Before the Australian Department of Foreign Affairs and Trade

"Trade Pillar of an Indo-Pacific Economic Framework"

Written Comments from Rethink Trade

November 1, 2022

Rethink Trade thanks the Australian Department of Foreign Affairs and Trade for the opportunity to submit comments with regard to the plans to develop an Indo-Pacific Economic Framework (IPEF). Our comments will focus specifically on the Trade pillar and mainly on digital trade issues.

Rethink Trade is a program of the American Economic Liberties Project (AELP), based in Washington DC. AELP, a non-profit research and advocacy organisation, is a thought leader in the anti-monopoly movement in the United States 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 public 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.

We support the Biden administration's vision for a worker-centred trade policy. This 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 economic resilience and security.

We have commended the U.S. Office of the United States Trade Representative (USTR) for favouring a new approach that very sensibly starts with goals and then develops policies designed to deliver on those goals. Namely, the Biden administration states that its reasoning behind the IPEF is to create rules that prioritise ensuring all Americans – and our allies' citizens – 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 U.S. administration also says that the IPEF will reflect its commitment to combatting the looming climate crisis and strengthening economic resilience and supply chains both to provide affordable access to goods for consumers and to guarantee good-paying jobs to our workers and

those of our allies. 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.

Whether or not the IPEF process is a venue to establish a new trade pact model *writ large*, in part given the countries involved, 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 favour 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" chapter of the United States-Mexico-Canada Agreement (USMCA).

IPEF talks must build on the standards developed over time with respect to actual terms of trade. Namely, under the new worker-centred trade model, IPEF parties must promote strong and enforceable labour and environmental standards that establish a floor of conduct for companies producing goods and services that are to be "traded" under a pact. USMCA made some important improvements with respect to labour standards and their enforcement. And as a result, it garnered broad congressional support in the United States. 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 U.S. 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 labour standards and their effective facility-specific enforcement to the service sector as well as to trade in goods.

In sum, Rethink Trade supports the new approach to trade policy that the Biden administration has pledged IPEF will promote. Our more detailed comments will focus on the areas of the Trade pillar that hold the most promise to advance the aforementioned goal. This submission includes:

- 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.
- General objectives that should guide negotiations, including some procedural principles the negotiating parties should follow to ensure the transparent and inclusive policymaking that can result in fair and broadly beneficial outcomes and the importance of effective, strong labour and environmental standards and enforcement as a foundation to all elements of the IPEF initiative, not only the trade pillar.

1. 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 Australia, the United States and other countries. Yet, in the absence of 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' behaviour 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. In a race against time, Big Tech's aim with their "digital trade" agenda is to excavate the policy space out from under parliaments and various governments before they can act. At the same time, Big Tech aspires to roll back digital governance initiatives taken by the governments of countries worldwide, such as the Australian News Media Bargaining Code, by imposing binding constraints in "digital trade" pacts against a wide array of digital governance tools.

If this "digital trade" ploy succeeds, Big Tech interests could weaken existing policies worldwide and stop future 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' labour 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 customs policies, particularly in the United States, to reflect the reality of hundreds of millions of packages annually of imported goods that consumers have ordered online that skirt normal 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. Tens of billions of dollars of goods are crossing borders without inspection, much less the prohibition of dangerous or banned goods, 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.

The 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 labour 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 IPEF negotiating countries 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 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.

<u>a. Negotiate digital standards that promote fair and competitive markets, instead of undermining them</u>

- **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 "non-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 non-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 respecting limits on the number of active drivers. 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 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, as well as rules designed to squeeze out prospective competitors to develop globally dominant online platforms. In response, scores of countries, including Australia, 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."

Big Tech's furious attack on Australia's News Media Bargaining Code shows how these companies are misusing trade "non-discrimination" notions to undermine digital competition policies. The law, which 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 online traffic searching for news,[1] has faced a sustained assault by digital platforms' lobbyists and other industry groups.[2] During the legislative process, associations financed by Facebook and Google, such as the U.S. Chamber of Commerce, the Software and Information Industry Association, and the Information Technology Industry Council, filed several comments before the Australian authorities claiming that the then-bill was discriminatory.[3] Some of these groups and others consistently urged U.S. authorities to interfere and pressure Australia not to pass the law. For instance, the now-shuttered Internet Association (IA) claimed in a submission to USTR filed in October 2020 that "*The internet industry has strong concerns that the Code violates Australia's trade obligations and unfairly discriminates against U.S. companies. IA is expressly concerned that the Code targets two U.S. digital companies to assist a class of domestic players in a way that runs counter to Australia's international trade commitments.*"[4]

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 Bargaining Code is inconsistent with Australia's trade obligations.[5] This is so because, as detailed below, the non-discrimination provisions of older "e-commerce" chapters exclude de facto national

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[1] 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

[2] 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/

[3] PDFs of all submissions regarding the code to the Australian Senate Standing Committee on Economics can be viewed at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/TLABNewsMedia/Submissions.

