

# Entering the Twilight Zone: Examining the President's Authority to enact the Indo-Pacific Economic Framework Under Justice Jackson's Model of Presidential Power

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## ABSTRACT

In May 2022, President Biden made the Indo-Pacific region the focus of a historic foreign policy initiative, the Indo-Pacific Economic Framework (IPEF). The IPEF is a multi-faceted partnership between the United States and thirteen Indo-Pacific nations. It consists of agreements between the member nations on trade, climate, supply chains, tax, and anti-corruption. The IPEF includes plans to address critical issues such as climate change and supply chain disruptions. However, some members of the U.S. Congress question whether the IPEF agreements are constitutional. As the Biden administration continues to negotiate the agreements, the IPEF sits at the center of a domestic power struggle between the President and Congress.

The IPEF implicates both presidential foreign relations powers and congressional commerce powers, but there is no formula for the exact authority required to implement the IPEF agreements. Historically, statutes have guided the power-sharing between the President and Congress on trade issues by delegating certain authority to the President. However, the IPEF is not a traditional trade agreement. Also, the primary statute delegating authority to the President to negotiate international trade agreements expired in 2021. The Biden administration has stated that the President does not need delegated statutory authority to create the IPEF; however, lawmakers continue to question whether the President's executive authority is sufficient to negotiate and implement the IPEF agreements.

After examining how constitutional powers, statutory authority, and custom interact, this Comment uses case law to propose a rule to determine whether President Biden has the unilateral authority to negotiate and

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implement the IPEF. After applying the rule, the Comment finds that the Biden administration does not have the requisite authority to implement the IPEF.

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#### I. INTRODUCTION

U.S. President Joseph Biden introduced the Indo–Pacific Economic Framework (“IPEF”) on May 23, 2022, creating a new type of foreign

relations instrument.<sup>1</sup> The IPEF has 14 members.<sup>2</sup> It consists of multilateral agreements on four topics, called pillars: supply chains, climate, tax and anticorruption, and trade.<sup>3</sup> If President Biden implements the IPEF as planned, it will be one of the most comprehensive regional partnerships in American history.<sup>4</sup> However, opposition from Congress threatens the IPEF's future.<sup>5</sup> Some members of Congress see the IPEF not as a new type of regional relationship but as a presidential ploy to enter agreements without congressional oversight and approval.<sup>6</sup> As a result, the IPEF is caught in a stand-off between achieving groundbreaking international cooperation and maintaining the sacred American principle of separation of powers.<sup>7</sup>

There are both international and domestic reasons to examine President Biden's authority to implement the IPEF.<sup>8</sup> Internationally, the IPEF promises significant security and economic benefits for the United States and the Indo-Pacific region.<sup>9</sup> The non-U.S. members of the IPEF contribute \$900 billion in foreign investment to the United States.<sup>10</sup> In addition, the region hosts the largest concentration of U.S.

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1. See *In Asia, President Biden and a Dozen Indo-Pacific Partners Launch the Indo-Pacific Economic Framework for Prosperity*, WHITE HOUSE BRIEFING ROOM (May 23, 2023) [hereinafter IPEF Launch Statement], <https://perma.cc/3G4Z-PXJR>.

2. See Press Release, U.S. Dep't of Com., Joint Statement from Indo-Pacific Economic Framework For Prosperity Partner Nations (Nov. 16, 2023), <https://perma.cc/LGV3-BD48>. The members are Australia, Brunei, Fiji, India, Indonesia, Japan, Korea, Malaysia, New Zealand, Philippines, Singapore, Thailand, the United States, and Vietnam. See *id.*

3. See IPEF Launch Statement, *supra* note 1.

4. See Steph Sterling, *The Indo-Pacific Economic Framework for Prosperity (IPEF): Another Nail in the Coffin of the Washington Consensus*, ROOSEVELT INSTITUTE (May 26, 2022), <https://perma.cc/DR4D-TAWK>.

5. See Press Release, Sherrod Brown, Senator, U.S. Senate, *Brown Successfully Pushes Biden Administration to Remove the Trade Pillar from the Indo-Pacific Economic Framework*, (Nov. 15, 2023) [hereinafter Sherrod Brown Press Release], <https://perma.cc/XP64-KPVS>.

6. See, e.g., Letter from Ron Wyden, Chairman, U.S. Senate Comm. on Fin., to Joseph R. Biden, U.S. President, (Dec. 1, 2022) [hereinafter Wyden Letter], <https://perma.cc/4QGX-A835>; see also, e.g., Letter from Elizabeth Warren, Senator, U.S. Cong., to Katherine Tai, Ambassador, U.S. Trade Rep., Honorable Gina Raimondo, Sec'y, Dep't of Com. (Apr. 21, 2023) [hereinafter Warren Letter], <https://perma.cc/CKY8-F8EZ>.

7. See THE FEDERALIST NO. 47 (James Madison) (Libr. of Cong.) (explaining the importance of separation of powers by stating that "accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny").

8. See, e.g., THE FEDERALIST NO. 47, *supra* note 7; see also EXEC. OFF. OF THE PRESIDENT, INDO-PACIFIC STRATEGY OF THE UNITED STATES 4, 5 (2022) [hereinafter INDO-PACIFIC STRATEGY].

9. See INDO-PACIFIC STRATEGY, *supra* note 8.

10. See *id.* at 4.

servicemembers stationed overseas.<sup>11</sup> The IPEF's initiatives would strengthen these financial and military connections.<sup>12</sup> The Indo-Pacific region also sits on the frontlines of increasing Chinese aggression.<sup>13</sup> The Biden administration designed the IPEF's four pillars to strengthen regional resilience against China and other threats, such as climate change.<sup>14</sup> However, the IPEF cannot provide its promised security and prosperity unless it is legal domestically.<sup>15</sup>

The IPEF's domestic lawfulness depends on whether President Biden has the power to create and implement the IPEF without a delegation of authority from Congress or direct congressional oversight and approval.<sup>16</sup> The U.S. Constitution divides governing power between the judicial, legislative, and executive branches of government to prevent any branch,<sup>17</sup> especially the executive, from becoming too powerful.<sup>18</sup> However, the IPEF addresses areas of governance that do not exclusively belong to one branch,<sup>19</sup> making it unclear which branch can authorize its implementation. If the IPEF requires more than just presidential authorization, its continued implementation represents unlawful executive overreach.<sup>20</sup> Executive overreach is hard to undo because presidents often use the unilateral acts of previous administrations to justify their own.<sup>21</sup> Therefore, allowing the IPEF to move forward without the proper authority risks granting future presidents *de facto* authority beyond what the Constitution describes.<sup>22</sup> This Comment seeks to determine whether President Biden is legitimately acting under executive authority, or if he is taking advantage of gaps in the Constitution's distribution of power to illegitimately expand executive authority.<sup>23</sup>

To determine whether President Biden has the unilateral authority to implement the IPEF, Part II of this Comment introduces Justice Robert

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11. See *id.* (There are over 50,000 U.S. troops stationed in Japan alone); see also Mohammed Hussein & Mohammed Haddad, *Infographic: US military Presence Around the World*, AL JAZEERA (Sept. 10, 2021), <https://perma.cc/P9G3-Q2LU>.

12. See INDO-PACIFIC STRATEGY, *supra* note 8, at 4–5.

13. See *id.* at 5.

14. See *id.* at 5–6; see also Sterling, *supra* note 4 (explaining that the IPEF is “using the power of international agreements to create . . . commitments on clean energy”).

15. See Wyden Letter, *supra* note 6 (showing that if the Biden administration is unlawfully overstepping its authority by negotiating the IPEF, the IPEF agreements will not be valid and Congress will fight their implementation).

16. See *id.*; see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 580–83 (1952) (illustrating that if a presidential act lacks the requisite congressional approval, the act is invalid.)

17. See U.S. CONST., art. I, § 1; *id.* art. II, § 1; *id.* art. III, § 1.

18. See THE FEDERALIST NO. 47, *supra* note 7.

19. See *infra* Sections III.A–III.B.

20. See THE FEDERALIST NO. 47, *supra* note 7.

21. See *infra* note 51 and accompanying text.

22. See *id.*

23. See *infra* Part III.

Jackson's model of presidential power as a tool for measuring presidential authority.<sup>24</sup> Part II then reviews the sources of governing authority applicable to the IPEF,<sup>25</sup> describes the IPEF agreements as of May 2024,<sup>26</sup> and reviews the case law on sole executive agreements.<sup>27</sup> Finally, Part III proposes a rule for determining whether President Biden has the authority to implement the IPEF and concludes that he does not.<sup>28</sup>

## II. BACKGROUND

Although the IPEF is a novel proposition, it raises a familiar question: How much unilateral authority does the President have?<sup>29</sup> In a letter to President Biden dated December 1, 2022, members of the U.S. Senate Committee on Finance (Senate Finance Committee) stated that the proposed IPEF agreements cover subjects that fall within Congress's constitutional powers, and that the President does not have the requisite statutory authority to implement them.<sup>30</sup> The Biden administration responds that because the IPEF agreements do not grant market access or create tariffs,<sup>31</sup> they fall within the executive's general Article II foreign relations authority.<sup>32</sup> The administration further asserts that because the IPEF agreements are executive agreements, they do not require congressional oversight or approval.<sup>33</sup>

Meanwhile, the IPEF members continue negotiating agreements for each IPEF pillar.<sup>34</sup> In November 2023, the Indo-Pacific Economic Framework for Prosperity Agreement Relating to Supply Chain Resilience ("Supply Chain Agreement") became the first signed IPEF pillar

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24. See *infra* Section II.A.

25. See *infra* Section II.B.1–B.3.

26. See *infra* Section II.D.

27. See *infra* Section II.C.

28. See *infra* Part III.

29. See *infra* Section II.C.

30. See Wyden Letter, *supra* note 6.

31. See Tai, *Raimondo defend engagement with Congress on IPEF; Wyden unmoved*, WORLD TRADE ONLINE (June 1, 2023, 6:42 PM) [hereinafter *Tai, Raimondo defend engagement*], <https://perma.cc/WR9F-CEHX>.

32. See U.S. CONST. art. II, § 2 (stating in part that the President "shall be Commander in Chief" and have the power to "make treaties"); see also *U.S. v. Curtiss–Wright Export Corp.*, 299 U.S. 304, 318–19 (1936) (finding that Presidents have the inherent power to conduct foreign relations that is derived from Article II of the Constitution).

33. See *Tai, Raimondo defend engagement, supra* note 31; see also CONG. RSCH. SERV., R47679, CONGRESSIONAL AND EXECUTIVE AUTHORITY OVER FOREIGN TRADE AGREEMENTS 6 (2023) (explaining that executive agreements do not require traditional congressional approval.)

