Before the United States Trade Representative

Docket Number USTR-2022-05044

"Proposed Fair and Resilient Trade Pillar of an Indo-Pacific Economic Framework"

Written Comments from Rethink Trade

April 11, 2022

Rethink Trade thanks the United States Trade Representative (USTR) for the opportunity to submit comments with regard to Biden administration plans to develop an Indo-Pacific Economic Framework (IPEF) and specifically about the Fair and Resilient Trade pillar negotiations that USTR will lead.

Rethink Trade is a program of the American Economic Liberties Project (AELP). AELP, a non-profit research and advocacy organization, is a thought leader in the anti-monopoly movement and promotes policy changes to address today's crisis of concentrated economic power. The Rethink Trade program of AELP was established to intensify analysis and advocacy regarding the myriad ways that today's trade agreements and policies must be altered to undo decades of corporate capture and to deliver on broad national interests. This includes resilient supply chains and fair markets, creation and support of good jobs with workers empowered to earn decent wages, the public health and safety delivered by strong consumer and environmental protections and the ability for those who will live with the results to decide the policies affecting their lives.

The Biden administration's worker-centered trade policy represents a long overdue reckoning with the chasm between the grand promises made in support of past trade policies and their actual outcomes, which have proved deeply damaging to workers and communities, many domestic businesses and independent farmers and our nation's economic resilience and security. Despite overwhelming evidence of such results, for decades during Republican and Democratic administrations alike the same trade agreement model and trade-policy perspective were pursued as various prominent commercial interests were able to dominate the process.

The Office of the USTR earns high praise for turning away from that rut in favor of a new approach that very sensibly starts with goals and then develops policies designed to deliver on those goals. Namely, the Biden administration has prioritized ensuring all Americans have economic security by creating a more inclusive and equitable economy with less corporate concentration and more opportunity and access to affordable healthcare and medicines. The administration is committed to combatting the looming climate crisis and strengthening the resilience of our economy and supply chains both to provide affordable access to goods for

consumers and to ensure our national security. The fundamental question with respect to prospective IPEF negotiations is how – and in some instances if – trade tools can be used to achieve those goals.

USTR's new approach presents a historic opportunity to redress decades of harm that past trade policies and pacts have inflicted on American workers and consumers. However, it remains to be seen if the IPEF context could provide an opportunity to translate this new approach into a new model that is premised on trade policy as an instrument to contribute to social welfare, equality and economic security, and promote our values at home and abroad, instead of being an end in itself. Factors that could limit whether IPEF can provide such a venue include uncertainties about what countries may be involved and whether they share key goals and values, as well as the Byzantine structure that seems to be developing for the talks.

What countries are involved in various aspects of the IPEF will have an enormous impact on a prospective pact's success. If the goal of the Fair and Resilient Trade pillar is to translate the administration's proposed new approach to trade into an agreement, then it is critical to include countries in this pillar that meet criteria consistent with the proposed policy goals. Yet, prominent countries about which administration officials have spoken as prospective IPEF partners have serious labor and human rights problems, including violence against unionists and expansive use of child labor, as documented year after year in the U.S. State Department's Country Reports on Human Rights Practices. Last year prospective IPEF member nation Malaysia was downgraded to Tier 3, the worst classification in the State Department's Trafficking in Persons Report, which documents forced labor, debt bondage and other forms of trafficking. And directly relevant to how country selection will shape outcomes, many of the countries that have been mentioned as prospective IPEF partners have systematically opposed inclusion of enforceable labor rights in trade agreements.

Indeed, the focus on the Indo-Pacific region and the mention of various countries seems to reflect what appears to be conflicting goals for IPEF. Namely, the Department of State and National Security Council seem focused on countering China geopolitically and thus want to unite the largest number of countries with a focus on those that are most able or willing to provide a bulwark against China. The Office of the USTR has a mission to implement the president's new trade policy, and to do so needs like-minded partners. The Commerce Department seems intent on promoting the interests of U.S. corporations in the Indo-Pacific region, and thus seems keen to have participation by nations most willing to confirm to U.S. corporate demands, such as the approach signaled by Singapore and Australia's recent Digital Economy Agreement. This pact has a full complement of Big-Tech-friendly rules that go beyond already worrying limits on digital governance and anti-monopoly policy that were included in the revised North American Free Trade Agreement (NAFTA), which itself was more restrictive of public interest protections than the Trans-Pacific Partnership (TPP) and its absurdly renamed, but not much changed, successor the Comprehensive Progressive Trans-Pacific Partnership (CPTPP).

Rethink Trade urges the administration writ large to select countries for participation in various pillars of the IPEF based on the stated goals of those pillars. Thus, for the Fair and Resilient Trade pillar, we urge the administration to seek countries that agree with the goals and values inherent to the administration's new worker-centered trade policy approach. And given the priority that will be given to "digital trade" negotiations in this pillar, we specifically urge the USTR to only seek participation of countries that support USTR Katherine Tai's expression of the administration's agenda in this area: "Our approach to digital trade policy must be grounded

in how it affects our people and our workers. We must remember that people and workers are wage earners, as well as consumers. They are more than page views, clicks, and subjects of surveillance. They are content creators, gig workers, innovators and inventors, and small business entrepreneurs. This means they have rights that must be protected – both by government policy and through arrangements with other governments."[1]

Further, we urge the Office of the USTR (and will urge the Department of Commerce in comments submitted to that agency) to seek public comments and consult with Congress on proposed IPEF partner countries.

With respect to the structure of the talks, the division of negotiations among pillars for which different agencies are responsible and in which different countries may participate in an à la carte fashion can be described, at best, as extremely complex. Issues clearly within the remit of USTR seem implicated by subject matter for which the Commerce Department has lead responsibility, such as Supply Chain Resilience. For instance, the administration's supply chain review process has identified strengthening domestic procurement preferences as an important tool to increase the resilience of U.S. supply chains. Various prospective IPEF participating countries have U.S. Free Trade Agreements that provide national treatment in procurement or obtain the same via the World Trade Organization's procurement agreement, such that U.S. domestic procurement preferences are effectively waived. Using the IPEF process to deliver on that recommendation by renegotiating those terms to restore U.S. preferences would seem like an obvious step. Perhaps USTR can do so as part of its "Fair and Resilient Trade" pillar. (And certainly the IPEF process should not include the extension of procurement national treatment to additional countries or lower thresholds or extend coverage for countries with existing procurement benefits.)

Whether or not the IPEF process is a venue to establish a new trade pact model *writ large*, clearly certain elements of the old model *must not* be replicated in IPEF talks while recent progress must be expanded upon.

