TWN
Third World Network
Website: www.twn.my

Briefing Paper

August 2023

How the US can enforce an "unenforceable" IPEF

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The proposition that the Indo-Pacific Economic Framework for Prosperity (IPEF) will not be enforceable is an illusion. Whether or not the IPEF texts, especially Pillar 1 on Trade, contain a dispute mechanism that empowers enforcement by the United States – because the IPEF is all about the US – there are numerous other potent means for the US to enforce IPEF obligations and commitments against the other parties. Given the current focus of political concern over governments' unilateral recourse to "economic coercion", it is timely for participating states to consider these implications closely in the context of the IPEF.

This briefing examines three unilateral options available to the US to enforce the IPEF:
A. Congressional legislation that requires certification of compliance by IPEF parties
B. Denial or withdrawal of the Generalized System of Preferences
C. Section 301 investigations and sanctions.

Congressional review and legislation requiring certification

Under the US Constitution, the executive branch has exclusive authority to *conduct international negotiations*. The President lacks authority to *enter binding trade agreements* without the US Congress's approval. However, since the late 1990s Presidents from both political parties have attempted to bend this rule by claiming certain agreements do not require approval.

A previous briefing[1] addressed the prospect of the US Congress exercising its constitutional jurisdiction over the IPEF as a trade agreement and imposing requirements for the US Trade Representative (USTR) to certify that another party has complied with the US's view of what the IPEF requires before the agreement can enter into force with that country.

Congress asserts authority over US-Taiwan agreement

In June, the US Congress took steps to do just that with respect to the first chapters of a US trade framework agreement with Taiwan. Negotiations for the US-Taiwan Initiative on 21st-Century Trade began in June 2022

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
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and the first chapters of the agreement were concluded a year later, on 1 June 2023.[2] The Administration deemed this was an "executive agreement", as for the IPEF.

The scope of the US-Taiwan negotiations and the June 2023 agreement is similar to what is understood to be in the IPEF. Notably, there are no tariff or other market access provisions. Rather, the June 2023 agreement includes provisions on digitalised trade facilitation, protection of information, "good regulatory practices", services domestic regulation, anti-corruption, small and medium enterprises, and other IPEF topics, especially from Pillar 1.

The US Congress acted quickly to exert its authority. The United States-Taiwan Initiative on 21st-Century Trade First Agreement Implementation Act reiterates Congress's exclusive authority under the US Constitution over setting the terms of international trade – both tariffs and "commerce with foreign nations" – and provides that the completed parts of the Taiwan deal cannot go into effect without the President certifying to Congress that Taiwan has complied with its obligations.

The introduction of this legislation indicates Congress's thinking with regard to its constitutional trade authority and how it intends to exert its authority in relation to the IPEF. A press release by the Ways and Means Committee of the House of Representatives said the bill will help "make sure the Administration does not ignore the constitutionally established role of Congress in international trade".[3] This development is widely understood in Washington as a signal from Congress to the White House that either the President can work with Congress to discuss terms for its consideration of the IPEF, or Congress will act unilaterally as it has done with respect to the Taiwan agreement.

US-Taiwan Initiative on 21st-Century Trade bill process

The speed and unanimity of Congress's actions were telling. Only one week after the Taiwan deal was announced, on 9 June 2023 the chairs and ranking members (the top member of the minority party) of the House and Senate committees that have jurisdiction over trade announced the introduction of the Implementation Act. It is extremely rare for the "Big Four" trade leaders, with a Republican-led House Ways and Means Committee and a Democratic-led Senate Finance Committee, to agree on legislation.