34. See Press Release, Gina Raimondo, Sec'y, Dep't of Com., *Raimondo Announces Substantial Conclusion of IPEF Pillars III & IV, Signs Landmark Pillar II Supply Chain Agreement* (Nov. 16, 2023) [hereinafter *Raimondo Nov. 16 Statement*], <https://perma.cc/RN4X-YZ2P>.

agreement.<sup>35</sup> In March 2024, the United States published final versions of the climate and tax and anti-corruption pillar agreements.<sup>36</sup> However, U.S. domestic opposition halted the trade pillar agreement negotiations.<sup>37</sup> Without a clear answer as to the President's authority, the IPEF may be grounded before it has a chance to take off.<sup>38</sup>

#### A. *The Jackson Model of Presidential Power*

Justice Jackson's model of presidential power emerged from the U.S. Supreme Court case *Youngstown Sheet & Tube Co. v. Sawyer* in 1952.<sup>39</sup> Ruling against President Harry Truman's administration after it seized private steel mills,<sup>40</sup> the Court held that presidents have no inherent powers beyond those explicitly enumerated in the Constitution or in statutes.<sup>41</sup> In his concurrence, Justice Jackson instead proposed that presidents do have some unenumerated, inherent powers, subject to boundaries set by statutes and the Constitution.<sup>42</sup>

Justice Jackson wrote that in certain areas of governance, these inherent presidential powers will overlap with Congress's powers.<sup>43</sup> When the powers overlap, Justice Jackson stated that presidential powers "fluctuate, depending upon their disjunction or conjunction with those of Congress."<sup>44</sup> When the President's actions align with Congress's will, the President's authority to act is strong.<sup>45</sup> Conversely, when the President's actions conflict with Congress's will, the President's authority to act is weak.<sup>46</sup> When Congress's will is not discernible, Justice Jackson describes a "zone of twilight" where "[C]ongressional inertia, indifference or quiescence may sometimes . . . enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."<sup>47</sup> In other words, the model proposes that, in this "zone of twilight," Congress can implicitly

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35. *See id.*

36. *See Indo-Pacific Economic Framework*, U.S. DEP'T OF COMMERCE, <https://perma.cc/CFM2-BQPN> (last visited May 31, 2024).

37. *See* Demetri Sevastopulo & Alex Rogers, *Joe Biden Halts Plan for Indo-Pacific Trade Deal After Opposition from Democrats*, FIN. TIMES (Nov. 14, 2023), <https://perma.cc/X3Y2-3X48>.

38. *See id.*

39. *See* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952).

40. *See* *Youngstown*, 343 U.S. at 582–83.

41. *See id.* at 585.

42. *See id.* at 637–38 (Jackson, J., concurring).

43. *See id.* 635–37.

44. *Id.* at 635.

45. *See id.* at 635–36.

46. *See id.* at 637.

47. *Id.*

accept a presidential action not expressly authorized by the Constitution.<sup>48</sup> Congress's implicit acceptance legitimizes the President's inherent power to perform that action.<sup>49</sup> Whether Congress implicitly approves or rejects a president's inherent authority to act is determined on a case-by-case basis.<sup>50</sup> However, if approved, subsequent presidents may repeat the inherently authorized act until it becomes a customary presidential power.<sup>51</sup> Therefore, when Congress's will is not explicit, the President's authority to act depends on three variables: the Constitution, Congress's expressions of will, and custom.<sup>52</sup> Section II.B and Part III will discuss each of these variables as they relate to the IPEF.<sup>53</sup>

### *B. Sources of Negotiating Power: The Constitution, Statutes, and Custom*

The Constitution outlines the distribution of power between the federal executive and legislative branches.<sup>54</sup> Article II describes the President's exclusive powers.<sup>55</sup> Article I gives Congress exclusive power over foreign commerce and government funding, among other subjects that impact international agreements.<sup>56</sup> However, Congress may use statutes to delegate some of its power on these subjects to the President.<sup>57</sup> The President also has customary powers beyond those explicitly outlined in Article II, including the power to make sole executive agreements.<sup>58</sup>

#### 1. The Constitution: The Original Distribution of Negotiating Power

Article II of the Constitution names the President Commander in Chief of the United States and authorizes the President to form treaties and

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48. *See id.*

49. *Id.* The Supreme Court has found that Congress passing legislation permitting actions similar to the presidential action in question represented implicit acceptance. *See, e.g., Dames & Moore v. Regan*, 453 U.S. 654, 657 (1981).

50. *See Youngstown*, 343 U.S. at 637.

51. *See* DYCUS ET. AL., NATIONAL SECURITY LAW 60–61 (Rachel E. Barkow et. al. eds., 7th ed. 2020); *see also, e.g.,* April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities 42 Op. O.L.C. 1, 3–4 (2018) (stating that the President's authority to conduct limited airstrikes was legally supported by the "weightier precedents of history").

52. *See Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

53. *See infra* Section II.B, Part III.

54. *See* U.S. CONST. art. II, § 2; *see also id.* art. I, § 8.

55. *See id.* art. II.

56. *See id.* art. I, § 8.

57. *See, e.g.,* 19 U.S.C. § 2171 (creating USTR under the President and delegating it the authority to negotiate trade agreements); *see also, e.g.,* DYCUS ET. AL., *supra* note 51, at 99–103 (explaining that Congress can delegate authority to the President through statutes provided the delegation is discrete and not violating the constitution).

58. *See also* CONG. RSCH. SERV., R47679, *supra* note 33.

appoint foreign ambassadors.<sup>59</sup> Article II also states that the President “shall take [c]are that the [l]aws be faithfully executed.”<sup>60</sup> These provisions establish the President’s broad powers to conduct foreign relations and defend the United States.<sup>61</sup>

Article II, section 2, clause 2, or the Treaty Clause, broadly informs the President’s general foreign relations power but explicitly grants the President treaty-making power.<sup>62</sup> However, increasingly, the executive branch negotiates and receives approval for international trade agreements through statutory authorizations.<sup>63</sup>

Article I, section 8 gives Congress the power to “regulate commerce with foreign nations” and between the states.<sup>64</sup> Using this power, Congress can enact statutes regarding international trade agreements.<sup>65</sup> For example, Congress passes laws preventing consular transactions and commerce-related discrimination,<sup>66</sup> two topics mentioned in the proposed IPEF agreements.<sup>67</sup> More broadly, section 8, clause 18 grants Congress the power to “make all [l]aws which shall be necessary and proper for carrying into [e]xecution the foregoing [p]owers.”<sup>68</sup> In terms of international trade agreements, clause 18 establishes Congress’s ability to make criminal laws related to commerce.<sup>69</sup> Section 8 also grants Congress its spending

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59. See U.S. CONST. art. II, § 2.

60. *Id.* art. II, § 3.

61. See *United States v. Curtiss–Wright Export Corp.*, 299 U.S. 304, 318–19 (1936) (recognizing the “exclusive power of the President . . . in the field of international relations”); see also *Brig Amy Warwick*, 67 U.S. 635, 668 (1862) (holding that the President has the unilateral power to defend the United States from attack without prior congressional approval).

62. See U.S. CONST. art. II, § 2, cl. 2. The Treaty Clause gives the President authority to make treaties “with the [a]dvice and [c]onsent of the Senate[.]” *Id.* The senate approval process requires a formal treaty negotiation followed by a Senate ratification vote. See *Treaties with Floor Status Actions in the Current Congress*, U.S. SENATE, <https://perma.cc/DRN5-JNX9> (last visited Feb. 18, 2024) (showing an example of the Senate actions and ultimate advice and consent resolution for a treaty on taxation in June 2023).

63. See CONG. RSCH. SERV., S. PRT. 106–71, TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 5 (Comm. Print 2001).

64. *Id.* art. I, § 8, cl. 3.

65. See U.S. CONST. art. I, § 8.

66. See, e.g., 42 U.S.C. §§ 1981–2000 (codifying federal protections against discrimination); see also, e.g., *United States–Mexico–Canada Agreement Implementation Act*, 19 U.S.C. § 4501 (codifying the United States–Mexico–Canada Agreement’s consular transactions ban in U.S. law); see also, *Free Trade Agreement Between the European Union and the Republic of Singapore*, Eu.–Sing., Oct. 12, 2018, 294 O.J.L. 3 (Eur.) (defining consular transactions as the process of submitting import documentation to the consul of the importing country to receive required, special documentation).

67. See *infra* Section II.D.

68. U.S. CONST. art. I, § 8, cl. 16.

69. See CONG. RSCH. SERV., R43023, CONGRESSIONAL AUTHORITY TO ENACT CRIMINAL LAW: AN EXAMINATION OF SELECTED RECENT CASES 1 (2013).



power,<sup>70</sup> exercised through appropriations legislation.<sup>71</sup> As all aspects of federal governance require congressionally approved funding, Congress can exercise indirect power over the negotiations and commitments involved in international agreements by deciding what to fund.<sup>72</sup> The funding decisions contained in appropriations legislation may also indicate whether proposed future commitments align with Congress's will.<sup>73</sup>

The provisions in Article I of the Constitution give Congress broad authority.<sup>74</sup> As a result, international agreements often involve areas subject to congressional authority,<sup>75</sup> and the IPEF agreements are not an exception.<sup>76</sup> However, Congress also may delegate its authority,<sup>77</sup> and has a long tradition of delegating authority to negotiate trade agreements to the executive branch.<sup>78</sup>

## 2. Congress's Explicit Will: Trade Promotion Authority and Other Delegating Statutes

Beginning in 1962, Congress has periodically passed statutes delegating its authority over negotiations on trade and related areas to the executive branch.<sup>79</sup> This type of statute became known as Trade

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70. See U.S. CONST. art. I, § 8, cl. 1.

71. See, e.g., Consolidated Appropriations Act, 2022, Pub. L. No. 117–103, 136 Stat. 49 (2022); see also, e.g., Consolidated Appropriations Act, 2023, Pub. L. No. 117–328, § 2102, 136 Stat. 4459 (2022).

72. See Mark Seidenfeld, *The Bounds of Congress's Spending Power*, 61 ARIZ. L. REV. 1, 3 (2019).

73. See *id.* For example, the Inflation Reduction Act increases funding for climate and energy programs, highlighting those two areas as congressional priorities. See *Inflation Reduction Act of 2022*, DEP'T OF ENERGY, <https://perma.cc/A82X-VFS4> (last updated Sept. 22, 2023).

74. See, e.g., 42 U.S.C. §§ 1981–2000 (codifying, in part the Civil Rights Act of 1964 protecting against discrimination based on sex, color, nationality, race, and religion). Congress's broad authority enables it to pass laws on discrimination. See *id.* This broad authority also allows Congress to pass laws on border protection, criminal penalties, climate incentive programs, and international aid, among other subjects. See, e.g., 6 U.S.C. §§ 101–1534 (containing federal laws on homeland security and federal border management); 18 U.S.C. §§ 541–55 (detailing federal customs and smuggling related crimes); I.R.C. § 30(D) (codifying the clean vehicle tax credit program of the Inflation Reduction Act); See, e.g., Consolidated Appropriations Act, 2023, Pub. L. No. 117–328, § 2102, 136 Stat. 4459 (2022) (legalizing U.S. aid and support for international development programs and climate resilience programs).