The IPEF cannot continue the practice of diplomatically legislating wide swaths of non-trade policy via closed-door negotiations in favor of particular commercial interests. Thus, it must not include the terms found in previous trade agreements that have required governments to implement various protections and privileges for large transnational firms, including expansive investor protections and often private Investor-State Dispute settlement (ISDS) enforcement of those rights against governments and classic rent-seeking monopoly licenses in the form of lengthy patent, copyright and data exclusivity terms. Nor can it include constraints on government action on numerous "behind the borders," non-trade policy issues, including many that were and are extremely controversial and subject to intense domestic political debate. This includes limits on food and product safety to the regulation of the size of service sector firms and building zoning standards to energy and financial regulation to government procurement and, most lately, the regulation of digital platforms and data, consumer privacy and even the processes by which domestic regulatory policy is made such as were included in the "Good Regulatory Practices" revised NAFTA.

[1] U.S. Trade Representative Katherine Tai, Speech on Digital Trade for the Georgetown University Law Center, Nov. 2021. Available at: https://ustr.gov/about-us/policy-offices/press-office/speeches-and-remarks/2021/november/remarks-ambassador-katherine-tai-digital-trade-georgetown-university-law-center-virtual-conference.

IPEF talks must build on the standards developed over time with respect to actual terms of trade. Namely, under the new worker-centered trade model, the United States must promote strong and enforceable labor and environmental standards that establish a floor of conduct for companies producing goods and services that are to be "traded" under a pact. The, revised NAFTA, officially renamed the U.S. Mexico Canada Agreement (USMCA), made some important improvements with respect to labor standards and their enforcement. And as a result, it garnered broad congressional support. But the USMCA was viewed in the context of trying to lessen ongoing damage caused by an existing pact, and thus was subject to a lower standard than a tabula rasa project like the IPEF. Further, the unions and Democratic supporters of the USMCA made clear at the time that the pact was not THE new trade model, but rather a floor from which more progress must be built in order to achieve a truly good trade agreement. IPEF could contribute to the development of such a new trade model that deliver broader benefits if it becomes a venue to extend improved labor standards and their effective facility-specific enforcement to the service sector as well as to trade in goods.

In sum, Rethink Trade supports the administration's new approach to trade policy and the underlying goals it seeks to further. Our more detailed comments will focus on the areas of the Fair and Resilient Trade pillar that hold the most promise to advance the aforementioned goals. This submission includes:

- General objectives that should guide negotiations, including some procedural principles the administration should follow to ensure the transparent and inclusive policymaking that can result in fair and broadly beneficial outcomes and the importance of effective, strong labor and environmental standards and enforcement as a foundation to all elements of the IPEF initiative, not only the trade pillar.
- A review of problems associated with the explosion of online commerce conducted across borders that IPEF should address and elements of Big Tech's "digital trade" agenda that IPEF must not replicate.
- The interlinkages between trade and competition policy and how to approach IPEF so as to not undermine the Biden administration's antitrust reform agenda.

1. Any agreement resulting from IPEF must embody the administration's new worker-centered trade policymaking approach.

The policy areas included by USTR under the Fair and Resilient Trade pillar of IPEF reflect our long-held view that the scope of "trade" deals have expanded far beyond strictly trade policy matters, such as tariffs. As a matter of fact, USTR clearly states in its notice that the administration is not seeking to address tariff barriers at this time.

Traditionally, trade agreements focused on how goods shipped across borders would be treated, including what tariff rates would apply, what rules would determine the origin of a good and whether there would be quotas on how much could be imported. Some deals also included rules on the use of trade remedies, such as subsidies rules and antidumping duties. However, with the exception of a few pacts among geographically proximate nations with similar levels of economic development, until the early 1990s trade agreements did not cover policy areas such as regulation of the service sector, intellectual property rights or competition policy, nor labor or the environment. The establishment of the World Trade Organization and the North American Free

Trade Agreement radically expanded the scope of "trade" agreement rules, newly imposing constraints and obligations on countries regarding an expansive array of domestic regulatory policies. These pacts and numerous subsequent free trade agreements with expansive scope of coverage have given primacy to commercial interests and goals over public interest objectives.

This model of agreement, branded as "free trade" and sold as maximizing efficiency and lifting all boats, has implemented a version of corporate-led hyperglobalization worldwide over the past three decades. This model has led to wide disarray, furthered offshoring of good-paying – often unionized – manufacturing jobs to jurisdictions with lower labor and environmental standards, affected food and product safety, promoted deregulation in financial services and public utilities and constrained procurement policy by undermining domestic content preferences. The 1994 NAFTA was an essential element of the hyperglobalization scaffolding that led to more than one million U.S. jobs being certified as lost to NAFTA countries under the Trade Adjustment Assistance (TAA) program that undercounts job loss.[2]

Increasingly the American public has become aware and angered by these outcomes. Some experience the problem as workers in communities across the country facing the absence of 70,000 manufacturing facilities that once supported middle-class lives for the large portion of working Americans who do not have college degrees as well as the tax base for communities' schools, public safety services, hospitals and more. Some experience the problem as consumers facing shortages of key goods and/or price spikes, including the shock of the United States being unable to make or get critical goods needed to keep their families safe and well during the peak of the COVID-19 crisis. Others focus on the hollowing out of U.S. production capacity and the weakening of U.S. economic resilience as a national security threat.

All of these perspectives are based on specific outcomes that are undeniably linked to policies and practices that have left the United States largely dependent on other countries in general and overly reliant on China in particular for access to the most essential goods. Decades of hyperglobalization as implemented by a particular model of trade agreements and trade policies have undermined our independence and resilience, as all Americans were forced to recognize during the peak of the COVID-19 crisis. With our economy organized to serve a production model focused almost exclusively on "efficiency" and reliant on long, brittle global supply chains and production of many goods in too few countries – often by too few firms after decades of global consolidation – today even the world's wealthiest countries find themselves vulnerable to untenable risks.

A core feature of this model is a "race-to-the-bottom" through which countries were positioned to compete to attract increasingly mobile investment capital by keeping taxes low, backsliding environmental safeguards and undermining workers' wage gains and/or their efforts to fight for better wages. In response, worldwide legislators, academics, unionists, small business leaders, independent farmers and civil society representatives have demanded the inclusion of standards related to production of traded goods and services that reverse these trends and guarantee "a floor of decency" undergirding commercial relationships that reflect the commitment sovereign nations have made domestically and through the International Labor Organization Conventions,

[2] See Public Citizen and the Labor Council for Latin American Advancement's "*Fracaso*: NAFTA's Disproportionate Damage To U.S. Latino and Mexican Working People" (Dec. 2018). Available at: https://www.citizen.org/article/fracaso-naftas-disproportionate-damage-to-u-s-latino-and-mexican-working-people/ at page 1.

multilateral environmental agreements, including the Paris Agreement, and other treaty instruments.

The IPEF must be constructed on such a floor of required conduct that incorporates and reinforces the obligations for workers and the environment to which countries have committed. These obligations and those related to countries' human rights, health and other public interest protection treaty obligations must be included and enforced throughout the IPEF initiative, not only in the context of the trade pillar. And, nothing in the agreement must limit countries' abilities to enact and enforce strong labor, environmental, health or other public interest standards.