On 16 June the bill was approved unanimously by the Ways and Means Committee and on 21 June it was passed in the House by voice vote, which is a procedure used for bills with overwhelming bipartisan support. The legislation was then "hotlined" in the Senate late on 23 June, which reflects that both the Democratic Senate Majority Leader and the Republican Minority Leader had agreed that the legislation could skip normal committee procedure and go directly for a floor vote under unanimous consent rules. This is also extremely unusual. Only one Senator objected to the request for unanimous consent, so it was not passed the next day. The bill was passed by the Senate, largely unchanged, on 18 July, a week after a round of IPEF negotiations took place in Busan, South Korea. The legislation was sent to the President on 27 July to be signed into law within 10 days.[4] The President duly did so, but as noted below, he reserved his commitment to implementing some of its provisions.[5]

Certification requirements

The legislation approves the first chapters of the Taiwan agreement, noting that such Congressional approval is necessary to ensure an agreement is durable. While the bill says Congress has approved the Taiwan agreement signed on 1 June 2023, it sets down conditions that have to be met before it enters into force. This cannot occur until at least 30 days after the President submits a "certification" to Congress. The bill requires the President, at least 30 days before submitting that certification, to consult the appropriate Congressional committees and to submit a report to those committees that:

(i) specifically refers to measures the parties intend to use to comply with the obligations,
(ii) answers in writing any questions relating to compliance and implementation submitted by the Congressional committees, and
(iii) describes the trade benefits to various US sectors.

The bill is explicit that the President should only issue the certification if he has determined that Taiwan has taken measures necessary to comply with the provisions of the agreement, to take effect no later than the date the agreement enters into force. The President must also identify the date on which he intends to exchange notes to notify Taiwan that all US procedures have been completed.

The USTR must table a subsequent Report on Implementation no later than 180 days after entry into force providing an assessment of the implementation, including any provisions for which further progress is needed to secure compliance. That report must be made public within five days of its submission to the Congressional committees.

No application of Inflation Reduction Act 2022

There are several other substantive provisions of significance for the IPEF:

(i) no provision in the agreement that is inconsistent with any US law shall have effect, meaning it is not self-executing; and
(ii) the agreement does not constitute a free trade agreement (FTA) for the purpose of the International Revenue Code, which means that critical minerals used in electric vehicle (EV) batteries mined or processed in Taiwan do not qualify for the tax credits provided in the Inflation Reduction Act of 2022 for such minerals mined or processed in the US or a US FTA partner.

Further US-Taiwan agreements

One further jurisdictional provision in the Implementation Act is important for the IPEF, given the conclusion of the latter's Pillar 2 (Supply Chain) agreement in advance of proposed agreements on Pillar 1 (Trade), Pillar 3 (Clean Economy) and Pillar 4 (Fair Economy), and given that negotiations for Pillar 1 at least are expected to continue into 2024.

Under the Implementation Act, if "further agreements" related to the US-Taiwan Initiative on 21st-Century Trade are negotiated, the USTR must provide the appropriate Congressional committees with:

(i) the negotiating text prior to sharing it with Taiwan or outside the executive,
(ii) texts tabled by Taiwan within three days of receipt,
(iii) any consolidated negotiating texts, including attributions of the source of each provision in the text, and
(iv) the final text no later than 45 days before being made public.

The appropriate Congressional committees shall have a minimum time to review these texts and make comments, which can be extended if that is requested by the bipartisan leadership of the committees.

The USTR shall notify the appropriate committees, within one day of scheduling any negotiating round, of the date and place of the round and ensure that specified Congressional officials can attend as accredited members of the US delegation, and provide them with daily briefings, including on tentative agreements to accept any aspect of the negotiating texts.

Any such "further agreement" cannot take effect until at least 60 days after the text is published and a bill has been enacted that expressly approves the agreement, and if necessary makes any changes to US law.

Political considerations for the IPEF

When President Biden signed the bill into law, he said his administration would treat as "non-binding" any procedures that might infringe on its authority, referencing in particular some of the requirements relating to the further US-Taiwan agreements.[6] It is unclear how the President views the requirements for certification of the initial agreement.

The Chair of the Ways and Means Committee, Jason Smith (R-MO), responded by insisting: "What President Biden signed is not a suggestion – it's the law. Congress will hold the President and his Administration accountable for following its requirements to the letter."[7] With a clear reference to the IPEF, Smith warned:

> "The President cannot ignore the core principle this legislation reiterates—that the Executive Branch can only enter into binding trade agreements with approval from Congress. This applies both to ongoing negotiations with Taiwan and trade initiatives being negotiated with other partners, all of which must show concrete benefits to American workers, small businesses, and farmers to earn the support of Congress."