75. See CONG. RSCH. SERV., R47679, *supra* note 33.

76. See IPEF Launch Statement, *supra* note 1 (describing how the IPEF will address topics that fall under Congress's jurisdiction, such as supply chains and renewable energy).

77. See *supra* note 57 and accompanying text.

78. See *infra* note 79 and accompanying text.

79. See Trade Expansion Act of 1962, 19 U.S.C. § 1861 (repealed 1975) (authorizing the President to unilaterally negotiate certain tariff reductions); see also Trade Act of 1974, 19 U.S.C. §§ 2111–2242 (same); Bipartisan Congressional Trade Priorities and Accountability Act, 19 U.S.C. §§ 4201–10.

Promotion Authority (“TPA”).<sup>80</sup> The most recent TPA statute was the Bipartisan Congressional Trade Priorities and Accountability Act (“BCTPAA”) of 2015.<sup>81</sup> The BCTPAA authorized presidents to “enter into trade agreements with foreign countries” when they determined that a tariff or a non-tariff “barrier” (“NTB”) “adversely affect[ed] the United States economy.”<sup>82</sup> Under the TPA statutes, presidents had to inform Congress of intended agreements but did not need congressional approval.<sup>83</sup> Traditionally, the President asks Congress to renew the delegation of authority when each TPA statute expires.<sup>84</sup> The BCTPAA expired in 2021, and President Biden has not requested its renewal.<sup>85</sup>

Congress’s early delegations of trade negotiation power established the office of the United States Trade Representative (“USTR”) to negotiate on behalf of the President.<sup>86</sup> USTR’s “organic statute,”<sup>87</sup> authorizes USTR to lead “international trade negotiations,”<sup>88</sup> providing it “reports to Congress with respect to” those negotiations.<sup>89</sup>

Congress’s ability to delegate authority also impacts the subject matter of the agreements themselves.<sup>90</sup> For example, the executive branch’s Customs and Borders Protection agency (“CBP”) regulates customs and border affairs pursuant to a delegating statute authorizing the executive branch to “coordinate and integrate [] security, trade facilitation, and trade enforcement.”<sup>91</sup> Thus, any trade agreement impacting U.S. customs policies must comply with the statutes governing CBP operations.<sup>92</sup>

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80. See CONG. RSCH. SERV., IF 10038, TRADE PROMOTION AUTHORITY 2–3 (2022).

81. See 19 U.S.C. §§ 4201–10.

82. *Id.* § 4202(a)(1)–(b)(1)(A).

83. See *id.* § 4202(a)(2); see also CONG. RSCH. SERV., R47679, *supra* note 33.

84. See CONG. RSCH. SERV., IF 10038, *supra* note 80, at 2.

85. See *id.* at 1.

86. See 19 U.S.C. § 2171.

87. *Tai, Raimondo defend engagement*, *supra* note 31 (noting that 19 U.S.C. § 2171 is referred to as USTR’s “organic statute”).

88. 19 U.S.C. § 2171(c)(1)(C).

89. *Id.* § 2171(c)(1)(H).

90. See, e.g., *United States–Mexico–Canada Trade Fact Sheet Rebalancing Trade to Support Manufacturing*, OFF. OF THE U.S. TRADE REPRESENTATIVE, <https://perma.cc/E3JA-CEPX> (last visited Jan. 13, 2024) (describing trademark provisions in the U.S.-Mexico-Canada Agreement); see also, e.g., 15 U.S.C. §§ 1051–1141n (featuring statutes delegating authority on trademarks).

91. 6 U.S.C. § 211(c)(1).

92. See *id.*; see also THE FEDERALIST NO. 47, *supra* note 7 (explaining the importance of separation of powers, which ensures that the executive cannot negate congressional lawmaking).

### 3. Custom: Sole Executive Agreements

Absent direct statutory authorization, presidents may cite custom as evidence of their inherent presidential authority to act.<sup>93</sup> For example, presidents have adopted the customary power to unilaterally make sole executive agreements, based only on their Article II powers.<sup>94</sup> Due to its lack of congressional approval, the IPEF resembles a sole executive agreement.<sup>95</sup> However, the subject matter of the IPEF agreements does not fall squarely within the President's Article II powers. Thus, the agreements exemplify the increasingly common presidential practice of creating sole executive agreements on subjects not clearly within their Article II powers.<sup>96</sup> Historically, courts have determined the validity of these sole executive agreements by examining both the President's and Congress's constitutional powers, and the implications of related congressional actions.<sup>97</sup>

#### C. Case Law on Presidents' Authority to Form Sole Executive Agreements

Across the twentieth century, courts have upheld sole executive agreements in all but one instance.<sup>98</sup> One early case, *United States v. Belmont*, concerned President Franklin Roosevelt's decision to open diplomatic relations with the Soviet Union in 1933.<sup>99</sup> As part of opening relations, President Roosevelt agreed to the Litvinov Assignment, a plan for settling outstanding legal claims between the United States and the Soviet Union.<sup>100</sup> In response to a challenge that the Litvinov Assignment

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93. See *supra* note 51 and accompanying text.

94. See Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy: I*, 54 YALE L.J. 181, 187 (1945) (stating that “[p]ractices of successive administrations . . . have . . . made agreements negotiated by the President, on his own responsibility and within the scope of his own constitutional powers, appropriate instruments for handling . . . foreign relations”)

95. See ALLEN S. WEINER & DUNCAN B. HOLLIS, INTERNATIONAL LAW 266–75 (7th ed. 2018); see also CONG. RSCH. SERV., R47679, *supra* note 33, at 3.

96. See Harold Hongju Koh, *Triptych's End: A Better Framework to Evaluate 21st Century International Lawmaking*, 126 YALE L.J. FORUM, 338, 349–50 (2017).

97. See *infra* Section II.C.

98. See *United States v. Belmont*, 301 U.S. 324, 330 (1937) (upholding a sole executive agreement); see also *United States v. Pink*, 315 U.S. 203, 229–30 (1942); *Consumers Union of U.S., Inc. v. Kissinger*, 506 F.2d 136, 144 (D.C. Cir. 1974); *Dames & Moore v. Regan*, 453 U.S. 654, 657 (1981). *But see* *United States v. Guy W. Capps, Inc.*, 348 U.S. 296, 298–99 (1955) (invalidating a sole executive agreement). Note, Courts have heard relatively few defining cases concerning the constitutionality of sole executive agreements. See DYCUS ET. AL., *supra* note 51, at 130–32 (explaining the Supreme Court's increasing reluctance to risk overstepping its constitutional jurisdiction on matters related to the President's foreign relations authority).

99. See *Belmont*, 301 U.S. at 331.

100. See *id.* at 331.

was invalid without Senate ratification, the Court found that the Litvinov Assignment did not require Senate ratification because it was not a treaty.<sup>101</sup> However, because the Court determined that the Litvinov Assignment was not a treaty, the Court also found that the Treaty Clause could not authorize the President's entrance into the agreement.<sup>102</sup> Nevertheless, the Court held that the Litvinov Assignment was appropriately "negotiated . . . under the authority of the President," thereby recognizing a unilateral presidential authority to negotiate international agreements outside of the Treaty Clause.<sup>103</sup>

In *United States v. Pink*, the Supreme Court elaborated on the unilateral presidential authority it recognized in *Belmont*.<sup>104</sup> In *Pink*, the Court again upheld the Litvinov Assignment but this time explained the source of President Roosevelt's non-Treaty Clause authority to form the agreement.<sup>105</sup> The Court reasoned that President Roosevelt could unilaterally negotiate the Litvinov Assignment because he could not formally recognize the Soviet Union without settling the claims between the two nations.<sup>106</sup> The Court referred to the outstanding claims as "obstacles" impeding the President's ability to exercise his constitutional power of recognition.<sup>107</sup> The Court further stated that the implied "[p]ower to remove such obstacles" was part of "the historic conception of the powers and responsibilities of the President in the conduct of foreign affairs."<sup>108</sup> According to the Court, Congress "tacitly" recognized this implied authority when it "authorized" a commissioner to oversee the Litvinov Assignment's implementation.<sup>109</sup>

Despite the Court's findings in *Belmont* and *Pink*, in 1955, the Court refused to uphold a sole executive agreement between the United States and Canada.<sup>110</sup> In *United States v. Guy W. Capps*, the U.S. government brought a claim against American importer Guy W. Capps, Inc.<sup>111</sup> The claim alleged that the company had imported seed potatoes in violation of an agreement between the United States and Canada, which limited potato exports to the United States.<sup>112</sup> Before the President entered into the agreement, Congress was preparing legislation imposing similar import

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101. *See id.* at 325–26.

102. *See id.*

103. *Id.* at 330.

104. *See United States v. Pink*, 315 U.S. 203, 210–13 (1942).

105. *See id.* at 229–30.

106. *See id.* at 228–30.

107. *Id.* at 229–30.

108. *Id.*

109. *Id.* at 228–29.

110. *See United States v. Guy W. Capps, Inc.*, 348 U.S. 296, 297–98 (1955).

111. *See id.* at 298.

112. *See id.* at 298–99.

limits.<sup>113</sup> The Supreme Court affirmed the holding of the U.S. Court of Appeals for the Fourth Circuit Court that “the executive agreement was void.”<sup>114</sup> The Fourth Circuit explained that the Truman administration’s authority to enter into international agreements could not negate Congress’s power to “regulate foreign commerce.”<sup>115</sup> The Fourth Circuit reasoned that because the agreement “contravened . . . a statute dealing with the very [same] matter,” it went against Congress’s will and exceeded the President’s inherent powers.<sup>116</sup>

In 1974, the U.S. Court of Appeals for the District of Columbia appeared to suggest a middle ground by upholding a “voluntary” sole executive agreement.<sup>117</sup> *Consumers Union of U.S., Inc. v. Kissinger* concerned the executive branch’s response to a dramatic increase in U.S. steel imports in the late 1950s.<sup>118</sup> The Nixon administration secured agreements from steel export groups in Japan and Europe that they would voluntarily limit their steel exports to the United States.<sup>119</sup> As in *Guy W. Capps, Inc.*, the court stated that Congress held the authority to regulate commercial imports.<sup>120</sup> However, the court found that the Nixon administration had sufficient authority to negotiate the agreements with foreign exporters because voluntary agreements did not negate Congress’s ability to legislate.<sup>121</sup>

Seven years later, the Supreme Court affirmed a non-voluntary sole executive agreement in *Dames & Moore v. Regan*.<sup>122</sup> *Dames & Moore* involved an agreement negotiated by President Jimmy Carter to secure the release of American citizens held hostage by Iranian militants.<sup>123</sup> The agreement negated all current and future litigation between American and Iranian entities.<sup>124</sup> *Dames & Moore*, an American company that had been awarded damages in a claim against the Iranian government, challenged the constitutionality of the agreement.<sup>125</sup> Citing *Pink*, the Supreme Court held that President Carter had the authority to unilaterally enter into

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113. See *United States v. Guy W. Capps, Inc.*, 204 F.2d 655, 658 (4th Cir. 1953).