Ensuring this is the case will require special diligence in the context of negotiating rules covering the digital sector. The "digital trade" agenda promoted by Big Tech firms seeks to effectuated a form of labor "misclassification" via trade agreement that is premised on the Original Sin of the digital economy. Namely, that somehow having a transportation, hotel, retail or other service provided by online means transforms a firm into a communications platform or computing service that is not required to meet the standards of its actual industry nor treat its employees as employees with respect to unionization, contributions to social insurance programs, hours of service and the like. Labor and other laws of general application that are enforced through the prospective loss of operating authority could be characterized as illegal limits on market access or censorship while facially neutral policies that have a disparate impact on a specific firm because it is the dominant player in a sector could be deemed to be discriminatory.

The administration has announced that IPEF's objective is not further "market access" – for instance by cutting already low tariffs or providing service sector access beyond U.S. General Agreement on Trade in Services (GATS) schedules. The president committed to not including ISDS in his future agreements.[3] Moreover imposing foreign investor protections that incentivize offshoring of jobs is contrary to the stated IPEF objectives. Thus, depending on what countries are involved, the IPEF venue could become an opportunity to further a new approach to international cooperation on economic matters. Namely, these negotiations create an opportunity to develop strong facility-specific enforcement mechanisms that reflect the broader reality that there are relatively few tariffs remaining and some aspects of the IPEF project will have no connection to trade or market access of any kind.

Adding labor standards and enforcement mechanisms that could redress or at least stop further damage being done was one of the highlights of NAFTA's renegotiation in 2019. That pact also was also largely without new market access incentives, as NAFTA had zeroed out most tariffs. The revised NAFTA aka USMCA in addition to bringing improved labor standards to the core of the text, has innovative facility-specific labor enforcement provisions called the Rapid Response Mechanism conceived to deal with violations of the right of free association and collective bargaining. We commend USTR's leadership in boldly using these provisions to fight for

[3] In 2020, then-candidate Biden was clear about his position on Investor-State Dispute Settlement (ISDS): "I don't believe that corporations should get special tribunals that are not available to other organizations. I oppose the ability of private corporations to attack labor, health, and environmental policies through the Investor-State Dispute Settlement (ISDS) process and I oppose the inclusion of such provisions in future trade agreements." Available at: https://www.law360.com/internationalarbitration/articles/1295978/biden-comes-out-against-special-tribunals-for-corporations

workers' rights in Mexico, which already has generated material gains in the facilities that were the focus of the first two actions.[4]

With regard to the environment, rising to the challenge presented by the looming climate crisis requires a serious realignment of existing international trade rules and agreements. Firstly, IPEF is an appropriate venue to negotiate a climate "peace clause" to ensure that governments' efforts to invest in a sustainable global economy and to reduce climate pollution are free from challenges based on trade agreements.[5] This peace clause should cover any commitment made via IPEF and the WTO Agreements and existing FTAs among participants.

IPEF also presents an opportunity to terminate the bilateral investment treaties (BITs) and amend regional FTAs' investment chapters, removing ISDS provisions from them. This would contribute to liberating the policy space required to adopt bold green transition measures without the threat of facing multimillion-dollar lawsuits.

Like with labor standards, meeting environmental standards must be a prerequisite to countries enjoying the benefits of an IPEF pact, and environmental provisions must also include strong, built-in mechanisms to guarantee their swift and certain enforcement moving forward. Enforcement mechanisms must enable members of the public to initiate claims of environmental violations, and these claims must trigger an independent investigation and, where appropriate, adjudication with binding remedies, regardless of whoever occupies the White House at any given moment.

Given previous "trade" pacts wasted the opportunity to meaningfully condition tariff cuts and market access on meeting labor or environmental standards, enforcement in the future in general and in IPEF in specific inevitably will require imposition of duties, fines and other penalties for non-compliance, including withdrawal of existing market access, which is how USMCA's labor standards are ultimately enforced.

In exchange for accepting these obligations and penalties for failing to comply with them, IPEF countries could enjoy guarantees against Section 301, Section 232 and other U.S. trade enforcement mechanisms and penalties with respect to covered issues if they meet IPEF terms. As well, the IPEF could offer uniform rules of origin (ROO) that facilitate trade with fewer compliance costs for existing U.S. FTA partners.

While making ROOs uniform, IPEF talks also must focus on strong rules of origin to ensure that countries that meet the standards are the beneficiaries of a pact, not non-parties. In that regard, IPEF talks should build from the strengthened USMCA ROO standards.

As well, to ensure fair trade, IPEF must include strong, enforceable disciplines against currency manipulation and currency misalignment. This must include mechanisms for the automatic triggering of corrective action against currency manipulators, rather than just reports or dialogue.

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[4] Statements from Office of the USTR on votes by workers in Silao, Mexico and Matamoros, Mexico available at https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/february/statement-ambassador-katherine-tai-february-1-2-vote-workers-silao-mexico and https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/march/statements-ambassador-katherine-tai-and-secretary-marty-walsh-vote-tridonex-workers-matamoros-mexico

[5] See the Sierra Club's "A New, Climate-Friendly Approach to Trade," Available at: https://content.sierraclub.org/creative-archive/sites/content.sierraclub.org.creative-archive/files/pdfs/1433%20New%20Trade%20Report%2005_low.pdf?_ga=2.145857587.66931597.1649715705-57273439.1649715705, page 6.

Setting such terms of trade will ensure that competition between member countries reflects innovations and other advantages, not trade cheating or the past race-to-the-bottom approach that hurts workers and the environment.

President Biden's worker-centered trade policy reflects the broadly supported demand to replace the existing trade policies that have made us less resilient, have undermined many workers, farmers and small business owners' economic security and exacerbated health and environmental threats in favor of creating a new model of trade agreements, laws and regulations that can deliver broader benefits in line with domestic policy goals.

However, in order to achieve this, the Biden administration must commit to a transparent and participatory process, the complete opposite of the opaque and corporate-dominated processes that produced trade agreements under previous administrations. To date, more than 400 official U.S. trade advisers representing corporate interests have held a privileged role in developing our past trade deals while the public and Congress were locked out. This has not only resulted in the same special-interest pacts being negotiated over decades, but as the damaging results of past pacts became evident it resulted in deals like the Trans-Pacific Partnership being unable to gain a majority in Congress and thus never being enacted. We urge the Office of the USTR to create a new process for these negotiations that includes regular public consultation mechanisms on specific policy approaches, texts and prospective IPEF member countries; publication of U.S. opening offers and related documents in line with European Union practices before the start of the Trans-Atlantic Trade and Investment Partnership negotiations; and making negotiated texts publicly available, with opportunity for comment, after each negotiating round.

Specifically, civil society organizations, Congress and the public must be invited to help formulate U.S. positions and comment on draft U.S. proposals not just via this public comment period, but throughout the entire course of the negotiations. Specifically, the U.S. must publish draft versions of its IPEF proposals and solicit public comment upon them prior to tabling them. IPEF negotiating rounds should be announced in advance and include public stakeholder engagement and interactions with negotiators from each nation. Lastly, U.S. proposals, other countries' proposals, related materials and any consolidated texts must also be quickly published after each negotiating round so that the public can review and comment on the latest proposals while there is still opportunity to make real changes.