How the President ultimately implements the Act will require an interesting political calculation as an election year looms. Ignoring the signal Congress is sending with this bill could result in a Congressional escalation with respect to the IPEF, which will play out in parallel with the further negotiations with Taiwan.

The ultimate leverage would be for Congress to withhold funding from the executive branch for negotiation and implementation of the IPEF and other trade agreements unless they are approved by Congress. There is a precedent. In 2006, the Science, State, Justice, Commerce, and Related Agencies appropriations bill stated: "None of the funds made available in this Act may be used to include in any new bilateral or multilateral trade agreement the text of" specified provisions proposed in agreements under negotiation relating to parallel importing.[8] When signing the Act into law, the President said he would construe those provisions as "advisory".[9]

What might transpire is necessarily speculative. However, a President calling Congress's bluff on a constitutional issue of separation of powers would have major implications for the IPEF. To date, the USTR has ignored comments, hearings, and letters from both parties in Congress insisting that the IPEF is subject to their constitutional mandate. The other negotiating parties should thus be acutely aware of the prospect that the IPEF will be reviewed and voted on by Congress and its entry into force will be made subject to certification of their compliance with what the US views as their obligations.

Generalized System of Preferences

The Generalized System of Preferences (GSP) provides non-reciprocal duty-free tariff treatment to certain products imported into the US from designated beneficiary developing countries. GSP is a recognised exception to the most-favoured-nation (MFN) obligation in the World Trade Organization (WTO).

Expiry and reauthorisation of GSP

The US's GSP programme expired on 31 December 2020 and there has been a deadlock on its reauthorisation (which underscores just how unusual it is for the House and Senate trade committees to have agreed on the US-Taiwan bill). In June 2021 the Senate passed legislation to reauthorise the programme until the beginning of 2027, including criteria of gender equality and digital trade. That bill expired when the 117th session of Congress ended and no new GSP reauthorisation bill has yet been introduced to the Senate. The legislation that the House passed in the previous Congress reauthorised GSP only until 31 December 2024.[10]

There has been enormous pressure from importing industries that use the programme, and from countries that have benefited, to reauthorise GSP at some point in 2023. In June 2023, Democrats in the House introduced the American Worker and Trade Competitiveness Act that included GSP along with several other measures. If passed, this would reauthorise GSP through to 2026 with retrospective application.[11] Along with stronger labour standard conditions, and requirements that discrimination, violence against workers, and gender-based violence and harassment be addressed, the bill added new criteria on human rights, rule of law, equal protection under the law and anti-corruption.