114. *Id.*

115. *Id.*

116. *Id.*

117. See *Consumers Union of U.S., Inc. v. Kissinger*, 506 F.2d 136, 144 (D.C. Cir. 1974).

118. See *id.* at 138.

119. See *id.* at 138–39.

120. See *id.* at 142–43.

121. See *id.*

122. See *Dames & Moore v. Regan*, 453 U.S. 654, 657 (1981).

123. See *id.* In November 1979, Iranian militants seized the American embassy in Tehran and took about 70 American personnel hostage. See *The Hostage Crisis in Iran*, JIMMY CARTER PRESIDENTIAL LIBR. & MUSEUM, <https://perma.cc/5XEX-2MCY> (last visited Nov. 2, 2023).

124. See *Dames & Moore*, 453 U.S. at 654–55.

125. See *id.* at 663–67.

agreements on behalf of the United States.<sup>126</sup> In its reasoning, the Court acknowledged the custom of using sole executive agreements to settle claims.<sup>127</sup> The Court also found that the International Claims Settlement Act<sup>128</sup> signified Congress's implicit approval of the agreement because the statute demonstrated "congressional acquiescence in the President's power to settle claims."<sup>129</sup>

In most cases, the Supreme Court has upheld sole executive agreements, citing presidential authority derived from custom, inherent powers, and Article II.<sup>130</sup> These cases also demonstrate the impact Congress's implicit approval, or the lack thereof, has on a president's authority to form international agreements.<sup>131</sup>

#### D. The IPEF Pillar Agreements

On February 24, 2024, the Supply Chain Agreement became the first IPEF agreement to enter into force.<sup>132</sup> As of May 2024, the climate and tax and anti-corruption IPEF pillar agreements are finalized but not yet ratified by any Parties, and the trade pillar agreement remains on hold.<sup>133</sup> This Section will briefly review each pillar agreement.<sup>134</sup>

##### 1. Pillar I: Trade

Negotiations on the trade pillar agreement have been on hold since November 2023.<sup>135</sup> However, USTR released a summary of the proposed agreement in March 2023.<sup>136</sup> Most notably, the proposed agreement includes a provision that would "prohibit[] licensing rules from

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126. *See id.* at 682.

127. *See id.* at 656–57.

128. *See* 22 U.S.C. §§ 1621–27.

129. *Dames & Moore*, 453 U.S. at 657.

130. *See supra* note 106 and accompanying text. In 2003, the Supreme Court again affirmed that the President had inherent authority to make agreements outside of the Treaty Clause and without congressional approval. *See* *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 398 (2003).

131. *Compare Dames & Moore*, 453 U.S. at 657 (holding a sole executive agreement was constitutional when it aligned with existing legislation), *with* *United States v. Guy W. Capps, Inc.*, 204 F.2d 655, 658 (4th Cir. 1953) (holding a sole executive agreement was invalid when it usurped proposed legislation).

132. *See* Press Release, U.S. Dep't of Com., U.S. Department of Commerce Announces Upcoming Entry into Force of the IPEF Supply Chain Agreement (Jan. 31, 2024), <https://perma.cc/RM53-PMC6>.

133. *See Indo-Pacific Economic Framework, supra* note 36.

134. *See infra* Sections II.D.1–II.D.4.

135. *See* Sevastopulo & Rogers, *supra* note 37 (stating that negotiations on the trade pillar were suspended in November 2023 and may not be resumed before the 2024 U.S. presidential elections).

136. *See* OFF. OF U.S. TRADE REPRESENTATIVE, IPEF PILLAR I: TRADE (2023) [hereinafter IPEF PILLAR I SUMMARY].

discriminating on the basis of gender.”<sup>137</sup> The agreement would also prohibit “consular transactions for imported goods.”<sup>138</sup> The IPEF trade pillar agreement even proposes imposing penalties on members that do not eliminate trade barriers, such as consular transactions, to make sure those members comply with standards of “transparency and fairness, standards of conduct for border agents . . . and cooperation between the parties.”<sup>139</sup> Overall, the proposed trade agreement aims to address customs and trade sticking points by increasing efficiency during border transit, rather than increasing market access.<sup>140</sup>

## 2. Pillar II: Supply Chain

According to the Biden administration, the Supply Chain Agreement is the first multilateral agreement on supply chains in history.<sup>141</sup> The goal of the agreement is to prevent supply chain disruptions through collaboration and information-sharing.<sup>142</sup>

The Supply Chain Agreement establishes three organizational bodies.<sup>143</sup> First, Article 6 establishes the IPEF Supply Chain Council, which will be composed of a “relevant senior official from the . . . government of each Party.”<sup>144</sup> Parties must identify their senior officials within 30 days of the Supply Chain Agreement entering into force.<sup>145</sup> Within the Supply Chain Council, members will divide into teams and submit team action plans within one year.<sup>146</sup>

Second, Article 7 establishes the IPEF Supply Chain Crisis Response Network, which is designed to “facilitate cooperation on responses to supply chain disruptions.”<sup>147</sup> As with the Supply Chain Council, each party must appoint a representative to the Crisis Response Network within

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137. *Id.* at 2.

138. *Id.* Consular transactions involve the submission of goods for export “to the supervision of the consul of the importing party . . . for the purpose of obtaining . . . customs documentation.” Free Trade Agreement Between the European Union and the Republic of Singapore, *supra* note 66. Consular transactions likely qualify as non-tariff barriers to trade because they create an extra hurdle in importing foreign goods. *See supra* note 82 and accompanying text.

139. IPEF PILLAR I SUMMARY, *supra* note 136, at 2.

140. *See id.*

141. *See* Press Release, U.S. Dep’t of Com., U.S. Department of Commerce Announces Upcoming Entry into Force of the IPEF Supply Chain Agreement, *supra* note 132.

142. *See* Indo-Pacific Economic Framework for Prosperity Agreement Relating to Supply Chain Resilience, Nov. 14, 2023, U.S. Dep’t of State Depository [hereinafter Supply Chain Agreement].

143. *See id.*

144. *Id.* art. 6 § 1.

145. *See id.* art. 6 § 2.

146. *See id.* art. 6 § 12.

147. *Id.* art. 7 § 2 (b).

30 days of the agreement entering into force.<sup>148</sup> The agreement provides that any Party experiencing supply chain problems must call an emergency meeting and “share the . . . information about the supply chain disruption.”<sup>149</sup>

Third, Article 8 establishes the IPEF Labor Rights Advisory Board.<sup>150</sup> Parties must appoint three people to this Board: a senior government official who works in labor, “a worker representative,” and “an employer representative.”<sup>151</sup>

The Supply Chain Agreement concludes with a provision stating that no Party is required to share information that would violate its national security interests.<sup>152</sup> It remains the first and only completed IPEF agreement as of May 2024.<sup>153</sup>

### 3. Pillar III: Climate

The Clean Economy Agreement has yet to be ratified by any Party, but the United States released the final text of the agreement in March 2024.<sup>154</sup> The agreement emphasizes financial and technical collaboration between members to increase electric efficiency, reduce greenhouse gas emissions across transportation sectors, and manage sustainable ecosystems.<sup>155</sup> The agreement includes a provision on increasing sales and production of zero emission vehicles, and another on “reducing potential non-tariff barriers to cross-border trade.”<sup>156</sup> The agreement also expresses Parties’ commitment to a “just transition” to cleaner economies.<sup>157</sup>

Although not mentioned by name in the Clean Economy Agreement’s final text, an IPEF Catalytic Capital Fund (“Fund”) is also part of the Clean Economy Agreement.<sup>158</sup> The Fund will be managed by

148. *See id.* art. 7 § 3.

149. *Id.* art. 12 § 2.

150. *See id.* art. 8.

151. *See id.*

152. *See* Supply Chain Agreement, *supra* note 142, art. 15.

153. *See* Raimondo Nov. 16 Statement, *supra* note 34.

154. *See* U.S. DEP’T OF COM., INDO-PACIFIC ECONOMIC FRAMEWORK FOR PROSPERITY AGREEMENT RELATING TO A CLEAN ECONOMY (2024), [hereinafter Clean Economy Agreement Final Text].

155. *See id.* at art. 1.

156. *Id.* at art. 15, § 1 (b).

157. *Id.* at arts. 19–21 (describing a “just transition” as including addressing labor and poverty issues).

158. *See* U.S. DEP’T OF COM., FACT SHEET: SUBSTANTIAL CONCLUSION OF NEGOTIATIONS ON GROUNDBREAKING IPEF CLEAN ECONOMY AGREEMENT (2023) [hereinafter Climate Agreement Fact Sheet]. The pillar also includes the IPEF Clean Economy Investor Forum, a platform for bringing together innovative companies, investors, and government agencies, which will have its first meeting in early June 2024. *See id.*; *see also* Press Release, U.S. Dep’t of Com., *U.S. Sec’y of Com. Gina Raimondo to Travel to IPEF Ministerial and Inaugural IPEF Clean Economy Investor Forum*, U.S. DEP’T OF COM. (May 28, 2024), <https://perma.cc/f7ns-sttk>.



the Private Infrastructure Development Group (“PIDG”)<sup>159</sup> and will provide “later-stage support to projects such as lender due diligence, viability gap funding, and other forms of concessional capital.”<sup>160</sup>

#### 4. Pillar IV: Tax and Anti-Corruption

The U.S. Department of Commerce also released the final text of the Fair Economy Agreement in March 2024.<sup>161</sup> The agreement focuses on three areas: corruption, “tax administration,” and information sharing.<sup>162</sup> The agreement requires Parties to implement criminal laws against bribery and to increase governing transparency.<sup>163</sup>

American domestic entities will play a large role in the Fair Economy Agreement.<sup>164</sup> Partly in anticipation of the agreement, the Department of State (“State Department”) has already created a “regional anti-corruption hub” in Southeast Asia.<sup>165</sup> The United Nations Office on Drugs and Crime (“UNODC”) manages the hub and the State Department’s Bureau of International Narcotics and Law Enforcement Affairs (“INL”) funds it.<sup>166</sup>

Although the Biden administration describes these proposed pillar agreements as a framework, the President still needs either Congress’s collaboration or sufficient unilateral authority to constitutionally enact the IPEF’s provisions.<sup>167</sup> Part III evaluates the IPEF agreements with respect to the President’s Article II powers, and Congress’s explicit and implicit expressions of approval, to determine whether the President has the authority necessary to implement the IPEF.<sup>168</sup>

### III. ANALYSIS

The President and Congress both have constitutional authority applicable to the IPEF agreements.<sup>169</sup> Case law indicates that the President

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159. See About Us, PIDG, <https://perma.cc/VKN2-BMHW> (last visited Nov. 19, 2023). PIDG is an organization funded by aid entities associated with or part of the governments of the United Kingdom, Netherlands, Switzerland, Australia, Sweden, and Germany. See *id.*

160. *Climate Agreement Fact Sheet*, *supra* note 158, at 2.

