



Before the United States Trade Representative

Docket Number USTR-2022-0002

Comments From Public Citizen Regarding the Fair and Resilient Trade Pillar of the Proposed Indo-Pacific Economic Framework

April 8, 2022

Public Citizen welcomes the opportunity to comment on the Fair and Resilient Trade pillar of the proposed Indo-Pacific Economic Framework (IPEF). Public Citizen is a nonprofit consumer advocacy organization with more than 500,000 members. A mission of Public Citizen is to ensure that in this era of globalization, a majority can enjoy economic security; a clean environment; safe food, medicines and products; access to quality affordable services; and the exercise of democratic decision-making about the matters that affect their lives. We have conducted extensive analysis of U.S. trade and investment agreements and their outcomes, starting in 1991 during the initial North American Free Trade Agreement (NAFTA) negotiations.¹

We were also heavily involved in the public education campaign that raised awareness about the harms of the proposed Trans-Pacific Partnership (TPP), leading to its eventual collapse. The mainstream understanding of our trade policies and their effects has come a long way since then. More recently, through our work with unions, other civil society groups and congressional and administration allies, we were part of the movement that replaced NAFTA with the U.S.-Mexico-Canada Agreement (USMCA). The USMCA, while an improvement over NAFTA, is not a template for future agreements; rather, it sets the floor from which we will continue the fight for good trade policies that put working people and the planet first. These comments provide guidance for U.S. negotiating objectives for IPEF based on our extensive knowledge of the damaging terms of the TPP and NAFTA, as well as the improvements in the USMCA that should be expanded upon.

U.S. Trade Representative (USTR) Katherine Tai has stated repeatedly that the Biden administration's vision for trade will not repeat the past mistakes of prioritizing efficiency above all else, but will serve workers, consumers, and the environment. This is a welcome change after decades of U.S. trade policies that privileged large business interests, leading to job offshoring to countries with exploitative labor conditions, encouragement of polluting industries, and constraints on domestic policymaking to protect consumers. IPEF could be an opportunity to realize a new, lasting vision for trade that deserves broad support.

¹ For more on our vision for trade policies that would help the United States to build back better, please see our January 2021 [Transition Memo on Trade Policy](#), jointly written with the United Brotherhood of Carpenters and Joiners of America.

At the same time, the notion of an IPEF did not come from consumer advocacy organizations, environmental groups, or organized labor. A number of its boosters claim that an IPEF is needed for the United States to counter the influence of the Regional Comprehensive and Economic Partnership (RCEP). But as Ambassador Tai recently explained to the U.S. Senate Finance Committee, the RCEP will not have “significant or detectable impacts” on the U.S. economy because its 15 members already have multiple trade agreements between them, making it “a remix and match of what’s already there.”ⁱ

At that same hearing, Senator Elizabeth Warren warned Ambassador Tai that “lobbyists for the giant corporations are celebrating IPEF as the second coming of the TPP... Tech companies like Facebook and Amazon... are involved in spreading misinformation, mistreating workers, and squashing competition. They also hire hordes of lobbyists to protect their way of doing business.” Public Citizen and our allies in the U.S. and throughout the Indo-Pacific region share this concern. In order to realize President Biden’s vision for worker-centered trade, and to earn broad political support, USTR must ensure that IPEF does not become a TPP 2.0.

Given the information shared about the prospective IPEF at this stage, our detailed comments center on the seven areas described below.

1. Negotiating Process

If the current trade advisory system, that gave 500 official U.S. trade advisers representing corporate interests a privileged role in shaping U.S. positions and opening offers and exclusive access to reviewing confidential texts,ⁱⁱ remains in place, then IPEF negotiations will likely result in a deal that not only would be more damaging to working people, but – like the TPP and NAFTA 2.0 text Trump signed in November 2018 – would be unacceptable politically. It was only after the release of Trump’s NAFTA text in October 2018 that the public and even most members of Congress became aware of the unacceptable terms within. The lack of transparency and public input in the process facilitated the negotiation of a deal that added new monopoly protections for Big Pharma to lock in high medicine prices, and contained labor and environmental terms insufficient to counteract NAFTA’s ongoing outsourcing of jobs and pollution and downward pressure on wages. When the secret terms finally became public, the deal was dead on arrival in Congress. House Speaker Nancy Pelosi announced there would be no vote unless labor and environmental terms and their enforcement were strengthened, and the Big Pharma favors were eliminated. For a year, as the NAFTA trade deficit exploded, the administration refused to make the changes needed so that a revised pact might be enacted.

