Trade*, 6 January 2006; see also “Honduras, Nicaragua May Implement CAFTA Next Month as Guatemala Lags”, *Inside US Trade*, 31 March 2006
- 30 “USTR Announces Delay in CAFTA Implementation”, *Inside US Trade*, 6 January 2006