161. See U.S. DEP’T OF COM., INDO-PACIFIC ECONOMIC FRAMEWORK FOR PROSPERITY AGREEMENT RELATING TO A FAIR ECONOMY (2024) [hereinafter *Fair Economy Agreement Final Text*].

162. *Id.* at art. I.

163. See *id.* at arts. 5, 7 (detailing proposals for increased transparency such as “publishing on a website . . . gifts, hospitality, and expenses for . . . public officials”).

164. See U.S. DEP’T OF COM., FACT SHEET: SUBSTANTIAL CONCLUSION OF NEGOTIATIONS OF AN INNOVATIVE IPEF FAIR ECONOMY AGREEMENT, (2023) [hereinafter *Fact Sheet: Fair Economy Agreement*].

165. *Id.*

166. See *id.*

167. See *supra* Part I, Section II.C.

168. See *infra* Part III.

169. See *supra* Section II.B.1.

has broad powers under Article II.<sup>170</sup> At the same time, Congress has significant applicable powers under Article I, section 8,<sup>171</sup> but has not legislated to explicitly approve or reject the IPEF.<sup>172</sup> Therefore, the authority to form the IPEF falls within Justice Jackson's "zone of twilight."<sup>173</sup> In this twilight zone, no statutes clearly prohibit the presidential actions in question but the extent of the President's power to take action unilaterally is not clear.<sup>174</sup> According to Justice Jackson, in the twilight zone, the extent of presidential authority is determined by examining the facts of the situation.<sup>175</sup> Therefore, to assess whether the President has sufficient unilateral authority to form the IPEF, this Comment looks to when courts have previously found presidential authority to enter into sole executive agreements.<sup>176</sup> From the above case law on sole executive agreements,<sup>177</sup> this Comment proposes a rule for determining whether the President has the necessary authority to negotiate and implement the IPEF agreements. After examining the President's constitutional powers and the contents of the IPEF agreements,<sup>178</sup> the proposed rule evaluates whether the goals of the IPEF agreements are in "disjunction or conjunction with those of Congress."<sup>179</sup> In the absence of explicit legislation, the rule assesses whether there is sufficient evidence of "congressional inertia, indifference or acquiescence" to "enable, if not invite," the formation of the IPEF on "independent presidential responsibility."<sup>180</sup>

The proposed rule is that the President's constitutional powers under Article II imply presidential authority to remove obstacles to the exercise of those powers.<sup>181</sup> This implied power includes the authority to enter into international agreements if the agreement does not violate existing

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170. See *supra* Section II.C.

171. See *supra* Section II.B.1.

172. See *Statutes at Large and Public Laws 117th Congress (2021–2022)*, CONGRESS, <https://perma.cc/2DH4-DXDK> (listing legislation passed by Congress from 2021–2022); *Public Laws 118th Congress (2023–2024)*, CONGRESS, <https://perma.cc/NHM3-E6YQ> (listing legislation passed by Congress as of January 2024); see also Wyden letter, *supra* note 6 (voicing congressional concern over the IPEF in the absence of any formal legislation approving or rejecting the IPEF's initiatives).

173. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

174. See *supra* Section II.A.

175. See *Youngstown*, 343 U.S. at 637.

176. See *supra* Section II.C.

177. See *id.*

178. See *infra* Sections III.A, III.B.

179. *Youngstown*, 343 U.S. at 635.

180. *Id.* at 637.

181. See *United States v. Pink*, 315 U.S. 203, 229–30 (1942).

statutes<sup>182</sup> and if the President can show implicit congressional approval of the agreement.<sup>183</sup>

For the IPEF, this rule means that President Biden has the authority to create the IPEF if: (1) forming the IPEF removes obstacles impeding President Biden's exercise of his Article II powers, (2) the IPEF agreements do not violate existing statutes, and (3) sufficient evidence demonstrates implicit congressional approval of the IPEF.<sup>184</sup> The following Sections address each element of the rule and conclude that President Biden does not have the authority required to implement the IPEF.<sup>185</sup>

*A. The IPEF Helps Remove Obstacles Preventing the President from Exercising his Article II Powers*

The first element of the proposed rule requires that the IPEF agreements remove an obstacle blocking President Biden's exercise of his Article II powers.<sup>186</sup> In this case, the IPEF removes obstacles preventing President Biden from fully exercising his Article II powers to conduct foreign relations and defend the United States.<sup>187</sup> Specifically, the IPEF helps remove certain obstacles to the formation of stronger regional partnerships. It also helps remove obstacles impeding President Biden from defending the United States against Chinese aggression.<sup>188</sup>

In *Pink*, the Supreme Court found that President Roosevelt had the unilateral authority to form the Litvinov Assignment to settle claims because the claims prevented President Roosevelt from exercising his Article II recognition power.<sup>189</sup> Here, President Biden seeks to exercise his Article II foreign relations and defense powers in the Indo-Pacific to strengthen regional partnerships and defend against growing Chinese aggression.<sup>190</sup> However, the President faces two main obstacles.<sup>191</sup>

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182. See *United States v. Guy W. Capps, Inc.*, 204 F.2d 655, 658 (4th Cir. 1953).

183. See *Pink*, 315 U.S. at 228; see also *Dames & Moore v. Regan*, 453 U.S. 654, 657 (1981).

184. See *supra* notes 126–29 and accompanying text.

185. See *infra* Sections III.A–III.C.

186. See *supra* note 107 and accompanying text.

187. See U.S. CONST. art. II, § 2; see also *supra* note 61 and accompanying text.

188. See, e.g., Colin Grabow, *5 Years Later the United States is Still Paying for Its TPP Blunder*, CATO INST. (Feb. 10, 2022, 10:45AM), <https://perma.cc/3FKF-Q5CC> (describing some of the damage caused by U.S. TPP withdrawal); see also, e.g., INDO-PACIFIC STRATEGY, *supra* note 8, at 4–5 (describing security challenges caused by China's presence in the Indo-Pacific region); see also IPEF Launch Statement, *supra* note 1 (showing how the IPEF will help the U.S. address these challenges).

189. See *United States v. Pink*, 315 U.S. 203, 230 (1942).

190. See INDO-PACIFIC STRATEGY, *supra* note 8, at 4–5.

191. See Grabow, *supra* note 188 (discussing the first obstacle of uncertain regional relations after the U.S. withdrawal from the TPP); see also Riley Walters, *China's Military Puts Indo-Pacific on Edge*, GEOPOLITICAL INTEL. SERVS. (May 26, 2023),

The first obstacle is the strained relations caused by the U.S. withdrawal from the Trans-Pacific Partnership (“TPP”).<sup>192</sup> Withdrawing from the TPP “hurt the credibility and standing of the U.S., not just in Asia, but worldwide.”<sup>193</sup> The United States was “left on the outside looking in” as other countries negotiated new regional trade agreements, such as the Comprehensive and Progressive Trans-Pacific Partnership (“CPTPP”).<sup>194</sup> U.S. withdrawal from the TPP also pushed countries in the Indo-Pacific to develop relations with China.<sup>195</sup> The IPEF helps the United States to overcome the barriers created by the TPP withdrawal in several ways.<sup>196</sup> First, by reducing Congress’s role,<sup>197</sup> the President’s support of the IPEF signals to Indo-Pacific countries that they can rely on U.S. engagement and support regardless of congressional party politics.<sup>198</sup> The IPEF also establishes multiple regional organizations that require representatives from each country.<sup>199</sup> This requirement guarantees that the United States will have a seat at the table during regional initiatives, rather than being locked out as it was after the TPP withdrawal.<sup>200</sup> In addition, the IPEF agreements emphasize American norms, such as transparency,<sup>201</sup> non-discrimination,<sup>202</sup> and the rule of law.<sup>203</sup> By crafting the IPEF according to U.S. values, President Biden ensures that United States will be comfortable and dominant operating in the future regional order.<sup>204</sup> The norms embedded in the IPEF also convey to Indo-Pacific countries that alignment with China is incompatible with U.S. partnership.<sup>205</sup>

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<https://perma.cc/J4SY-KPNP> (illustrating the second obstacle, China’s strength and aggression at the doorstep of the Indo-Pacific region).

192. See Timothy R. Heath, *Strategic Consequences of U.S. Withdrawal from TPP*, RAND CORP. (Mar. 27, 2017), <https://perma.cc/KV7N-HE8J>.

193. *Id.*

194. See Grabow, *supra* note 188.

195. See *id.* (describing China’s growing influence and partnerships with countries in the Indo-Pacific region in the absence of the United States, such as the Regional Comprehensive Economic Partnership (RCEP)).

196. See, e.g., Wyden Letter, *supra* note 6 (describing Congress’s diminished role); see also, e.g., IPEF Pillar I Summary, *supra* note 136 (describing some IPEF multilateral groups).

197. See Wyden Letter, *supra* note 6.

198. See IPEF Launch Statement, *supra* note 1. *But see* Sherrod Brown Press Release, *supra* note 5 (showing that after November 2023, it is not clear whether it is true the IPEF can survive regardless of congressional politics).

199. See, e.g., IPEF Pillar I Summary, *supra* note 136.

200. See Grabow, *supra* note 188.

201. See IPEF Pillar I Summary, *supra* note 136.

202. See *id.*

203. See *Fair Economy Agreement Final Text*, *supra* note 161.

204. See IPEF Launch Statement, *supra* note 1.

205. See INDO-PACIFIC STRATEGY, *supra* note 8, at 8–10.

The second obstacle is China's strength and coercion in the region.<sup>206</sup> The Biden administration's Indo-Pacific Strategy states that the United States can "only be secure if Asia [i]s, too."<sup>207</sup> The strategy identifies China's "coercion and aggression" as a threat to U.S. security—a threat most acutely felt in the Indo-Pacific.<sup>208</sup> The IPEF helps alleviate China's threat to the President's pursuit of national defense in two main ways.<sup>209</sup> First, by removing obstacles to stronger regional relations described above, the IPEF reinforces U.S. strategic alliances in the region.<sup>210</sup> Second, the IPEF strengthens supply chain and cyber resilience against Chinese interference.<sup>211</sup> For example, the supply chain crisis response system aims to prevent China from hurting the United States and its regional allies by withholding key goods.<sup>212</sup> As the United States faces post-TPP fallout and Chinese regional coercion,<sup>213</sup> the IPEF seems uniquely designed to help remove these obstacles to allow President Biden to exercise his foreign relations and defense powers in the Indo-Pacific region.<sup>214</sup>

#### B. *The IPEF Does Not Directly Violate Statutory Law*

The second element of the proposed rule states that the IPEF cannot directly violate any existing statutes.<sup>215</sup> There are two components to this element: (1) whether the act of creating the IPEF violates statutes, and (2) whether the contents of the IPEF agreements violate statutes.<sup>216</sup> Section III.B.1 reviews the statutes most applicable to the IPEF negotiation process and finds no violations.<sup>217</sup> Section III.B.2 identifies red flag provisions, or the IPEF agreement provisions that mandate U.S. action or compliance, which could conflict with U.S. law.<sup>218</sup> Section III.B.2 concludes that the proposed IPEF agreements also do not directly violate any current statutes.<sup>219</sup>

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206. *See id.* at 5.