[4] Comment from Internet Association, United States Trade Representative National Trade Estimate Report on Foreign Trade Barriers. Posted Oct. 30, 2020. Available at: https://www.regulations.gov/comment/USTR-2020-0034-0028. P. 21.

[5] 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/

treatment discrimination claims, unless the complaining party proves that the alleged less favourable treatment had protectionist intent. Since the News Media Bargaining Code does not have a protectionist intent – its main aim is to redress an imbalance of power between digital platforms and local journalism – AUSFTA's e-commerce non-discrimination clause does not provide sound footing to Big Tech to launch its attacks. However, if Australia had a digital trade non-discrimination provision with terms such as those included in USMCA or the Australia-Singapore Digital Economy Agreement (Article 6), these digital platforms would have a more reliable basis to underpin their "discrimination" claims.

Another example is the Korean law to end anti-competitive app store practices. 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.[6] The South Korean parliament passed the bill on August 30, 2021.[7] Regulations implementing the new law were published in March 2022.[8] And, although initially both Apple and Google announced that they would abide by the law, South Korean regulators are warry about Google and Apple, along with a Korean platform called One Store, not complying with the new policy and have launched a formal probe.[9] This latest development indicates that Big Tech interest in generating controversy over the new law is not over. Like AUSFTA, 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. However, 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.

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

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

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[6] 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

[7] 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

[8] 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/

[9] Laura Dobberstein, "*South Korean regulator worried Apple, Google, may be working around app store payment choice law,*" The Register, Aug. 10, 2022. Available at: https://www.theregister.com/2022/08/10/apple_google_south_korea_investigation/.

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
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 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	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**. 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,	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.

accords to like digital products whose author, performer, producer, developer, or distributor is a person of a non-Party. (*emphasis added.*)	producer, developer, distributor, or owner is a person of a non-Party. (*emphasis added.*)	

Leaving aside the potential differences in coverage arising from disparate definitions of "digital products," it seems clear that 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 favourable treatment had protectionist intent – hence, the "as to otherwise afford protection" clause in both deals. 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. This is a particular risk for Australia as it is entering into negotiations with the United States, the country where most mega-platforms are based, since these firms will not hesitate to leverage any commitment made by Australia under IPEF to undermine current and potential initiatives in the digital economy by the Australian authorities.

Hence, 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.

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

- **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,[10] 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 favour of free flows and freedom to process and store data in the locations of choice of the platform, then the Australian

[10] 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.

government should ensure that broad and effective specific exceptions are included that safeguard governments' policy space. The 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.[11] 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, including Australia, negotiated specific *self-judging* exceptions to the "location of computing facilities" and "cross-border transfer of information by electronic means" provisions.[12] 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. IPEF negotiating parties also must not replicate the General Agreement on Tariffs and Trade (GATT) general exceptions' language such as the "necessity test" or requirements that the questioned policy does not "*constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade*," given the pernicious way in which these terms have been interpreted to prioritize commercial interests over public interest policies.[13]

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

[11] 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/

[12] 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."

[13] Daniel Rangel, "*WTO General Exceptions: Trade Law's Faulty Ivory Tower,*" Public Citizen's Global Trade Watch, January 2022. Available at: https://www.citizen.org/article/wto-general-exceptions-trade-laws-faulty-ivory-tower/.

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 labelled as high-risk, to monitor compliance with civil and consumers rights.[14] This will require government agencies responsible for enforcing such policies to have access to algorithms and code. Any IPEF agreement on digital trade 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.[15] 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 software, it could request patent protection to be afforded the right to commercialize and use it exclusively, including its source code, 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.[16]

Rethink Trade respectfully suggests Australia not base its proposals for the digital trade component of IPEF negotiations on the language included in Article 28 of the Australia-Singapore Digital Economy Agreement. This provision, like its equivalent in USMCA, bases the exception to the general ban on source code disclosure on individual investigations or enforcement actions. This approach forecloses the possibility of governments enacting regulation that requires generalized, *ex ante* source code disclosure for high-risk AI applications, such as those that determine employment opportunities or access to public services. This is a real regulatory possibility that might surface from, for instance, the EU AI Act currently being discussed by the European institutions.[17] The correct way to regulate AI is still being discussed

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[14] Kristina Irion, "*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?"* January 26, 2021. Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3786567

[15] 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.