These procedural measures are necessary not only to ensure IPEF outcomes that align with the Biden administration's goals on worker rights, climate change, racial justice, durable, broad-based economic growth, consumer protection and other areas, but to rebuild public faith in trade policymaking generally after years of backroom deal making. International trade is an important part of our economy, connects us with the rest of the world and if conducted under the right terms can deliver broad benefits to people here and in other countries. It's worth devoting the time and care needed to ensure that any IPEF rules governing international trade work for everyone, and not just commercial special interests.

2. Problems associated with the explosion of online commerce conducted across borders that IPEF should address and elements of Big Tech's "digital trade" agenda that IPEF must not replicate.

The fourth industrial revolution has the potential to unleash unparalleled economic growth and opportunities for humanity. Seizing the advantages of the digital economy can increase efficiency, reduce information asymmetries, promote global cooperation and narrow the differences between the haves and the have-nots, both in the United States and abroad. Yet, in the absence of U.S. digital governance policies and with lax anti-monopoly enforcement, the most rapacious collectors and exploiters of peoples' personal data that have crushed or bought out competitors and used enormous computing power, shady algorithms and toxic business models have become the few overwhelmingly dominant online platforms. These mega-platforms kill competition and their prospective competitors, manipulate and surveil users and undermine democratic institutions.

Policymakers around the world acknowledge that determining how to deal with this paradox is one of the existential policy questions of our times and are developing laws, rules and regulations to try to reign in digital giants. In response, one way Big Tech interests are trying to preserve their market power and influence is attempting to use trade negotiating venues to lock in binding international rules that limit governments from regulating digital firms' behavior in the public interest and from fighting corporate concentration and monopoly power. The mega-platforms seek to quickly establish international agreements that quietly undermine regulatory efforts here and abroad. To obscure this, they have misbranded their attack against the very notion of digital governance as "e-commerce" or "digital trade" policy initiatives. In a race against time, Big Tech's aim with their "digital trade" agenda is to excavate the policy space out from under Congress and various U.S. agencies before they can act. At the same time, Big Tech aspires to roll back digital governance initiatives taken by the governments of countries worldwide by imposing binding constraints in "digital trade" pacts against a wide array of digital governance tools or getting such policies labeled as "illegal trade barriers" subject to review, listing and sanction through strategies like extending Special 301 procedures to cover digital regulation.

If this "digital trade" ploy succeeds, Big Tech interests could weaken existing policies worldwide and stop future U.S. policies that constrain digital entities' monopolistic abuses and anticompetitive market power, that protect privacy and individual rights over personal and non-personal data, that fight algorithm discrimination, that hold platforms liable for dangerous products and violent incitement, and that protect gig workers' labor rights.

Meanwhile, past "digital trade" agreements have failed to address the real trade problems that result from actual cross-border commerce that is generated online. This includes an abject failure of U.S. customs policies to reflect the reality of hundreds of millions of packages annually of imported goods that consumers have ordered online that skirt normal U.S. Customs procedures including inspection, documentation, taxation or prohibition for forbidden goods and enter the United States. These problems are not unique to the United States. Indeed, many countries' customs systems, like those of the United States, remain geared toward containerized ocean shipping or containerized rail or truck shipping. But the volume of packages of foreign-produced goods purchased online and express delivered directly to U.S. consumers has exploded. Tens of billions of dollars of goods are crossing borders without inspection, much less the prohibition of dangerous or banned goods, or taxation or the collection of tariffs, or even being accounted for in national accounts data.

Instead of focusing on the updating of customs procedures to suit the new realities of large-scale international flows of goods valued in the billions broken into small shipments, past "digital trade" agreements have imposed limits on governments' regulation of digital platforms that undermine policies to protect gig economy workers, civil rights, consumer safety and privacy and to counter platforms' anti-competitive practices.

USTR's objectives for IPEF negotiations related to the digital sphere must be the opposite of past "digital trade" talks. First, new customs procedures must be established to ensure that the large volume of smaller-value-per-each-package trade is documented with data collected on goods' formal classification and HTS code, value, origin and manufacturer and requirements for online filing of such data so that goods can be prioritized for inspection based on risk assessment. As well, a new regime must be established to ensure banned goods, such as those made with Uighur forced labor or endangered species products, are excluded and tariffs and taxes collected. Second, any rules resulting from IPEF negotiations must preserve domestic policy space to adopt measures to guarantee that the digital economy works for everyone and not just a few dominant online platforms. That means that the administration must reverse the past Big Tech "digital trade" agenda and, instead, ensure that signatory countries preserve full policy space for digital standards that protect workers, consumers, small businesses and civil rights. To the extent that IPEF is to impose any standards in these areas, they must be a floor of workers and consumer protections and fair market rules without imposing ceilings on countries' ability to enact and enforce stronger measures.

Finally, given the constantly-changing nature of the digital sector and the fact that the U.S. Congress and agencies are now fast at work trying to catch up to the rest of the world in establishing digital governance and anti-monopoly enforcement policies, locking in policies in an international agreement is entirely inappropriate. Whatever one thinks should be the proper policies in this sphere, certainly all can agree that cementing into place policies in a pact that cannot be changed but for consent by all signatories is a terrible idea at a time when domestic policymakers are yet to determine our domestic policies on these matters.

a. Negotiate digital standards that safeguard consumers and are respectful of the policy space needed to protect them

- **IPEF negotiations should tackle the myriad current problems related to small direct-to-consumer shipments of goods across borders enabled by digital platforms.**

Neither existing "digital trade" rules nor currently ongoing international negotiations target the real problems with trade in goods purchased online. This includes major consumer safety and inspection problems, tax and tariff evasion, transshipment and other forms of trade cheating. Moreover, corporate interests are putting pressure on the U.S. government for it to deepen the already large de minimis loophole,[6] which is one of the programs that allows this state of affairs. De minimis rules let goods valued in the billions to move freely from one nation to another without paying taxes and duties or going through customs inspections that otherwise would

[6] The U.S. Chamber of Commerce has announced in its "digital trade priorities" that it wants the de minimis thresholds to be raised. Available at: https://www.uschamber.com/assets/documents/Final-The-Digital-Trade-Revolution-February-2022_2022-02-09-202447_wovt.pdfat page 20.

guarantee their safety and compliance with other laws and regulations, such as those aimed at combating forced labor.

In the United States, every day more than two million packages are arriving mainly from China by air express alone to fulfill online order purchases. Thanks to the de minimis program, these goods entirely evade U.S. safety, environmental and other inspection protocols and thus standards enforcement as well as all taxes and tariffs. U.S. brick and mortar retailers must pay both tariffs and taxes and are liable for dangerous products they may sell. U.S. manufacturers must pay taxes and meet the domestic environmental, safety and other standards the de minimis goods skirt.