207. *Id.* at 4.

208. *Id.* at 5.

209. *See, e.g.,* John Grady, *China's Indo-Pacific Aggression Pushing India Closer to U.S., Say Experts*, U.S. NAVAL INST. NEWS (June 1, 2023, 6:41 PM), <https://perma.cc/2YXZ-77VX> (describing the first way: strengthening U.S. alliances in the region); *see also, e.g.,* Sukegawa Seiya, *Can IPEF Protect Corporate Supply Chains?* THE DIPLOMAT (June 12, 2023), <https://perma.cc/P37U-88D9> (describing the second way the IPEF helps the President pursue national defense by working to protect supply chains).

210. *See* Grady, *supra* note 209.

211. *See* Supply Chain Agreement, *supra* note 142.

212. *See id.* art. 7.

213. *See supra* note 191 and accompanying text.

214. *See supra* notes 209, 211 and accompanying text.

215. *See supra* note 129 and accompanying text.

216. *See infra* Sections III.B.1, III.B.2.

217. *See infra* Section III.B.1.

218. *See infra* Section III.B.2.

219. *See id.*

### 1. The IPEF Does Not Violate Trade Negotiation Statutes

The Biden administration has received several letters from congressional groups questioning the President's authority to enact the IPEF.<sup>220</sup> A letter from the Senate Finance Committee accused the President of failing to adequately report IPEF negotiation progress to Congress.<sup>221</sup> In response, the Biden administration argued that part of its authority to enact the IPEF came from 19 U.S.C. section 2171, stating that the statute gives USTR authority to “defend and promote U.S. interests through the negotiation of trade agreements.”<sup>222</sup>

Under section 2171, USTR must “mak[e] reports to Congress with respect to” international trade negotiations.<sup>223</sup> For specific guidance on how to meet this reporting requirement, USTR would typically look to the TPA statutes.<sup>224</sup> However, the last TPA expired in 2021,<sup>225</sup> so its reporting requirements cannot help define the “reports” referenced in section 2171.<sup>226</sup> Aside from the TPA, title 19 describes reporting criteria for over 60 other specific circumstances, but none apply directly to the subject matter or circumstances of the IPEF.<sup>227</sup> With no applicable explanation of USTR's reporting requirements in title 19, this Comment looks at the legislative history to interpret USTR's statutory obligation to “mak[e] reports to Congress” in the context of the IPEF.<sup>228</sup>

The Trade Act of 1974 established the modern statutory parameters for USTR.<sup>229</sup> The phrase “making reports to Congress” is included in section 141 of the initial House bill introduced in November 1974,<sup>230</sup> and remains consistent until the bill's enactment in January 1975.<sup>231</sup> Notably, the Senate did alter a different provision within the same sub-section.<sup>232</sup> The original provision stated STR would “be responsible to the President

220. See, e.g., Wyden Letter, *supra* note 6; see also, e.g., Warren Letter, *supra* note 6.

221. See Wyden Letter, *supra* note 6.

222. See *Tai, Raimondo defend engagement*, *supra* note 31.

223. 19 U.S.C. § 2171(c)(1)(H).

224. See, e.g., 19 U.S.C. §§ 4202–04.

225. See *id.* at § 4202.

226. See 19 U.S.C. § 2171(c)(1)(H).

227. See 19 U.S.C. §§ 1–4732.

228. 19 U.S.C. § 2171(c)(1)(H).

229. See 19 U.S.C. § 2112(b)(1). The Trade Act of 1974 refers to the Special Trade Representative (STR). See *id.* In 1979, Executive Order 12188 changed the STR to the USTR but the statutory delegation of authority remained largely unchanged. See *History of the United States Trade Representative*, OFF. U.S. TRADE REPRESENTATIVE, <https://perma.cc/HGS3-5RW9> (last visited Oct. 7, 2023).

230. H.R. 10710, 93d Cong. § 141(b)(2)(c)(1) (D) (1974).

231. See Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 § 141 (1975).

232. See STAFF OF S. COMM. ON THE JUDICIARY, 93RD CONG., SUM. OF THE PROVISIONS OF H.R. 10710 (Comm. Print 1974).

and to Congress for the administration of trade agreements.”<sup>233</sup> The Senate added the phrase, “report directly to the President and the Congress” to the beginning of that sentence.<sup>234</sup> The addition shows that Congress not only required reporting twice within the same sub-section but also was willing to sacrifice bureaucratic protocol to receive updates “directly” from the negotiators.<sup>235</sup> This legislative history indicates that Congress was focused on ensuring that USTR reported to it, rather than on dictating the quality or quantity of the reports themselves.<sup>236</sup>

Absent further explanation of “reports” in section 2171 or its legislative history, USTR must look to the plain meaning of “report” for guidance. Merriam-Webster’s dictionary defines “report” as “account or statement.”<sup>237</sup> Regarding the IPEF, USTR describes “briefings” with congressional staff and consultations with “the congressional committees of jurisdiction on draft U.S. negotiating proposals.”<sup>238</sup> Members of Congress describe receiving “draft . . . text for feedback” that “a few cleared advisors, [m]embers of Congress, and their staff with security clearances were allowed to see.”<sup>239</sup> Although these characterizations of the IPEF reporting differ,<sup>240</sup> both describe “account[s] or statement[s]” given directly to members of Congress.<sup>241</sup> Therefore, USTR engagements with Congress on the IPEF conform to the applicable statutory reporting requirement,<sup>242</sup> as defined by the legislative history and plain meaning of the statute.<sup>243</sup>

## 2. The IPEF’s Contents Do Not Directly Violate Existing Statutes

Currently, the IPEF consists of the completed Supply Chain Agreement, the finalized, but unsigned, climate and tax and anti-corruption agreements, and the proposed trade agreement.<sup>244</sup> Section III.B.2 identifies the red flag provisions, or provisions that would require U.S. action or compliance when doing so could potentially violate U.S.

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233. S. REP. NO. 93-1298, at 105 (1974).

234. STAFF OF S. COMM. ON THE JUDICIARY, 93RD CONG., SUM. OF THE PROVISIONS OF H.R. 10710 (Comm. Print 1974).

235. *See id.*

236. *See* 19 U.S.C. § 2171(c)(1)(H); *see also supra* notes 242–46.

237. *Report*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2011).

238. *Tai, Raimondo defend engagement, supra* note 31.

239. Warren Letter, *supra* note 6.

240. *See supra* notes 238–39.

241. *See Report, supra* note 237.

242. *See* 19 U.S.C. § 2171(c)(1)(H).

243. *See supra* notes 233–37 and accompanying text.

244. *See supra* Section II.D.

law, in each agreement. After examining each red flag provision, this Comment finds that none directly conflict with any existing statutes.<sup>245</sup>

a. Trade Pillar

The first red flag provision in the proposed trade pillar text “prohibits licensing rules from discriminating on the basis of gender.”<sup>246</sup> As Congress controls licensing laws, the President’s commitment to this mandatory ban could conflict with existing licensing statutes.<sup>247</sup> However, for this provision to conflict with a statute, the statute would have to promote discrimination. A discriminatory licensing statute in the United States would violate the 14<sup>th</sup> Amendment and likely the Civil Rights Act of 1964.<sup>248</sup> Consequently, U.S. compliance with this trade pillar agreement provision would not violate any statutes because of existing U.S. laws prohibiting gender discrimination.<sup>249</sup> The trade pillar text also proposes a ban on consular transactions for imported goods.<sup>250</sup> As noted in Part I, consular transactions likely qualify as NTBs.<sup>251</sup> Section 4202(b) of the BCTPAA authorized the President to negotiate trade agreements that remove NTBs.<sup>252</sup> Congress could not have delegated this power to the President in 2015 if removing NTBs, including consular transactions,<sup>253</sup> violated a statute. The BCTPAA has expired,<sup>254</sup> but Congress approved consular transaction bans in multiple existing U.S.-led free trade agreements.<sup>255</sup> In short, the IPEF ban on consular transactions merely extends an existing practice and therefore cannot directly violate any statutes.<sup>256</sup>

The summary of the proposed trade pillar agreement also references setting “standards of conduct for border agents.”<sup>257</sup> A commitment to

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245. See *infra* Sections III.B.2.a–B.2.d.

246. IPEF Pillar I Summary, *supra* note 136.

247. See, e.g., 15 U.S.C. §§ 1–9805; see also, e.g., 19 U.S.C. §§ 1–4732. Titles 15 and 19 both govern trade and commerce. See *id.*

248. See Olga Torres, *Anti-Discrimination Concerns in Light of U.S. Export Control Compliance Requirements*, JD SUPRA (Aug. 2, 2023), <https://perma.cc/7GLT-T3F8> (illustrating how export and import laws in the United States are subject to anti-discrimination legislation such as the Civil Rights Act of 1964’s ban on employment discrimination).

249. See, e.g., U.S. Const. amend. XIV; see also, e.g., 42 U.S.C. §§ 1981–2000 (codifying, in part, Civil Rights Act of 1964).

250. See IPEF Pillar I Summary, *supra* note 136.

251. See *supra* note 138 and accompanying text.

252. See 19 U.S.C. § 4202(b).

253. See Free Trade Agreement between the European Union and the Republic of Singapore, *supra* note 68.

254. See 19 U.S.C. § 4202.

255. See, e.g., *United States–Mexico–Canada Trade Fact Sheet*, *supra* note 66 (showing that the United States is currently committed to consular bans in other contexts).