One of the fundamental reasons why the original NAFTA, the 2018 NAFTA 2.0 and the TPP contained such damaging terms that made them so unpopular is that they were negotiated under the influence of hundreds of corporate advisors while the public and Congress were locked out. Terms needed for the deals to benefit most Americans were traded away in favor of special protections for the corporate interests that had access. The resulting deals did not prioritize creating good jobs, raising wages or safeguarding our democratically achieved health and environmental policies. A successful IPEF negotiation must replace the corporate advisory

system with an on-the-record public process, including public hearings, to formulate U.S. positions and obtain comment on draft and final U.S. text proposals. U.S.-proposed texts and draft consolidated texts after each negotiating session must be made public. Strict conflict of interest rules must be enforced. Only by issuing detailed goals and making draft texts available will the American public know in whose interest the negotiations are being conducted. Simply put, if there is to be an IPEF that can enjoy broad support, USTR must agree to and secure commitments from all negotiating partners to a truly transparent and participatory process as outlined above.

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, consumer protection and other areas, but to rebuild public faith in trade policymaking generally after years of backroom deal making.

2. Identifying Potential Negotiating Partners

The content of the IPEF will also be driven by the set of countries that USTR decides to engage in the process, so it will be important to allow for broad public comment once potential negotiating partners are identified, as it is difficult to give detailed comments without knowing the countries that will be involved. To achieve a worker-centered trade agenda, USTR should select negotiating partners that demonstrate their willingness to comply with strong labor and environmental standards and metrics, according to standards set by International Labour Organization (ILO) conventions and Multilateral Environmental Agreements (MEA) as a condition of participation. A number of countries that have been suggested as potential IPEF partners are known to prohibit the formation of independent labor unions, to permit many of the worst forms of child labor and/or to fail to address human trafficking and forced labor. Such nations are inappropriate partners for a new trade agreement or "trade framework." Insofar as IPEF is intended as a "docking agreement," it must only allow countries that respect labor rights to be considered for inclusion.

Negotiating partners should share the vision of building a new model that prioritizes public interest over narrow corporate interest. USTR's recent outreach to Singapore and Australia indicate that those countries are high on the list of prospective members. Given Singapore and Australia's aggressive pursuit of binding rules for so-called digital trade that limit governments' ability to regulate Big Tech in various international fora, including in World Trade Organization (WTO) e-commerce talks and in their bilateral FTA, their participation in IPEF could be cause for concern by public interest advocates, unless it is made clear that such anti-democratic terms will not be included in the deal.

3. Digital Economy-Related Matters

In a November 2021 speech, Ambassador Tai stated that:

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.ⁱⁱⁱ

This is precisely the outlook that must be at the core of U.S. decisions around “digital economy-related matters” in IPEF and beyond. However, many supporters of the status quo trade regime are pushing policies through the “digital trade” framework aimed at helping massive global retail, advertising, transportation, hotel and other businesses evade regulation and oversight.

The so-called “digital trade” proposals Big Tech is pushing are not focused on remedying actual problems related to the online sale of imported goods, such as tariff evasion and product safety. Instead, Big Tech interests have promoted binding international rules to limit governments worldwide from regulating online platforms in the interest of workers, consumers or smaller business competitors. Misbranding constraints on government regulatory authority as “e-commerce” or “digital trade” agreements has helped them to evade scrutiny and quietly undermine certain worker protections, policies that constrain entities’ size or market power and promote fair competition, and civil rights, privacy and liability policies being considered by your administration, many in Congress from both parties and other governments worldwide. By hijacking common trade-pact concepts, such as “non-discrimination,” the largest digital firms seek to secure their monopolistic dominance by labeling as illegal trade barriers countries’ labor, competition and other domestic policies of general application simply because such policies may have greater impact on the largest firms because of the firms’ size.