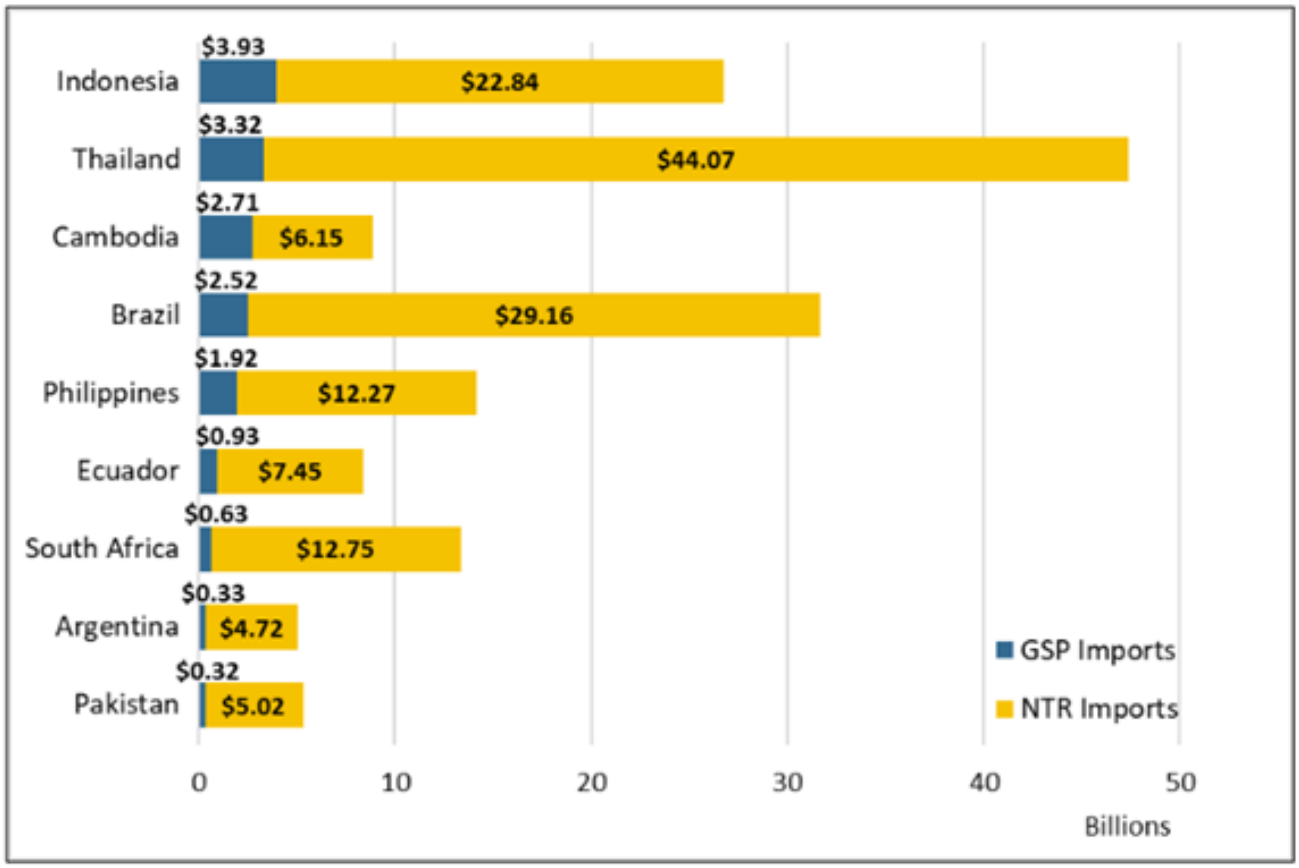
It remains to be seen whether Republicans will support this, especially on labour and environment. Development-focused critics of the bill argue that compliance with the labour and environment standards would be cost-restrictive for many developing countries. Many of these conditions resonate with proposals in several pillars of the IPEF.

GSP beneficiaries in the IPEF

The US Congressional Research Service published a helpful paper on GSP in July 2022 including data about recipients.[12] As of December 2020, there were 119 developing countries and territories benefiting from the US's GSP programme. IPEF negotiating parties that are designated as GSP recipients by the US are Fiji, Indonesia, the Philippines, and Thailand.[13] Figure 1 shows this has significant trade impacts. Indonesia and Thailand had the greatest value of GSP imports into the US.

Figure 1. Top US GSP Beneficiary Countries, 2021

GSP imports compared to BDC's Normal Trade Relations (NTR) imports, $ billions



Source: US Congressional Research Service, "Generalized System of Preferences (GSP): Overview and Issues for Congress", updated 20 July 2022

Eligibility criteria

The enforceability of the IPEF through GSP can come in decisions on eligibility and reviews. Eligibility criteria for the US's GSP programme are highly politicised. The last debate over reauthorisation of GSP saw demands to include stronger labour laws and worker rights, and add new criteria on gender equality, digital trade, human rights, good governance, and environmental law and regulations.

Current mandatory criteria[14] exclude countries that provide preferential treatment to the products of another developed country in a manner likely to have "a significant adverse impact on US commerce". In addition to FTAs with other developed countries that give better market access than the US enjoys, which could be argued is the case for many IPEF participants, this has potential implications for developing countries in the IPEF that have preferential arrangements with China, which the US House of Representatives recently voted to strip of its developing-country status.[15]

A beneficiary country must also have taken, or be taking, steps to grant internationally recognised worker rights (including collective bargaining, freedom from compulsory labour, minimum age for employment of children, and acceptable working conditions with respect to minimum wages, hours of work, and occupational health and safety) and implement its commitments to eliminate the worst forms of child labour. The President can waive this criterion if s/he considers it in the national economic interest to designate that country's GSP status.