256. See *id.*

257. IPEF Pillar I Summary, *supra* note 136.



multi-national border agent standards is a red flag provision because Congress governs border agent conduct via statute.<sup>258</sup> However, the main statutes governing border and customs management delegate broad authority to the executive branch.<sup>259</sup> Title 6 of the U.S. Code governs the CBP and delegates authority to the executive branch to “establish the standard operating procedures” for the agency.<sup>260</sup> The statute even directs CBP to “maintain partnerships and information-sharing agreements and arrangements with foreign governments.”<sup>261</sup> Therefore, the executive branch appears to have sufficient authority to alter the standards of conduct for border and customs officials. Further, the statute specifically delegates CBP authority to act in a way that would comply with a future trade pillar agreement.<sup>262</sup>

#### b. Supply Chain Pillar

The Supply Chain Agreement largely consists of commitments to form multilateral organizations.<sup>263</sup> Participation in these multilateral groups involves sending representatives, and, in some cases, collaborating on action plans.<sup>264</sup> The travel and commitments involved in U.S. participation in these organizations will require appropriations funding, which will need to comply with appropriations legislation.<sup>265</sup> However, the statutory parameters and recent appropriations for the Department of Commerce and the State Department have been broad and permissive of international engagement.<sup>266</sup> As a result, the Supply Chain Agreement likely does not violate existing appropriations legislation or delegation statutes.<sup>267</sup>

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258. *See, e.g.*, 6 U.S.C. §§ 101–1534.

259. *See, e.g., id.* § 211(c).

260. *Id.*

261. *Id.* § 211(i)(3)(C).

262. *See id.*

263. *See supra* Section II.D.2.

264. *See id.*

265. *See* Seidenfeld, *supra* note 72.

266. *See, e.g.*, 15 U.S.C. § 1501 (establishing the Department of Commerce); *see also, e.g.*, Consolidated Appropriations Act, 2022, Pub. L. No. 117–103, 136 Stat. 49, 579; Consolidated Appropriations Act, 2023, Pub. L. No. 17–328, § 2102, 136 Stat. 4459, 5204.

267. *See supra* note 266 and accompanying text. Also, most discussions on funding have not been made public and the topic should be revisited when they are. *See* Press Release, U.S. Trade and Dev. Agency, USTDA to Lead IPEF Project Preparation Facility (Nov. 16, 2023), <https://perma.cc/UX8Y-VUPL>. *But see Fact Sheet: Partnership for Global Infrastructure and Investment (PGI) IPEF Investor Forum*, WHITE HOUSE BRIEFING ROOM (Nov. 16, 2023), <https://perma.cc/SWH8-ZE2L>.

c. Climate Pillar

The Clean Economy Agreement's energy-related initiatives are largely forward-facing, and some have yet to be legislated.<sup>268</sup> However, one red-flag Clean Economy Agreement provision states that members should "significantly increas[e] the sale, production, and share of zero emission vehicles."<sup>269</sup> This commitment directly implicates several statutes enacted pursuant to Congress's commerce power.<sup>270</sup> Specifically, sections 13401 through 13404 of the Inflation Reduction Act of 2022 ("IRA") intersect the most with the Clean Economy Agreement's vehicle emission provisions.<sup>271</sup> These sections address clean vehicles, but increasing the production and sale of zero emission vehicles would not violate any law within them.<sup>272</sup> In fact, the nonpartisan think-tank Electrification Coalition describes the IRA as "perhaps the most significant legislation to accelerate transportation electrification in U.S. history."<sup>273</sup>

The Clean Economy pillar also requires IPEF members to create an IPEF Catalytic Capital Fund ("Fund").<sup>274</sup> The U.S. Commerce Department reported in March 2024 that the United States was one of the "founding supporters" of the Fund and that the U.S. government "will take steps . . . to contribute funds."<sup>275</sup> This provision is potentially unlawful because any misappropriation or use of funds for purposes not designated by Congress violates appropriations statutes.<sup>276</sup> However, contribution to the Fund may be authorized under existing appropriations legislation, or at least consistent with existing appropriations.<sup>277</sup> The Fund is managed by the PDIG.<sup>278</sup> The United States is not a PDIG member,<sup>279</sup> but the International

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268. See, e.g., Hydrogen for Industry Act of 2023, S. 646, 118th Cong. (2023) (exemplifying recently introduced legislation that will likely be relevant to the hydrogen initiatives of the Clean Economy Agreement).

269. See Climate Agreement Fact Sheet, *supra* note 158, at 2–3.

270. See U.S. CONST. art. I, § 8, cl. 3; see also, e.g., I.R.C. § 30(C), (D); 15 U.S.C. §§ 2501–14.

271. See I.R.C. § 30(C), (D) (codifying sections 13404 and 13401 of the IRA). Chapter 52 of Title 15 of the U.S. Code also refers to clean vehicles but does not conflict with the IPEF. See 15 U.S.C. §§ 2501–14.

272. See I.R.C. §§ 30(C), (D).

273. *Inflation Reduction Act Impact on Electric Vehicles*, ELECTRIFICATION COALITION, <https://perma.cc/XU5T-L68L> (last visited Jan. 13, 2024).

274. See *Climate Agreement Fact Sheet*, *supra* note 158, at 2.

275. Press Release, U.S. Dep't of Com., Raimondo, IPEF Ministers Welcome Continued Progress at Indo-Pacific Economic Framework for Prosperity Virtual Ministerial Meeting (Mar. 14, 2024), <https://perma.cc/3TQD-T5WN>.

276. See 31 U.S.C. § 1301(a) (stating that agencies must apply appropriations "only to the objects for which the appropriations were made").

277. See Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, § 2102, 136 Stat. 4459, 5204.

278. See *About Us*, PIDG, *supra* note 159.

279. See *id.*

Finance Corporation is part of the PDIG, and the International Finance Corporation is part of the World Bank.<sup>280</sup> For fiscal year (“FY”) 2023, Congress allocated about \$2.8 billion for “international financial institutions such as the World Bank’s International Development Association as well as other multilateral institutions.”<sup>281</sup> The FY 2023 bill also includes appropriations to “support the development of resilience standards with regard to weather and climate disasters . . . and for necessary expenses to carry out investigations of building failures.”<sup>282</sup> In addition, the FY 2023 bill supports the use of “private funds for the purposes of addressing the changing climate.”<sup>283</sup> Because the World Bank is tied to the Fund’s managers and because of the nature of the Fund’s goals, current U.S. appropriations for the World Bank, climate development, and public-private collaborations align with a commitment to contribute to the Fund.<sup>284</sup> Therefore, overall, the Clean Economy Agreement’s proposals do not seem to violate any current statutes.

#### d. Tax and Anti-Corruption

The Fair Economy pillar creates a “regional anti-corruption hub in Southeast Asia” to “provide technical assistance” in implementing anti-corruption measures.<sup>285</sup> The anti-corruption hub is slated to be funded by the INL.<sup>286</sup> As stated above, using funds for purposes other than those designated by Congress is illegal.<sup>287</sup> However, based on the information available, the regional hub would not misuse State Department funding.<sup>288</sup> For example, the FY 2023 appropriations bill states that “funds appropriated under International Narcotics Control and Law Enforcement shall be made available to support training and technical assistance for foreign law enforcement, corrections, judges and other judicial authorities,

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280. See *Who we Are*, INTERNATIONAL FINANCE CORPORATION, <https://perma.cc/9E47-AV93> (last visited Jan. 12, 2024).

281. See HOUSE COMM. APPROPRIATIONS, SUMMARY OF APPROPRIATIONS PROVISIONS BY SUBCOMMITTEE 40 (2023).

282. § 2102, 136 Stat. at 5204.

283. *Id.*

284. See *id.*

285. See *Fact Sheet: Fair Economy Agreement*, *supra* note 164.

286. See *id.*

287. See *supra* note 266 and accompanying text.

288. See, e.g., DEP’T OF STATE, FOREIGN OPERATIONS, AND RELATED PROGRAMS, CONGRESSIONAL BUDGET JUSTIFICATION FISCAL YEAR 2022 107–08 (2022); see also, e.g., Consolidated Appropriations Act, 2022, Pub. L. No. 117–103, § 412, 136 Stat. 49, 579; § 2102, 136 Stat. at 5204.

utilizing regional partners.”<sup>289</sup> These funding delegations align with, and could plausibly encompass,<sup>290</sup> the activities of the hub.<sup>291</sup>

However, the requirement that Parties adopt sanctions and “establish [] criminal offenses” to “combat corruption” is a red flag provision.<sup>292</sup> Because Congress must approve foreign sanctions, committing to sanction other countries as dictated by an international agreement usurps Congress’s authority.<sup>293</sup> However, during a national emergency, the President can unilaterally impose sanctions under the International Emergency Economic Powers Act (“IEEPA”).<sup>294</sup> The criteria for national emergencies are broad enough that the President could likely declare an emergency in the Indo-Pacific based on either Chinese aggression or climate change.<sup>295</sup> The declaration would invoke the President’s sanctioning powers under IEEPA,<sup>296</sup> allowing him to comply with the IPEF tax and anti-corruption foreign sanction provision without infringing on Congress’s sanctioning powers.<sup>297</sup> Further, the IPEF’s proposed foreign sanctions provision aligns with recent legislative trends.<sup>298</sup> In 2021 and 2022, Congress introduced over 40 bills imposing corruption and human rights-related sanctions.<sup>299</sup>

The Fair Economy Agreement’s call for criminal penalties is also potentially unlawful because only Congress may create federal criminal

289. See § 2102, 136 Stat. at 4992. The appropriations act also references the requirements in the Foreign Assistance Act of 1961 (FAA), which also support funding the hub. See *id.* For example, one FAA provision directs the State Department to manage “assistance provided by the United States Government to support international efforts to combat illicit narcotics production or trafficking.” Foreign Assistance Act of 1961, 22 U.S.C. § 2291(b)(1).

290. See, e.g., § 2102, 136 Stat. at 4992; see also, e.g., Foreign Assistance Act of 1961, 22 U.S.C. § 2291(b)(1) (delegating funds for the same goals pursued by the IPEF and INL’s regional hub).

291. See *Fact Sheet: Fair Economy Agreement*, *supra* note 164.

292. *Fair Economy Agreement Final Text*, *supra* note 161, at 3–4, 8.

293. See EDWARD J. COLLINS-CHASE, CONG. RSCH. SERV., R47829, SANCTIONS PRIMER: HOW THE U.S. USES RESTRICTIVE MECHANISMS TO ADVANCE FOREIGN POLICY OR NATIONAL SECURITY OBJECTIVES 1 (2023). The Fair Economy Agreement even instructs Parties on how to design the sanctions, instructing them to use factors such as value of a bribe or benefit. See *Fair Economy Agreement Final Text*, *supra* note 161, at 10.

294. See 50 U.S.C. § 1702; see also Andrew Boyle, *Checking the President’s Sanctions Powers*, BRENNAN CTR. JUSTICE (June 10, 2021), <https://perma.cc/5UGD-5Y7P>.

295. See Boyle, *supra* note 294 (explaining the broad criteria for national emergencies); see also INDO-PACIFIC STRATEGY, *supra* note 8, at 4, 6 (describing potential emergencies in the region).