This view was recently reinforced by 53 organizations representing labor, civil rights, consumer, and other constituencies – who joined together in a letter urging the administration not to enact any ‘digital trade’ rules that restrict or dissuade countries from regulating digital entities or that impose or lock in retrograde domestic digital governance policies.^{iv}

Rules limiting data and privacy protections, setting Internet Service Provider liability and safeguard rules, and related enforcement measures, and border measures should not be locked in via IPEF or other trade agreements. And specifically, the USMCA’s limits on financial, digital trade and other service sector consumer safeguards should not be part of any future U.S. trade agreement. The rise of artificial intelligence and big analytics, monopolization of services, the internet of things and billions of devices scattered around the globe raise immense challenges to privacy, competition, consumer protection and taxation. There are many unknowns regarding the technological advances ahead, and therefore the digital economy. For years, dominant internet companies have taken advantage of weak U.S. personal data protections. Today, many Americans are concerned about how companies collect and use their online data. Given the

constant technological developments and the moving boundaries of consumer threats, rather than having current U.S. industry-favored rules locked in via trade agreements, such policies must be made in democratic processes that provide opportunities to revisit and revise decisions as circumstances change. Even without constant technological change in this sector, on the basis of shifting public and policymaker opinions alone, it is entirely inappropriate to lock the current U.S. policies into place through a trade agreement: Trade agreement rules on digital trade should not shrink the policy space of U.S. regulators and the U.S. Congress. Yet the digital trade rules in the USMCA could do just that, undermining efforts to protect people's privacy, personal data and security.

For example, one rule in the USMCA requires governments to allow the transfer of consumers' data – including financial or medical data subject to privacy protections in the countries' laws – outside their borders. Policies to protect privacy by restricting where or how data may move or be stored would be subject to challenge as “illegal trade barriers” and face significant prospects of being found to violate the pact. The USMCA also forbids governments from requiring companies to disclose their source code or algorithms. This could increase the monopoly power of tech companies and thwart efforts to investigate and regulate anti-competitive and discriminatory behavior. As well, the Financial Services Chapter in the USMCA reversed the U.S. position in TPP negotiations that governments must be allowed to mandate where financial data is stored. This exception to the general TPP prohibition on governments requiring data to be stored locally was pushed by the U.S. Treasury Department based on the agency's concerns about being able to access information during financial crises and was supported by consumer groups concerned about the security of sensitive and confidential data stored offshore and the ability to obtain redress in the case of a data security breach occurring in another country. None of these terms from the USMCA should be included in future U.S. trade agreements. Thus, the IPEF should not require cross-border data transfers and data-processing across all service sectors without adequate safeguards. Data protection and privacy are not non-tariffs barriers to trade, but rather fundamental rights and strong safeguards that must be put in place to protect consumers.

Another controversial provision in the USMCA is its liability waiver for online platforms with respect to their content, similar to §230 of the U.S. Communications Decency Act. This issue is subject to a vigorous debate domestically, with proponents and opponents of the current policy in both political parties. This is also precisely the sort of policy that should not be locked into place in a trade agreement, establishing a form of international preemption with one-size-fits all international standards locked in, usurping the role of Congress and state legislatures. This view was supported in a May 2021 letter to President Biden signed by over a dozen U.S. internet accountability groups, including Public Citizen, Color of Change and the Center for Digital Democracy.^v In addition to protecting U.S. regulatory policy space, these issues should be off the table so U.S. negotiators do not push for any weakening of partner countries' laws in this realm. However, the 2022 National Trade Estimates (NTE) Report on Foreign Trade Barriers, which catalogues policies in other countries that U.S. commercial interests consider to be trade barriers, continues past administrations' worrying trend of citing other countries' digital policies as trade barriers.^{vi}

IPEF negotiators must recognize that protection of personal data and privacy is fundamental to human dignity and welfare, and essential for building consumer trust online and that protections in one country are rendered ineffective if data is transmitted to a country without such protections. Any terms requiring cross-border transmission of data must be conditioned on every signatory to an agreement establishing and enforcing transparent, strong and meaningful protections and safeguards for consumers and workers with respect to all digital products and services irrespective of the channel of acquisition, whether in physical form or over the internet. This will require the United States to improve its domestic policies to be in line with best practices, such as policies limiting data collection, processing, use and sharing; requiring data minimization and deletion, confidentiality and security and providing purpose specification and access and correction rights. It will require enactment of robust minimum standards for cybersecurity for consumers, devices and networks such as strong authentication mechanisms and requiring platforms and services to default to the strongest privacy settings. Plus, consumers must have meaningful redress options, including a private right of action and other means for fair settlement of claims, compensation for misrepresentation, fraudulent and/or deceptive products/services or unsatisfactory products/services.

