



Executive Authority to Enter Into and Define Free Trade Agreements: A Primer

TORI SMITH | APRIL 12, 2023

Executive Summary

- In late March – in response to concerns from U.S. trading partners that the Inflation Reduction Act’s (IRA) clean vehicle tax credits discriminate against foreign products – the Department of Treasury released guidance on rules for these credits that broadly interprets the term “free trade agreement” to allow for additional countries to participate in the supply chain for qualifying vehicles.
- To further mitigate these concerns, the Biden Administration in March signed a critical minerals agreement with Japan that Treasury will interpret as a “free trade agreement”; many in Congress criticized the administration for violating both the Constitution and Congress’ intent behind the IRA.
- This insight explores what a trade agreement is, the relevant authorities that allow the executive branch to enter into trade agreements, and how Congress can productively engage in the process for Treasury’s proposed rule.

Introduction

On March 31, 2023, the Department of Treasury and the Internal Revenue Service (IRS) released long-awaited guidance and a notice of proposed rulemaking for how the agency will implement the Inflation Reduction Act’s (IRA) new clean vehicle tax credits. The parameters set in the IRA for the new clean vehicle tax credits were controversial when the law was passed in 2022. Opposition was especially strong among U.S. trading partners and foreign automakers because the law’s regional and domestic content requirements for electric vehicle and battery production are discriminatory against foreign products.

To address concerns from trading partners, the new guidance and proposed rule apply a broad definition to the term “free trade agreement” to allow for new executive agreements negotiated by the U.S. Trade Representative (USTR) to expand the number of countries that can participate in the critical mineral and battery supply chains under the Inflation Reduction Act. Three days before the guidance and proposed rule were announced, USTR signed a critical minerals agreement with Japan that was mentioned by name in the proposed rule.

These two actions drew significant attention in Congress, with some members calling the proposed rule, interpretation of “free trade agreement,” and agreement with Japan unconstitutional. Ways and Means Trade Subcommittee Ranking Member Earl Blumenauer (D-OR) [accused](#) the Biden Administration of ignoring “congressional intent and unilaterally circumvent[ing] Congress’ constitutional role on international trade.” Senate Finance Committee Ranking Member Mike Crapo (R-ID) [claimed](#) the administration’s efforts were meant to “bypass the American people.” Senator Joe Manchin (D-WV) suggested that he would be willing to [challenge](#) the administration’s actions in court.

As Congress evaluates the administration's action to implement the IRA's clean vehicle tax credits, it is important for members to understand the powers given to each branch regarding trade and the current definition of free trade agreement. In addition to discussing those topics, this insight will look at options for Congress to engage in the process for this proposed rule.

What Is a Free Trade Agreement?

Colloquially, a free trade agreement has been understood as one that eliminates tariff and non-tariff barriers to trade between the United States and a partner country. The United States has 14 free trade agreements with 20 countries, with the most recent being the renegotiated trade agreement for North America called the United States Mexico Canada Agreement. Historically, these agreements have been negotiated and approved by Congress through a tool called [Trade Promotion Authority](#) (TPA). Some of the core understandings about what a free trade agreement is date back to the Reciprocal Trade Agreements Act of 1934.

Despite these traditions, there is no statutory definition for a free trade agreement. USTR's website currently separates [free trade agreements](#) into three categories: (1) comprehensive free trade agreements, (2) trade and investment framework agreements, and (3) bilateral investment treaties. The World Trade Organization calls free trade agreements [regional trade agreements](#) and defines them as "any reciprocal trade agreement between two or more partners, not necessarily belonging to the same region."

The IRA did not provide a specific definition for free trade agreements.^[1] When referencing the critical minerals requirements for the clean vehicle tax credits, it states that the critical minerals for electric batteries need to be "extracted or processed...in any country with which the United States has a free trade agreement in effect." Treasury's [rule proposes](#) establishing criteria for determining whether an agreement with the United States is a free trade agreement by requiring that any agreement:

(A) reduces or eliminates trade barriers on a preferential basis, (B) commits the parties to refrain from imposing new trade barriers, (C) establishes high-standard disciplines in key areas affecting trade (such as core labor and environmental protections), and/or (D) reduces or eliminates restrictions on exports or commits the parties to refrain from imposing such restrictions on exports.

By not defining the term free trade agreement, Congress left the door open for the executive branch to do so. Congress should be troubled, however, that Treasury is defining the term in a way that seems inconsistent with congressional understanding and intent.