[16] 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.

[17] Mark MacCarthy and Kenneth Propp, "*Machines learn that Brussels writes the rules: The EU's new AI regulation,*" Bookings, May 4, 2021. Available at: https://www.brookings.edu/blog/techtank/2021/05/04/machines-learn-that-brussels-writes-the-rules-the-eus-new-ai-regulation/.

and many years will pass before there is a general understanding of how to maximize the gains that AI offers, while minimizing its risks. Countries should not hastily impose limits on this frontier regulatory field.

- **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 behaviour 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 the U.S. 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.

2. Any agreement resulting from IPEF must embody a new worker-centred trade policymaking approach.

The policy areas included the 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, the parties have clearly stated that they are 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 labour or the environment. The establishment of the World Trade Organization and the North American Free Trade Agreement (NAFTA) 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 hyperglobalisation worldwide over the past three decades. This model has led to wide disarray, furthered offshoring of good-paying – often unionised – manufacturing jobs to jurisdictions with lower labour 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.

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 Labour Organisation Conventions, 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 labour, environmental, health or other public interest standards.

IPEF negotiating parties have announced that this deal'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. Thus, 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.

For the U.S. public, adding labour 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 labour standards to the core of the text, has innovative facility-specific labour enforcement provisions called the Rapid Response Mechanism conceived to deal with violations of the right of free association and collective bargaining. The U.S. government has shown that it is possible to use these provisions to fight for workers' rights in Mexico, which generated material gains in the facilities that were the focus of the first actions.[18]

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[18] Office of the USTR, "*Statement from Ambassador Katherine Tai on February 1-2 Vote by Workers in Silao, Mexico,*" February 3, 2022. 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; Office of the USTR, "*Statements from Ambassador Katherine Tai and Secretary Marty Walsh on the Vote by Tridonex Workers in Matamoros, Mexico,*" March 1, 2022. Available at: 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; Office of the USTR, "*United States Announces Successful Resolution of Rapid Response Labor Mechanism Matter at Panasonic Auto Parts Facility in Mexico,*" July 14, 2022. Available at: https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/july/united-states-announces-successful-resolution-rapid-response-labor-mechanism-matter-panasonic-auto; Office of the USTR, "*United States Announces Successful Resolution of Rapid Response Labor Mechanism Matter at Auto Parts Facility in Frontera, Mexico,*" August 16, 2022. Available at: https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/august/united-states-announces-successful-resolution-rapid-response-labor-mechanism-matter-auto-parts; Office of the USTR, "*United States Announces Successful Resolution of Rapid Response Labor Mechanism Matter at Manufacturas VU Automotive Components Facility in Mexico,*" September 14, 2022. Available at: https://ustr.gov/about-us/policy-

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.[19] 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 labour 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.

Given previous "trade" pacts wasted the opportunity to meaningfully condition tariff cuts and market access on meeting labour 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 labour standards are ultimately enforced.

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. 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.

In the U.S. context, president Biden's worker-centred trade policy reflects the broadly supported demand to replace the existing trade policies that have made us and our allies less resilient, have undermined many workers, farmers and small business owners' economic security and exacerbated health and environmental threats in favour of creating a new model of trade agreements that can deliver broader benefits for workers, consumers, and small businesses in the United States and its allies.

However, in order to achieve this, IPEF negotiating parties must commit to a transparent and participatory process, the complete opposite of the opaque and corporate-dominated processes that produced trade agreements during the previous decades. The news about the U.S. government demanding IPEF negotiating parties to keep proposals, explanatory materials, written communication and other information exchanged during the negotiations "in confidence"

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offices/press-office/press-releases/2022/september/united-states-announces-successful-resolution-rapid-response-labor-mechanism-matter-manufacturas-vu.

[19] 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.

for five years after an agreement enters into force or the talks otherwise come to an end[20] were extremely disappointing. We urge the Australian government to push for a new process for these negotiations that includes regular public consultation mechanisms on specific policy approaches and texts; publication of opening offers and related documents in line with European Union practices; and making negotiated texts publicly available, with opportunity for comment, after each negotiating round.

Specifically, civil society organizations, parliaments and the public must be invited to help formulate positions and comment on draft proposals t throughout the entire course of the negotiations. Lastly, 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 negotiating parties' 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 in Australia, the United States and elsewhere. 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.

[20] Steven Overly, "*IPEF confidentiality rules revealed,*" Politico, October 10, 2022. Available at: https://www.politico.com/newsletters/weekly-trade/2022/10/03/ipef-confidentiality-rules-revealed-00059967.