In sum, IPEF should contain no terms diminishing privacy and data protections afforded by the countries' respective laws, including by establishment of a horizontal and self-judging exception for domestic measures that protect privacy and establish and enforce data protection, with special protections for children and young people. And IPEF must ensure algorithmic transparency and accountability, including prohibition of discrimination against protected classes; remove barriers to due process; ensure accountability prevails over trade secrets; establish mechanisms for human oversight and control; and establish remedies for the adverse impacts of artificial intelligence systems on human rights and social justice, including but not limited to, ensuring effective privacy safeguards for large-scale datasets, collective complaint mechanisms, quality oversight, effective technical protection mechanisms and meaningful algorithmic auditing.

There are some legitimate international trade concerns associated with e-commerce and the broader digital economy that IPEF negotiators should consider. Any IPEF should ensure that goods purchased online across borders meet labor, environmental and consumer safety standards, including by raising de minimis levels so that, for instance, the two million packages arriving from China to the U.S. daily to fulfill online orders can no longer evade U.S. inspection regimes. It should prevent corporate misclassification so that so-called "digital platforms" involved in transportation, hospitality, healthcare, retail, education and other industries cannot evade labor, consumer and other regulations imposed on "brick-and-mortar" businesses. To combat the growing high-tech discrimination in artificial intelligence, IPEF should guarantee access to source codes and algorithms by congressional committees, government agencies, academic scholars, labor unions and nongovernmental organizations. IPEF should also introduce corporate liability for personal data collected via computers, cell phones and the "Internet of Things" without consumers' explicit, informed permission, shared or sold without their permission, and/or stolen.

While different governments, individual policymakers and organizations may reasonably disagree on what the best digital governance rules should entail, everyone should oppose locking in deregulatory rules in trade agreements.

4. Labor-Related Matters

U.S. trade agreements since the George W. Bush administration have included labor and environmental standards in their core texts as part of the “May 10” standard. The ostensible goal of these terms was to raise standards in trade partner countries. But these terms have proven ineffective. The absence of effective labor and environmental standards created race-to-the-bottom incentives for U.S. firms to offshore production and slammed U.S. firms and workers with a flood of imports subsidized by environmental and social dumping.

The USMCA, however, included some innovative labor provisions for the first time, which were recently employed to support two historic achievements for labor rights in Mexico. First, workers at a General Motors plant in Silao, Mexico successfully replaced their management-aligned “protection union” with an independent union supported by workers. Then, workers at the Tridonex auto-parts plant in Matamoros, Mexico overwhelmingly voted to elect their new independent union, despite reported efforts of bribery and intimidation. These victories are due in part to the labor enforcement provisions in the USMCA, including the innovative Rapid Response Mechanism (RRM). The RRM is a targeted, facility-specific enforcement mechanism unique to the USMCA that is devised to protect workers’ right to organize by imposing fines and tariffs on companies found to violate Labor Annex terms, or even denying entry of their goods to the United States. Public Citizen recognizes the efforts of Ambassador Tai to enforce these terms, as well as her role in the crafting of those provisions in Congress.

Future U.S. trade agreements including IPEF should build from the labor improvements in the USMCA, both in the rights that are enumerated and the mechanisms used to ensure those rights are implemented and enforced in an ongoing manner. As has been the consistent demand of unions, U.S. trade agreements must level the playing field by conditioning trade benefits on parties adopting, maintaining and implementing in their domestic laws the policies needed to ensure the four core labor rights enshrined in the eight fundamental Conventions of the International Labour Organization (ILO). This includes Convention 87 on Freedom of Association and Protection of the Right to Organise (1948) and Convention 98 on the Right to Organise and Collective Bargaining (1949); Convention 29 on Forced Labour (1930) and Convention 105 on the Abolition of Forced Labour (1957); Convention 138 on Minimum Age for Entry into Employment (1973) and Convention 182 on the Worst Forms of Child Labour (1999); and Convention 100 on Equal Remuneration (1951) and Convention 111 on Discrimination in Employment and Occupation (1958). And future agreements must ensure, in law and in practice, that all workers, regardless of the workers’ citizenship, immigration status or national origin, have the rights and freedoms guaranteed in the eight ILO Core Conventions.