Executive Authority to Negotiate Agreements with Foreign Countries

The U.S. Constitution separates powers to interact with foreign countries between the legislative and executive branches. Article I, Section 8 gives Congress the power to "lay and collect taxes, duties, imposts and excises...[and] to regulate commerce with foreign nations."^[2] Moreover, tariff rates are set in statute, meaning it generally takes an act of Congress to change them. Therefore, Congress must pass a new law to implement a free trade agreement that lowers or eliminates tariff barriers. TPA facilitates that process, but it also contains a provision allowing the president to unilaterally lower or eliminate tariffs within certain margins, called Section 103.^[3] For example, the Trump Administration cited Section 103 of TPA in 2019 when entering into the U.S.-Japan Trade Agreement, which eliminated bilateral tariff and non-tariff barriers between the countries.^[4] While the Trump Administration followed notification requirements under TPA for this agreement, it was never formally submitted to Congress for approval. Section 103 is an example of Congress delegating trade authority

to the executive.

At the same, the executive branch is granted under Article II, Section 2 of the Constitution the “power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur.” [5] This implies that to negotiate a treaty or executive agreement, the president must have consent from at least the Senate. Historically, however, the executive has negotiated many agreements and treaties without seeking congressional consent. At times that is due to the executive possessing some form of delegated authority to do so (e.g. Section 103 of TPA). The executive has also entered into treaties (e.g., the [Paris Agreement](#)) and not submitted them to the Senate for approval, leaving future administrations free to easily withdraw from them.

While TPA expired in July 2021, according to USTR, the [new critical minerals agreement](#) between the United States and Japan “builds on the 2019 U.S.-Japan Trade Agreement.” The Biden Administration ostensibly views this new agreement as an extension of the agreement that was negotiated by the Trump Administration utilizing Section 103 of TPA. In the past, the executive has modified trade agreements implemented under TPA without congressional involvement (e.g., modifications made to the [U.S.-Korea Free Trade Agreement](#) in 2018), but the U.S.-Japan Trade Agreement was not implemented by Congress. It is unlikely that USTR actually negotiated the critical minerals agreement with Japan under Section 103 of TPA, despite its reference to the former agreement with Japan. Instead, this new critical minerals agreement is an executive agreement that would most likely not qualify for consideration under TPA if it were still in effect.

Avenues for Congressional Oversight

When Congress passed the IRA in 2022, which included new rules for consumers to receive a tax credit when purchasing an electric vehicle, there were competing intentions for the law.[6] Some sought to use the clean vehicle tax credit to aid Americans when purchasing an electric vehicle to increase the percentage of electric vehicles on the road and further their goals to reduce carbon emissions and combat climate change. Others saw the tax credits as an opportunity to attach regional and local content requirements to onshore the production of electric vehicles, lithium batteries, and critical minerals to further an agenda geared towards economic and national security. These objectives were at odds with one another and tasked Treasury with implementing a tax credit that had such strict content rules that few, if any, vehicles could qualify. Moreover, the law as written put the United States in [violation of its trade commitments](#) under the World Trade Organization and various free trade agreements.

Congress is correct to question the administration’s implementation of the clean vehicle tax credits and Treasury’s new proposed rule. Yet it cannot go unsaid that the leeway the administration is exercising is largely possible because of Congress’ lack of specificity in the IRA, as well as competing priorities in the law that undermine each other. As the clean vehicle tax credits are implemented and this proposed rule is evaluated, there are several ways in which Congress can engage to influence the process. First, Congress should engage in the rulemaking process. This means submitting comments once the proposed rule is published in the Federal Register on April 17. Relevant committees could also consider holding hearings on the congressional intent behind the law.

Congress also possesses a very important tool called the Congressional Review Act (CRA), which can be used to undo regulations propagated by the executive branch. Congress can either wait for a notice-and-comment rulemaking to be finalized, or it can [seek a ruling](#) by the Government Accountability Office to determine if IRS guidance documents can be considered as rules under the CRA.[7] After a rule is finalized, which for the new IRS rule would likely be in a few months, Congress has 60 legislative days pass a [joint disapproval resolution](#). While a resolution like this must also be signed by the president to go into effect (and it is unlikely that the

president would sign a resolution blocking the IRS rule), using the CRA would be a concrete way for members of Congress to ensure their voices are heard.

[1] <https://www.americanactionforum.org/comments-for-record/comments-on-credits-for-clean-vehicles-in-the-inflation-reduction-act/>

[2] <https://www.law.cornell.edu/constitution/articlei>

[3] <https://uscode.house.gov/view.xhtml?path=/prelim@title19/chapter27&edition=prelim>

[4] <https://www.presidency.ucsb.edu/documents/proclamation-9974-take-certain-actions-under-the-african-growth-and-opportunity-act-and>; and <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2019/september/fact-sheet-us-japan-trade-agreement>

[5] <https://www.law.cornell.edu/constitution/articleii>

[6] <https://www.americanactionforum.org/insight/proposed-tax-credits-would-make-electric-vehicles-more-expensive/>

[7] The guidance in question that may be considered could include: <https://www.irs.gov/newsroom/irs-asks-for-comments-on-upcoming-energy-guidance>; and <https://www.irs.gov/newsroom/irs-issues-guidance-and-updates-frequently-asked-questions-related-to-new-previously-owned-and-qualified-commercial-clean-vehicle-credits>