The evasion of normal U.S. customs procedures via de minimis also poses significant risks beyond biasing the terms of commerce in favor of Big Tech giants and Chinese imports: De minimis provides a means to evade the ban on entry of Uighur forced-labor products, endangered species products, and counterfeit and dangerous medicines and other goods. The Department of Homeland Security has documented how the number of de minimis shipments skyrocketed after the United States started allowing imports valued up to $800 to evade normal Customs rules.[7] (This occurred after the Trade Facilitation and Trade Enforcement Act of 2015 amended Section 321 of the Tariff Act of 1930 and raised from $200 to $800 the value of imports given de minimis treatment that thus can enter the United States "informally" without meeting normal customs rules.) The U.S. de minimis level is much higher than the rest of the world, with Europe under $200 and Canada at $20 Canadian dollars.[8] In recent years, the EU abolished the de minimis threshold with respect to payment of value-added taxes (VAT). And, it also requires that all shipments must lodge a customs declaration regardless of their value and whether they qualify for an exemption from paying customs duties.[9] Similarly, countries like Australia, New Zealand, Norway and the United Kingdom have changed their de minimis regimes and now require prescribed e-commerce platforms to charge VAT on their sales of low-value imported goods to final consumers and remit the revenue to the importing country.[10]

Considering the grave problems caused by the 2015 reform in the United States and current international policymaking trends, instead of pushing other nations to raise their de minimis thresholds, IPEF offers an opportunity for trade partner countries to set a series of minimum standards that increase the level of scrutiny that de minimis shipments face. The U.S. government must negotiate rules over new customs procedures to ensure that data is collected for de minimis shipments. Particularly, information on goods' formal classification and HTS code, value, origin, manufacturer, exporter and importer is essential. IPEF must require online filing of such data so as to facilitate the risk-assessment-based prioritization systems employed to pick

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[7] See the U.S. Department of Homeland Security's "Privacy Impact Assessment for the E-Commerce "Section 321" Data Pilot DHS/CBP/PIA-059" (Sept. 26, 2019). Available at: https://www.dhs.gov/sites/default/files/publications/privacy-pia-cbp-section321-059-september2019.pdf, page 2

[8] See https://global-express.org/assets/files/Customs%20Committee/de-minimis/GEA%20overview%20on%20de%20minimis_9%20March%202018.pdf

[9] See "New form of customs declaration for low value consignments," EC Directorate-General for Taxation and Customs Union. Available at: https://ec.europa.eu/taxation_customs/news/new-form-customs-declaration-low-value-consignments-2019-07-11_en

[10] John Brondolo and Mark Konza, Administering the Value-Added Tax on Imported Digital Services and Low-Value Imported Goods, International Monetary Fund, Mar. 2021. Available at: https://www.imf.org/en/Publications/TNM/Issues/2021/05/21/Administering-the-Value-Added-Tax-on-Imported-Digital-Services-and-Low-Value-Imported-Goods-50332

items for further inspection by all of the co-located agencies, such as the Consumer Product Safety Commission, various agencies responsible for catching endangered species and other environmentally prohibited goods, etc. Additionally, a new regime must be established to ensure banned goods, such as those made with Uighur forced labor or endangered species products, are excluded from de minimis altogether so that they cannot abuse de minimis regime to evade the bans. These requirements would be in line with the current trends in international policymaking and are compatible with the approach adopted by some of the potential IPEF candidates.

- **An IPEF agreement should not include standards that undermine citizens' rights, such as consumer privacy and data security by prohibiting limits on data flows or location of computing facilities.**

Peoples' every move on the internet and via cell phone is increasingly tracked, stored, bought and sold — as are interactions with the growing "internet of things." Many people may not even be aware of this nor have a feasible way to opt out. Trade pacts should not restrict governments from acting on the public's behalf in establishing rules regarding under what conditions individuals' personal data may be collected, where it can be processed or transmitted, and how or where it is stored. Yet corporate interests are pushing for the inclusion of provisions that guarantee "free flow" of data without constraint or the absence of rules on the location of computing facilities,[11] both of which would handcuff governments and prevent them from developing policies with respect to where and how data is processed, stored or transmitted to protect citizens.

If IPEF negotiations are to include rules on data flows, processing and storage, these rules must protect the public interest. One way to do so is if the default rule is in favor of free flows and freedom to process and store data in the locations of choice of the platform, then the U.S. government must ensure that broad and effective specific exceptions are included that safeguard governments' policy space. The United States and its IPEF partners should be unencumbered if they wish to adopt policies to safeguard data privacy and security that mandate that data can only be transferred to places where adequate standards of protection are in place. An IPEF "digital trade" deal should not obstruct potential data stewardship initiatives to incentivize competition in digital markets, enhance public utilities in smart cities, or protect indigenous communities (as the New Zealand government has been recently ordered to do), among other means to democratize the value of data arising from social interactions.[12] All of these might require limits on data flows or localization conditions, hence, the need for effective exceptions designed to guarantee the policy space required to enact such policies.

One instance is provided by the approach in the Regional Comprehensive Economic Partnership (RCEP), where parties negotiated specific *self-judging* exceptions to the "location of computing

[11] See the U.S. Chamber of Commerce's "The Digital Trade Revolution: How U.S. Workers and Companies Can Benefit from a Digital Trade Agreement." Available at https://www.uschamber.com/assets/documents/Final-The-Digital-Trade-Revolution-February-2022_2022-02-09-202447_wovt.pdf, page 18.

[12] Data stewardship is a novel concept that refers to institutional arrangements where data related to a group of people is pooled and a a set of rules established that determine who has access to the data, under what conditions and to whose benefit. See Open Data Institute's "Data trusts in 2020." Available at: https://theodi.org/article/data-trusts-in-2020/

facilities" and "cross-border transfer of information by electronic means" provisions.[13] This exception empowers the country invoking it to determine whether a policy that might require some degree of data localization in its territory or limitation to cross-border data flows is necessary to achieve a public policy objective.

b. Negotiate digital standards that promote fair and competitive markets, instead of undermining them

- **Any use of the trade "non-discrimination" concept must focus on discriminatory intent, not disparate effects that reflect a company's size so as to protect governments' right to regulate markets and level the playing field.**

The "digital trade" framework promoted by Big Tech is premised in part on importing trade terms and concepts, like "discrimination" and "market access" to serve the goal of limiting digital governance. It is a sly approach. Who is for "discrimination"? Yet, the terms of past agreements have included provisions against domestic measures that have a discriminatory *effect*. Any policy of general application will have a bigger effect on a dominant platform not because the policy is discriminatory, but because the platform is larger than its competitors. As well, the relevant trade discrimination standard is a construct based on equal treatment with respect to "like" products or services. Yet, leading players in transportation, hospitality, retail, education, healthcare and other industries that provide services online categorize themselves as communications platforms and their service not like their brick-and-mortar counterparts.