Other, discretionary criteria include:

- commitment to provide "equitable and reasonable" access to the country's market and basic commodity resources;
- assurances to the US not to engage in unreasonable export practices;
- the extent of adequate intellectual property rights protection; and
- the extent of action to reduce or eliminate barriers to trade in services and trade-distorting investment policies and practices.

GSP reviews

Section 504(a) of the US Trade Act of 1974 gives discretionary powers to the US President to withdraw, suspend or limit the application of GSP to beneficiary countries based on conditions such as respecting arbitral awards in favour of a US corporation, combating child labour, and respecting internationally recognised workers' rights.

Since 2017 there has been a triennial reassessment of GSP beneficiaries' compliance with the eligibility criteria. These reviews in 2018 and 2020 have centred on worker rights, intellectual property rights and market access. The first assessment period focused on Asian countries. Reviews of India and Indonesia were initiated in 2018. As of July 2022, a country practices review of Indonesia was still ongoing.[16] In addition, a GSP redesignation review for Lao PDR did not grant it eligibility.

An annual review programme also allows any "interested party" to request a review. Recent reviews have directly affected IPEF parties. In April 2018, the USTR initiated a review of India's eligibility for GSP after petitions from three industry associations complained that India had denied adequate access to its agricultural and dairy markets and had placed prohibitive price controls on medical devices. India's GSP eligibility was removed in March 2019 because the US said it had failed to make improvements, and its GSP benefits were terminated in June 2019.[17] Special duty treatment on US$5.6 billion worth of exports to the US was removed, affecting India's export-oriented sectors such as pharmaceuticals, textiles, agricultural products and automotive parts.[18]

As part of the 2020 annual review, Thailand's GSP benefits were partially suspended over alleged lack of equitable and reasonable market access and worker rights issues. Thailand's GSP eligibility for 231 products worth approximately US$817 million was suspended, effective from 30 December 2020.[19]

The main criteria for granting and termination or suspension of GSP benefits are core elements of the US proposals in the IPEF, especially Pillar 1.

Section 301 investigations and sanctions

A third unilateral option available for the US to enforce the IPEF is for the USTR to initiate investigations under Section 301 of the Trade Act 1974.[20]

The Act offers a choice of taking action under Section 301, the WTO, an FTA, or all of them. According to the WTO's Dispute Settlement Understanding, Members cannot unilaterally determine that there has been a violation of WTO rules. Yet that is *de facto* what Section 301 of the US Trade Act empowers the USTR to do.

The Section 301 process was challenged by the European Union in 1998 as incompatible with the US's WTO obligations. A WTO panel in 2000 found no breach after the USTR promised the US would only render Section 301 determinations in conformity with its WTO obligations. The panel warned that the US would no longer be

considered as conforming to its obligations if it repudiated or in any way removed those undertakings, which it has done.

In September 2020, another WTO panel ruled that US tariffs imposed against Chinese goods were inconsistent with the US's GATT (General Agreement on Tariffs and Trade) obligations. The tariffs had been imposed following a Section 301 finding that China's intellectual property laws on technology transfer, technology licensing terms, acquisitions of US technology, and trade secrets protection were unreasonable or discriminatory, and burdened or restricted US commerce. However, the US has paralysed the WTO dispute process by blocking the appointment of Appellate Body members, which removes the ability of states targeted under Section 301 to resolve those matters with any legal finality and to require the US to cease and desist.

Section 301 criteria

A Section 301 inquiry is a domestic process in which the US is the accuser, prosecutor, judge and executioner.

After consultations with the country whose actions it objects to, the USTR can pursue an investigation to decide whether the measure concerned is "actionable" under Section 301 and, if so, what action to take. The inquiry considers whether the policy, law or practice:

- violates trade agreements; or
- is unjustifiable as inconsistent with US international law rights and burdens or restricts US commerce; or
- imposes an unreasonable or discriminatory burden or restriction on US commerce.