296. See Boyle, *supra* note 294.

297. See 50 U.S.C. § 1702.

298. See EDWARD J. COLLINS-CHASE, CONG. RSCH. SERV., R47344, U.S. SANCTIONS: LEGISLATION IN THE 117TH CONGRESS 29 (2022).

299. See *id.*

penalty laws.<sup>300</sup> However, the President has the power to “take care that the laws be faithfully executed,”<sup>301</sup> and the United States already has extensive laws against bribery and corruption.<sup>302</sup> Therefore, by committing to sanction and criminalize corruption,<sup>303</sup> the President is simply committing to “execute[]” existing U.S. statutes.<sup>304</sup> As a result, compliance with the tax and anti-corruption provision would not violate statutes or separation of powers principles.<sup>305</sup>

*C. There is Insufficient Evidence of Implicit Congressional Approval for the IPEF*

The final element of the proposed rule requires evidence of implicit congressional approval of the President’s action.<sup>306</sup> Here, evidence fails to show that Congress implicitly approves of the IPEF.<sup>307</sup>

Although expired,<sup>308</sup> the past TPA statutes support congressional approval for the IPEF. The TPA statutes all gave the President authority to “enter into a trade agreement” when he determined that some “barrier to . . . international trade . . . adversely affect[ed] the United States economy.”<sup>309</sup> The IPEF agreements are trade-related agreements that address multiple barriers to international trade that negatively impact the economy.<sup>310</sup> In other words, the IPEF agreements are the exact type of agreement Congress has repeatedly authorized.<sup>311</sup> Further, the most recent TPA expired automatically and the onus is on the President to request renewal,<sup>312</sup> so its expiration does not reflect Congress’s will or intent.

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300. See CONGRESSIONAL AUTHORITY TO ENACT CRIMINAL LAW: AN EXAMINATION OF SELECTED RECENT CASES, *supra* note 69. There is no domestic equivalent of IEEPA giving the President unilateral authority to impose legal penalties. See *Separation of Powers: An Overview*, NAT’L CONF. OF STATE LEGISLATURES, <https://perma.cc/5DT5-VCVQ> (last updated May 1, 2021).

301. U.S. CONST. art. II, § 3.

302. See, e.g., 15 U.S.C. § 78dd-1(a) (prohibiting bribery of any foreign official); see also, e.g., 18 U.S.C. § 226 (imposing a fine or prison sentence of 15 years for bribery “affecting port security”).

303. See *Fact Sheet: Fair Economy Agreement*, *supra* note 164.

304. U.S. CONST. art. II, § 3.

305. See *supra* notes 301–03 and accompanying text.

306. See *supra* notes 182–84 and accompanying text.

307. Compare, e.g., BCTPAA, 19 U.S.C. §§ 4202–10 (showing Congress’s past willingness to delegate trade negotiation authority), with Wyden Letter, *supra* note 6 (opposing the President’s unilateral IPEF negotiations).

308. See 19 U.S.C. § 4202.

309. *Id.* § 4202(b).

310. See discussion *supra* Section II.D. For example, the Clean Economy Agreement specifically commits Parties to “reducing potential non-tariff barriers to cross-border trade.” *Clean Economy Agreement Final Text*, *supra* note 154.

311. See, e.g., Trade Expansion Act of 1962, 19 U.S.C. § 1861 (repealed 1975); see also, e.g., Trade Act of 1974, 19 U.S.C. §§ 2111–2242; 19 U.S.C. §§ 4202–10.

312. See CONG. RSCH. SERV., R47679, *supra* note 33, at 6.

Rather, the multiple expired TPA statutes represent Congress's repeated willingness to delegate the President the authority required to negotiate the IPEF agreements.<sup>313</sup>

Also, many of the IPEF's red flag provisions align with existing congressional priorities and legislative trends.<sup>314</sup> For example, the proposed climate pillar commitment to promulgate zero emission vehicles complements the clean vehicle incentive programs in the IRA.<sup>315</sup> In *Dames & Moore*, the Supreme Court held that legislation allowing measures like those in President Carter's agreement with Iran constituted implicit congressional approval of the agreement.<sup>316</sup> Here, the consistencies between IPEF provisions and existing legislation support the existence of implicit congressional approval of the IPEF.<sup>317</sup>

Conversely, statements by members of Congress and the 21<sup>st</sup> Century Trade First Agreement Implementation Act ("TFAIA") of August 2023 evince Congress's implicit rejection of the IPEF.<sup>318</sup> In its December 2022 letter, the Senate Finance Committee stated: "There appears to be a misunderstanding as to whether an agreement like IPEF, which aims to regulate foreign commerce and reshape international trade flows, requires similar approval [by Congress]. It does."<sup>319</sup> The letter then states that the IPEF lacks the requisite approval, signaling Congress's displeasure with the IPEF's implementation.<sup>320</sup> Further, Senator Brown's statement that "the trade portion of the Indo-Pacific Economic Framework is unacceptable, and [he's] glad it's not moving forward" expresses clear disapproval.<sup>321</sup> Congress's expressions of opposition to the IPEF trade pillar ultimately led the Biden administration to suspend trade pillar negotiations in November 2023.<sup>322</sup>

Also, while the IPEF proposals may be consistent with existing legislation, new legislative efforts clash with the IPEF's proposals and strongly imply congressional disapproval.<sup>323</sup> An April 2023 letter from members of Congress expressed concerns that the IPEF trade pillar

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313. *See supra* note 311.

314. *See discussion supra* Section III.B.

315. *See* I.R.C. § 30(C), (D) (codifying sections 13404 and 13401 of the IRA).

316. *See Dames & Moore v. Regan*, 453 U.S. 654, 657 (1981).

317. *See discussion supra* Section III.B.

318. *See, e.g.*, Wyden Letter, *supra* note 6; *see also, e.g.*, United States-Taiwan Initiative on 21st-Century Trade First Agreement Implementation Act, Pub. L. No. 118-13, 137 Stat. 63 (2023).

319. Wyden Letter, *supra* note 6.

320. *See id.*

321. Sherrod Brown Press Release, *supra* note 5.

322. *See id.*

323. *See, e.g.*, United States-Taiwan Initiative on 21st-Century Trade First Agreement Implementation Act, Pub. L. No. 118-13, 137 Stat. 63 (2023) (establishing stricter guidelines for agreement negotiations that would have inhibited the IPEF negotiations had they been in place at the time).

agreement conflicted with Congress's "efforts to promote competition in the digital economy, regulate artificial intelligence, and protect online privacy."<sup>324</sup> Congress's passage of the TFAIA also expresses implicit disapproval of the IPEF because the TFAIA, by design, gives Congress more oversight of international agreement negotiations.<sup>325</sup> Specifically, section 7 appears to define USTR's required "reports to Congress," removing the ambiguity that the Biden administration may be relying on to justify its ability to unilaterally negotiate the IPEF.<sup>326</sup> Section 7 requires USTR to: (1) provide the appropriate congressional texts, (2) schedule briefings to discuss those texts, and (3) notify Congress of each scheduled negotiating round, among other actions.<sup>327</sup> According to *Insider U.S. Trade*, the bill's trade negotiation restrictions are "widely seen" as reactions to the IPEF.<sup>328</sup> As further evidence that the TFAIA is a reaction to the IPEF, *Insider U.S. Trade* cited the fact that the TFAIA implements "more aggressive" trade negotiation oversight than any Congress has previously enacted.<sup>329</sup> Implicit congressional expressions of will can come after the President forms an agreement. In this case, Congress's subsequent passage of the TFAIA expresses implicit rejection of the IPEF.<sup>330</sup>

As the congressional statements and new legislation are more recent expressions of congressional will than existing and expired legislation,<sup>331</sup> they more accurately indicate Congress's sentiments toward the IPEF. Also, unlike past legislation,<sup>332</sup> the statements and TFAIA represent affirmative action against the IPEF.<sup>333</sup> As a result, the evidence of Congress's implicit disapproval of the IPEF outweighs evidence of implicit acquiescence.

Without sufficient evidence of implicit congressional approval, President Biden's IPEF initiative fails to fulfill the third element of the proposed rule.<sup>334</sup> Therefore, the proposed rule states that President Biden does not have authority to implement the IPEF, even though the IPEF

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324. Warren Letter, *supra* note 6.

325. *See* § 7, 137 Stat. at 66.

326. *See id.*

327. *See id.*

328. *See Congress Likely to Push Harder for a Bigger Role in Trade Policy*, WORLD TRADE ONLINE (Dec. 28, 2023, 1:00AM), <https://perma.cc/S4MB-KVY3>.

329. *Id.*

330. *See id.*

331. *Compare* 19 U.S.C. §§ 4202–10 (2015), with Sherrod Brown Press Release, *supra* note 5.

332. *See, e.g.*, 19 U.S.C. §§ 4202–10; *see also, e.g.*, I.R.C. § 30(C), (D) (codifying sections of the IRA).

333. *See Congress Likely to Push Harder for a Bigger Role in Trade Policy*, *supra* note 328.

334. *See supra* note 181–83 and accompanying text.

helps President Biden exercise his Article II powers and does not directly violate any statutes.<sup>335</sup>

#### IV. CONCLUSION

The IPEF exists in Justice Jackson's twilight zone where the Constitution fails to clearly delineate presidential and congressional authority.<sup>336</sup> To determine whether the President has sufficient unilateral authority to implement the IPEF in this twilight zone, this Comment proposes that the President has authority to implement the IPEF if the IPEF facilitates the President's use of his Article II powers, does not violate existing statutes, and has implicit congressional approval.<sup>337</sup> The IPEF meets the first two elements.<sup>338</sup> However, the IPEF fails to fulfill the third element because most evidence points to Congress's implicit disapproval of the IPEF.<sup>339</sup> As a result, this Comment finds that the President does not have sufficient authority to unilaterally implement the IPEF.<sup>340</sup>

Allowing the President to continue negotiating the IPEF agreements without the requisite authority threatens the American commitment to separation of powers.<sup>341</sup> Continuing unilateral negotiations also leaves the IPEF vulnerable to cancellation by subsequent presidents. However, abandoning the IPEF would deal a blow to future global prosperity and security.<sup>342</sup> To save the IPEF and maintain the Constitution's separation of powers, Congress and the President should pass a new TPA statute granting the President authority to fully implement the IPEF. In Justice Jackson's model, presidential power is strongest when the President and Congress are united.<sup>343</sup> If the IPEF is going to survive, it likely needs the full force of presidential and congressional power behind it.

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335. *See supra* Sections III.A–III.B.

336. *See discussions supra* Part I, Section II.A.

337. *See discussion supra* Part III.

338. *See discussions supra* Sections III.A, III.B.

339. *See discussion supra* Section III.C.

340. *See id.*

341. *See discussion supra* Part I.

342. *See discussion supra* Section III.A.

343. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).