The mega-platforms tend to fight against governments that insist that domestic policies that generally apply to protect the rights of workers and consumers in the transportation, retail and other sectors apply to them as well. The fact that Big Tech has largely managed to escape regulation gives platform companies an unfair competitive advantage that contributed to their rise and dominance over world markets. Now, many countries, states and cities worldwide are starting to tear down this unfair state of affairs by requiring large ride-sharing companies to meet driver hours-of-service-rules or contribute to drivers' social security, or demanding that buildings of short stay guest units booked online must meet worker and consumer safety rules. IPEF rules must not give such firms new grounds to claim that application of such policies of general application violate "trade" rules.

As well, the lack of anti-monopoly enforcement here and lax enforcement worldwide has allowed a few rapacious collectors and exploiters of peoples' personal data to crush or buy out competitors and use algorithms designed to preference their own products and services and rules designed to squeeze out prospective competitors to develop globally dominant online platforms. In response, scores of countries, including the United States, are implementing or considering changes to their competition policies to redress the anticompetitive harm done and intervene in digital markets' structure to further competition. Online platforms are fighting back by claiming that these policies are illegal "discriminatory trade barriers."

[13] See RCEP Agreement, Articles 12.14.3(a) and 12.15.3(a): "3. Nothing in this Article shall prevent a Party from adopting or maintaining: (a) any measure inconsistent with paragraph 2 that it considers necessary to achieve a legitimate public policy objective[12] provided that the measure is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; (…) [12]For the purposes of this subparagraph, the Parties affirm that the necessity behind the implementation of such legitimate public policy shall be decided by the implementing Party."

The U.S. government must ensure that any "non-discrimination" standard discussed in IPEF's digital economy negotiations does not lead to forbidding domestic digital policies that *may* have a "discriminatory effect" due to the market dominance that certain firms might have over a market and which is precisely the reason behind the policies being questioned.

An example is the Korean law to end anti-competitive app store practices. It is similar to U.S. House and Senate proposals with bipartisan support. Notably, the Senate version, the Open App Markets Act, was approved by the Judiciary Committee on February 3, 2021.[14] Senior Republican members of Congress have app store legislation as a top legislative priority,[15] showing that the enactment of U.S. legislation similar to the Korean law is a real possibility and not just a Democratic Party goal. In spite of this, Apple and Google pushed U.S. trade officials to attack the Korean legislation as "discriminatory" while it was being considered by South Korea's parliament, because it would affect them more than other businesses based on their monopoly practices.[16] The South Korean parliament passed the bill on August 30, 2021.[17] Regulations implementing the new law were published in March 2022.[18] And, although initially both Apple and Google announced that they would abide by the law, recently, South Korean regulators determined that Google is not complying with the new policy since it is still charging commissions to app developers even when users opt for third-party payment systems.[19] This latest development indicates that Big Tech interest in generating controversy over the new law is not over. While the existing language of the "Electronic Commerce" chapter of the Korea-U.S. Free Trade Agreement (KORUS) does not provide a solid foundation for attacks against the app store law, the terms that Big Tech has managed to get inserted in other recent deals with "digital trade" chapters, such as the USMCA, are considerably more intrusive and could help dominant digital firms in their crusade against policies that aim to leveling the playing field. Hence the importance of not replicating them in an IPEF deal.

Similarly, Big Tech-backed groups have furiously attacked a recently enacted Australian law that enables media outlets to negotiate collectively with digital platforms given the evident power imbalances between news media businesses and the few online platforms that draw most of the

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[14] Lauren Feiner, "*Senate Committee advances bill targeting Google and Apple's app store profitability,*" CNBC, Feb. 3, 2022. Available at: https://www.cnbc.com/2022/02/03/senate-committee-advances-open-app-markets-act.html

[15] John Hendel, "*Tech antitrust optimism to kick off April,*" POLITICO, Apr. 1, 2022. Available at: https://www.politico.com/newsletters/morning-tech/2022/04/01/tech-antitrust-optimism-to-kick-off-april-00022252. David O. Williams, "*Ken Buck Battles Big Tech With Bill to Unlock App Stores' Rules,*" Colorado Times Reporter, Sept. 24, 2021. Available at: https://coloradotimesrecorder.com/2021/09/ken-buck-battles-big-tech-with-bill-to-unlock-app-store-rules/39899/

[16] David McCabe and Jin Yu Young, "*Apple and Google's Fight in Seoul Tests Biden in Washington*," The New York Times, Aug. 23, 2021. Available at: https://www.nytimes.com/2021/08/23/technology/apple-google-south-korea-app-store.html?searchResultPosition=10

[17] Chae Yun-hwan, "*S. Korea passes bill to curb sway of Google, Apple in app store fees*," Yonhap News Agency, Aug. 31, 2021. Available at: https://en.yna.co.kr/view/AEN20210830007800320

[18] Joyce Lee, "*South Korea approves rules on app store law targeting Apple, Google*," Reuters, Mar. 8, 2022. Available at: https://www.reuters.com/technology/skorea-approves-rules-app-store-law-targeting-apple-google-2022-03-08/

[19] Simon Sharwood, "*Google snubs South Korea's app store law*," The Register, Apr. 6, 2022. Available at: https://www.theregister.com/2022/04/06/google_south_korea_app_payments_illegal/. Mariella Moon, "*Korean authorities tell Google it can't remove apps that link to external payment*," Yahoo!Finance, Apr. 6, 2022. Available at: https://finance.yahoo.com/news/korea-kcc-app-store-law-google-external-payments-114054384.html

online traffic searching for news.[20] The law, which resembles the U.S. Journalism Competition and Preservation Act (JCPA) bill, has faced a sustained assault by digital platforms' lobbyists and other industry groups despite not being applied yet.[21] The JCPA was introduced last year by bipartisan coalitions in both chambers and now a draft amendment, which draws more elements from the Australian model, is being socialized before being formally introduced in Congress.[22] Tellingly, even though the Australia-United States Free Trade Agreement (AUSFTA) includes a non-discrimination provision in the "electronic commerce" chapter, industry groups are relying on AUSFTA's services and investment chapters to argue that the novel News Media and Digital Platforms Mandatory Bargaining Code is inconsistent with Australia's trade obligations.[23]

The following table presents a side-by-side of the relevant provisions from AUSFTA, KORUS and USMCA's "e-commerce" or "digital trade" chapters:

AUSFTA	KORUS	USMCA
Article 16.4: Non-Discriminatory Treatment of Digital Products	Article 15.3: Digital Products	Article 19.4: Non-Discriminatory Treatment of Digital Products

[20] See Australia Communications and Media Authority's "News media bargaining code." Available at: https://www.acma.gov.au/news-media-bargaining-code#:~:text=The%20News%20Media%20and%20Digital,platforms%20and%20Australian%20news%20businesses

[21] Disruptive Competition Project's "The Dangers of Australia's Discriminatory Media Code" (Feb. 19, 2021). Available at: https://www.project-disco.org/21st-century-trade/021921-the-dangers-of-australias-discriminatory-media-code/