The IPEF could potentially fall within any of those categories, depending on whether it is described as a trade agreement (which Pillar 1 clearly would be, even if the US says it is not a "free trade agreement").

The USTR invites the public and other interested persons to make submissions within the Section 301 criteria. In conducting the investigation, the US applies its own interpretation of the relevant trade rules, as well as its domestic law, even when that view is largely rejected internationally.

Unilateral economic coercion

Following an adverse finding, an IPEF party's obligations could become subject to Section 301 penalty tariffs even if the IPEF does not have an internal enforcement mechanism usable by all signatories. The Trade Act 1974 authorises the US to retaliate in a number of ways:

- unilateral suspension of the benefits under a trade agreement;
- restricting imports of goods and services from that country;
- making binding agreements with the country concerned about phasing out or eliminating the measure or providing compensation; or
- denying authorisations to supply certain services in the US.

By arrogating this authority to itself as an exercise of its own sovereignty, the US gains a potent tool to challenge another sovereign government's decision to proceed with a measure that the US opposes, or potentially claim that a government's failure to implement an obligation is damaging US trade interests. The consequences could be crippling, especially for developing countries.

The mere threat of a Section 301 investigation, facilitated by guaranteed rights of input under "transparency" provisions on "good regulatory practice" and "services domestic regulation", is often intended to have a chilling effect on the target government and any other government that is considering similar measures.

The example of digital services taxes

A recent pertinent example for IPEF parties is a series of Section 301 investigations by the USTR into a number of countries' adoption of digital services taxes (DST).[22] These investigations may be directly relevant to both Pillar 1 and Pillar 4 of the IPEF, as well as illustrating how this might be used in relation to the IPEF generally.

The first investigation was into France's DST in 2019. The vast majority of written submissions and all oral submissions to the investigation supported the allegations against the tax. Their views, including assertions by Facebook, Google and others about their tax compliance, were cited as uncontested evidence in support of the finding of an unfair trade practice. Few of these arguments were backed by independent research, and the USTR's report on the investigation treated the assertions of partisan think-tanks and lobbyists, or the digital multinational enterprises (MNEs) themselves, as unquestioned truth.

Among the allegations and findings that are pertinent to the IPEF were that: a tax that was non-discriminatory on its face was considered a discriminatory regulation that penalised US companies for the commercial success of their model and put them at a competitive disadvantage; the measure diverged from international tax and trade norms; and the legislation was introduced with inadequate consultation and opportunities for comment and was passed with undue haste. Punitive sanctions against key French exports were announced, but later deferred after France agreed to suspend the tax pending the outcome of tax discussions in the Organisation for Economic Cooperation and Development (OECD).

The report on France's DST provided a powerful precedent and warning to developing and developed countries. In June 2020, the USTR announced it was initiating similar proceedings against 10 countries that had adopted or were considering adopting a DST, including India and Indonesia.[23] The process mirrored the investigation into the French DST. In January 2021, the USTR's reports on five of these investigations, including on India, upheld the allegations.[24] Following hearings on proposed trade sanctions,[25] the USTR confirmed retaliatory tariffs, including up to 25 percent *ad valorem* duties on a list of products from India.[26] USTR Katherine Tai later made a political agreement with India, which would modify its DST legislation and provide a tax credit to affected US firms, in return for which the USTR would terminate the sanctions.[27] The investigation against Indonesia was discontinued in late March 2021 because the taxes had yet to be implemented, so they fell outside the timeframe set out by the Act.[28]

Lessons for IPEF parties

Section 301 provides a unique form of leverage for the US government and its multinationals to influence, chill and challenge other IPEF governments' decisions. The Section 301 inquiries also demonstrate how the "transparency" and "good regulatory practice" requirements proposed for the IPEF will significantly enhance the leverage of both the US and its corporations, and the associated chilling effect of threats to retaliate unilaterally or by bringing trade disputes should the targeted measures proceed.

This risk is especially evident in relation to rules and obligations under Pillar 1. But it can apply equally to IPEF members' actions, or inactions, relating to the climate crisis, biotech and genetically modified organisms (GMOs), labour standards, or almost anything else in the IPEF.

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