[22] Alexandra Bruell and Keach Hagey, "*Bill Would Let Small Publishers Use Baseball-Style Arbitration to Settle Disputes With Google and Facebook*," The Wall Street Journal, Apr. 5, 2022. Available at: https://www.wsj.com/articles/bill-would-let-small-publishers-use-baseball-style-arbitration-to-settle-disputes-with-google-and-facebook-11649190805?st=fwyrf2nyq0lehl2&reflink=desktopwebshare_twitter

[2323] Disruptive Competition Project's "The Dangers of Australia's Discriminatory Media Code" (Feb. 19, 2021). Available at: https://www.project-disco.org/21st-century-trade/021921-the-dangers-of-australias-discriminatory-media-code/

1. Neither Party may accord less favourable treatment to some digital products than it accords to other like digital products: (a) on the basis that the digital products receiving less favourable treatment are created, produced, published, stored, transmitted, contracted for, commissioned, or first made available on commercial terms outside its territory; (b) on the basis that the author, performer, producer, developer, or distributor of such digital products is a person of the other Party or a non-Party; or (c) so as to otherwise afford protection to other like digital products that are created, produced, published, stored, transmitted, contracted for, commissioned, or first made available on commercial terms in its territory.	(…) 2. Neither Party may accord less favorable treatment to some digital products than it accords to other like digital products (a) on the basis that: (i) the digital products receiving less favorable treatment are created, produced, published, stored, transmitted, contracted for, commissioned, or first made available on commercial terms in the territory of the other Party, or (ii) the author, performer, producer, developer, distributor, or owner of such digital products is a person of the other Party; or (b) so as otherwise to afford protection to other like digital products that are created, produced, published, stored, transmitted, contracted for, commissioned, or first made available on commercial terms in its territory.	1. No Party shall accord less favorable treatment to a digital product created, produced, published, contracted for, commissioned, or first made available on commercial terms in the territory of another Party, or to a digital product of which the author, performer, producer, developer, or owner is a person of another Party, than it accords to other like digital products. (…)

2. Neither Party may accord less favourable treatment to digital products: (a) created, produced, published, stored, transmitted, contracted for, commissioned, or first made available on commercial terms in the territory of the other Party than it accords to like digital products created, produced, published, stored, transmitted, contracted for, commissioned, or first made available on commercial terms in the territory of a non-Party, or (b) whose author, performer, producer, developer, or distributor is a person of the other Party than it accords to like digital products whose author, performer, producer, developer, or distributor is a person of a non-Party. (…)	3. Neither Party may accord less favorable treatment to digital products: (a) created, produced, published, contracted for, commissioned, or first made available on commercial terms in the territory of the other Party than it accords to like digital products created, produced, published, contracted for, commissioned, or first made available on commercial terms in the territory of a non-Party; or (b) whose author, performer, producer, developer, distributor, or owner is a person of the other Party than it accords to like digital products whose author, performer, producer, developer, distributor, or owner is a person of a non-Party.	

Leaving aside the potential differences in coverage arising from disparate definitions of "digital products," it seems clear that U.S. negotiators for AUSFTA and KORUS carefully drafted the non-discrimination provisions in the electronic commerce chapters of these deals to exclude de facto national treatment discrimination claims, unless the complaining party could prove that the alleged less favorable treatment had protectionist intent – hence, the "as to otherwise afford protection" clause. Conversely, USMCA's overly broad provision could be the basis for attacks against policies that might incidentally have a disparate effect on foreign digital products due to their market dominance, in spite of lack of protectionist intent.

Any IPEF "digital trade" module must not include the broad "non-discrimination" obligations of USMCA, must focus on discriminatory intent and must ensure that these disciplines do not obstruct governments' policies to regulate markets and level the playing field.

c. Negotiate digital standards respectful of civil rights

- **An IPEF agreement should not grant new special secrecy rights to Big Tech that could undermine investigation of discriminatory source code and algorithms, intrusive surveillance practices and violent incitement online**.

Everyday decisions made by artificial intelligence (AI) components of online platforms affect which individuals and communities access public and private services ranging from home loans to job postings to medical treatments — enabling a sort of high-tech redlining. Governments are likewise increasingly turning to private corporations for aid with "predictive policing" and other surveillance, law enforcement and security functions. These deeply concerning trends have led to oversight efforts from Congressional committees, scholars and public investigators that have tried to review applications' source code and related data to identify racist, sexist and other practices deserving of scrutiny, criticism and correction. Perhaps more importantly, a growing movement calls for AI governance in order to give governments the tools to be able to not only sanction the above-mentioned discriminatory practices, but also prevent them. Experts recommend, for instance, enacting regulation enabling effective external audits of AI systems, particularly those labeled as high-risk, to monitor compliance with civil and consumers rights.[24] This will require government agencies responsible for enforcing such policies to have access to algorithms and code. And IPEF must not establish new obstacles for those seeking to enforce their civil rights in court by making it more difficult for plaintiffs to gain access to information needed to prove companies' discriminatory practices with respect to discriminatory treatment that they have experienced online.

However, some existing "digital trade" provisions forbid governments from enacting laws or regulations that would require access to, or transfer of, the source code of software, with very limited exceptions. Corporate interests have made it clear that they would like to see these barriers to governmental regulatory powers included in an agreement with the Indo-Pacific economies.[25] In addition to the fact that source code provisions are at odds with AI governance principles, there is no rationale that justifies granting these special interest private rights. Digital firms that wish to protect their proprietary source code and algorithms can rely on existing intellectual property and trade secrets legislation. If a company develops a pathbreaking algorithm, it could request patent protection to be afforded the right of exclusive use with certain exceptions. If the same company does not want to file for a patent, as long as the algorithm complies with the requirements enshrined in existing regulation, it can rely on trade secrets rules to ensure its code is not improperly accessed or shared.[26]

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[24] Irion, Kristina (2021). AI regulation in the European Union and Trade Law: How Can Accountability of AI and a High Level of Consumer Protection Prevail over a Trade Discipline on Source Code? (Jan. 26, 2021). Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3786567

[25] The U.S. Chamber of Commerce has announced in its "digital trade priorities" that it wants rules that would guarantee that "companies should not be forced to transfer their technology—including source code and proprietary algorithms—to competitors or governments." This is code for the type of source code provisions that would prevent governments from demanding access to source on behalf of the public interest. Available at: https://www.uschamber.com/assets/documents/Final-The-Digital-Trade-Revolution-February-2022_2022-02-09-202447_wovt.pdf at page 19.

[26] See International Trade Union Confederation's "e-Commerce Free Trade Agreements, Digital Chapters and the impact on Labour." (2019). Available at: https://www.ituc-csi.org/IMG/pdf/digital_chapters_and_the_impact_on_labour_en.pdf, page 4.

- **An IPEF agreement should not shield Big Tech firms from corporate accountability via overly broad content liability waivers.**

How to address the ways in which certain online business practices, algorithms and moderation stoke racial and ethnic violence and contribute to other antisocial behavior is a hotly debated topic. While solutions may not yet be widely agreed upon, what is absolutely true is that this rapidly evolving area of public policy must not be restrained via trade agreements. Further, policies such as Section 230 of the Communications Decency Act, which was created to protect free speech online, have been stretched to allow massive corporations to evade liability for dangerous and deadly goods sold online. Using trade pacts to require countries to enact policies that insulate online sale platforms from product liability is unacceptable. As the U.S. Congress grapples with whether Section 230 should be altered and how, U.S. trade negotiators must not export the policy by obliging other countries to provide liability shields to online entities under IPEF.

3. The U.S. government should not promote the "consumer welfare" standard as the objective of competition policy through IPEF.

Trade agreements starting with the 1994 NAFTA and the WTO, as well as the corporate-led hyperglobalization model they underpinned, promoted corporate concentration and the supremacy of monopolies or oligopolies in virtually every sector of the economy. Indeed, in some critical ways, existing "trade" pact rules were designed to obligate governments to guarantee protections and privileges worldwide that were pushed by the largest global firms and their lobbying associations, which benefit them often to the detriment of smaller and mainly domestic competitors. This includes monopoly-guaranteeing intellectual property rights, foreign investor rights that privilege multinational players and government procurement disciplines that have nothing to do with cross-border commerce. The existing trade framework also includes rules on agricultural subsidies that do not discipline export subsidies paid to a handful of mega-grain trading firms worldwide, but do limit domestic payments to actual farmers and supply management regimes that help ensure a fair farmgate price against concentrated processing and storage/trading interests. Additionally, even mainstream economic theory recognizes that removing tariffs and exposing domestic firms to foreign competition benefits larger firms and generates corporate concentration.[27] Evidence supports this idea: U.S. FTAs increase the concentration of sales to the most dominant American firms, as well as increase industry concentration domestically in other countries party to the agreements.[28]

Despite this troubling state of international economic affairs, the last decades have been marked by weak enforcement of antitrust laws domestically. Over and over again, a narrow guild of antitrust enforcers allowed waves of corporate mergers and acquisitions, as well as predatory conduct by powerful monopolies to fortify and extend their power. Behind these policy choices lies a specific ideological framework of antitrust and competition policy officials: the "consumer welfare" standard. Starting in 1981, Ronald Reagan, backed by a community of law and

[27] Melitz, Marc J. (2003). The impact of trade on intra-industry reallocations and aggregate industry productivity. Econometrica, 71(6), 1695–1725. Available at: https://doi.org/10.1111/1468-0262.00467

[28] Baccini, L., Pinto, P. M., & Weymouth, S. (2017). The distributional consequences of preferential trade liberalization: Firm-level evidence. *International Organization*, *71*(2), 373-395. Available at: https://doi.org/10.1017/S002081831700011X

economics scholars from the "Chicago School," led by Robert Bork, shrank antitrust from its traditional goal of checking private power to a much narrower question of promoting what they characterized as economic efficiency. This was the "consumer welfare" standard ideological change: While antitrust enforcers had previously focused on dispersing power, the Chicago School approach led enforcers to focus on promoting welfare, measured through price and output.[29]

This contrasts with a previous generation of American antitrust policies that sought to contain commercial dominance domestically and internationally. There was a series of cases in the 1940s and 1950s against international cartels, territorial allocation agreements, and anticompetitive patent pools among dominant American and European firms.[30] Following this for decades, American law prohibited large corporations, American and foreign alike, from unduly controlling or dictating the terms of distribution, production or prices to their business partners across borders, regulating everything from restrictive joint ventures to restrictions on parallel imports from patent or process licensees.[31] The adoption of the consumer welfare standard by American courts, as well as the Foreign Trade and Antitrust Improvements Act of 1982,[32] substantially curtailed these rules, leaving international markets free to be controlled by dominant firms, against the original spirit of the antitrust laws and in the supposed name of consumer benefits.

The way in which this consumer welfare ideological framework has contributed to our current supply chains havoc – painfully laid bare by the COVID-19 pandemic and the undeniable shortages of critical medical or other supplies we have been experiencing since 2020 – is now at the core of the antitrust policy discussion.[33] The Biden administration has shown its commitment to addressing the crisis of concentrated economic power in the economy, including through the president's July 2021 Executive Order on Promoting Competition in the American Economy,[34] which necessarily requires revising the "consumer welfare" standard and revamping our antitrust laws, up to and including possible revisions to antitrust's relationship to trade policies and its international application.

While the United States goes through the process of reforming its antitrust regime, it would be highly undesirable and counterproductive to keep promoting the "consumer welfare" standard through trade negotiations. Starting in the 2000s, trade deals' competition chapters prescribe promoting the "consumer welfare" and efficiency as the main objectives of competition policy.[35]

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[29] See the American Economic Liberty Project's "The Courage to Learn." (Jan. 2021). Available at: https://www.economicliberties.us/wp-content/uploads/2021/01/Courage-to-Learn_12.12.pdf, pages 7–11

[30] United States v. National Lead Co., 332 U.S. 319 (1947); United States v. General Electric Co., 82 F. Supp. 753 (D.N.J. 1949); United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947 (1950); Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951); United States v. Imperial Chemical Industries, 100 F. Supp. 504 (S.D.N.Y. 1951).

[31] See Brewster, K. 1958. Antitrust and American Business Abroad, and Townsend, J. 1980. Extraterritorial Antitrust: The Sherman Act and U.S. Business Abroad, and Fugate, W. L. 1958. Foreign commerce and the antitrust law.

[32] 15 U.S.C. § 6a

[33] Matt Stoller, "America faces supply-chain disruption and shortages. Here's why" The Guardian, Oct. 1, 2021. Available at: https://www.theguardian.com/commentisfree/2021/oct/01/america-supply-chain-shortages

[34] See Executive Order on Promoting Competition in the American Economy, July 9, 2021. Available at: https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/

[35] See, for instance, Article 14.1 of AUSFTA; Article 16.1.1 of the KORUS FTA and Art. 21.1.1 of USMCA.

Any IPEF negotiation on competition matters must exclude attempts to promote this flawed standard for antitrust enforcement and focus on discussing means to break the monopolies that are behind our supply chain problems and that have undermined people's livelihoods and communities' economic stability.

Conclusion

Depending on the countries involved and the agenda pursued, the IPEF could further the new approach to trade that the Biden administration has supported. However, the Indo-Pacific is not the ideal region in which to promote this new approach. Indeed, the IPEF project seems to have been initiated to satisfy other agendas and goals by interests inside and outside government that promoted the TPP and remain adherents of the old, damaging approach of trade-pact-as-foreign-policy or trade pacts for, by and of corporate interests. Rethink Trade urges the Office of the USTR to make the best of this less than ideal context and try to build on the labor standards and enforcement gains made in the USMCA and to develop a new approach to digital economy rules that do not undermine digital governance policy space while remedying the real problems related to floods of uninspected small-value packages of imports purchased online. A new approach to trade policy explicitly designed to promote the administration policy goals noted in the introduction of these comments is smart policy because this approach can benefit more Americans. It is also smart politics because it can result in trade agreements that deserve and can achieve wide public and policymaker support.