IPEF and other new U.S. trade pacts must include provisions that require countries to effectively enforce their labor laws related to core labor standards and acceptable conditions of work with

respect to minimum wages, hours of work, wages and benefits owed; worker representation; termination of employment; gender-based violence; and occupational safety and health. Future pacts must also prohibit signatory countries from reducing, waiving or otherwise derogating from their laws and regulations relating to the core labor standards and acceptable conditions of work. This must include derogation by misclassification such that workers are excluded from the required rights by virtue of being classified as a temporary worker, contract worker, or the like, which has proved to be a significant problem under past U.S. pacts.

Any new agreement must establish floor wages to ensure a level playing field such that workers — regardless of sector — have the right to receive wages sufficient for them to afford, in the region of the signatory country where the worker resides, a decent standard of living for the worker and her or his family. (This is not a call for a fixed minimum wage that would apply uniformly in each country, but rather for floor wages to be required that reflect the remuneration needed to support a decent standard of living including to provide food, water, housing, education, health care, transportation, clothing and other essential needs.) Any new pact also must explicitly deem the work of all workers in the economy to be trade-related and therefore subject to the pact’s labor obligations given the impact of systemic abuse of worker rights on the ability of all workers in an economy to make fair wages. It also must forbid threats, acts of intimidation or acts of violence against a worker or workers exercising, or attempting to exercise, any of the rights and freedoms protected by the agreement and deem such action to be a violation of the underlying right or freedom. Any new pact must designate a failure to investigate or prosecute any such threat, act of intimidation or act of violence as a failure to enforce the underlying right or freedom.

Labor provisions must likewise remove barriers that could prevent labor enforcement action from being taken, such as those requiring that labor violations must be proven to be “in a manner affecting trade or investment” or that they must be “sustained” or “reoccurring” before enforcement actions can be taken.

To ensure the ongoing implementation of the labor provisions, the United States must assure that all such labor rules are being implemented and respected on the ground in partner nations before allowing any commercial aspects of an IPEF agreement to take effect, and include strong, built-in mechanisms to guarantee swift and certain enforcement of labor standards in an ongoing manner.

IPEF should create independent Labor and Environmental Secretariats, led and staffed by labor and environmental experts, respectively, with the duties of proactively monitoring compliance and rendering decisions on allegations of non-compliance. Any new U.S pact must also provide for the denial of entry for goods and service traded between the parties that fail to meet labor and environmental standards and the imposition of fines on the facility or entity or investor owning and controlling a facility that fail to meet the labor and environmental standards that produces goods and services that compete in the territory of a party with a good or a service of the other party and ensure access is denied to the government procurement market of the parties for a facility or entity or investor owning and controlling a facility that fails to meet the labor and

environmental standards and ensure such penalties remain in place until such non-compliance to have ended.

And to ensure a fair playing field for job creation, strong, enforceable disciplines against currency manipulation and currency misalignment are also needed, and must include mechanisms for the automatic triggering of corrective action against currency manipulators, rather than simply reports or dialogue.

5. Climate and Environment-Related Matters

As environmental groups have previously recommended, and Public Citizen concurs, environmental terms in any U.S. trade agreement must prohibit the signatories from weakening, eliminating, or failing to enforce domestic environmental or other public health or safety standards.^{vii} Any new U.S. trade agreement including IPEF must also require each country to adopt, maintain, and implement laws, regulations, and other measures to fulfill its Nationally Determined Contribution to the Paris Agreement under the United Nations Framework Convention on Climate Change. It must require each country to adopt, maintain, and implement laws, regulations, and other measures to limit the level of priority air, water, and land pollutants to the lowest maximum level found in the laws and regulations of any signatory to an agreement and require each country to adopt, maintain, and implement laws, regulations, and all other measures to prohibit the harvest, take, or trade of wild flora and fauna, including parts and products, in violation of domestic or international conservation obligations, including timber, fish, wildlife, minerals, and other environmentally sensitive goods. As well, any trade agreement must require each country to adopt, maintain, and implement laws, regulations, and other measures to fulfill its obligations under priority Multilateral Environmental Agreements, i.e., those that have been ratified by the U.S. and/or by over 90% of world governments.

Public Citizen encourages USTR to explore innovative ways to expand the RRM and labor provisions that have helped in the USMCA to apply to environmental obligations. Like with labor standards, meeting environmental standards must be a prerequisite to countries enjoying the commercial benefits from 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.

Furthermore, IPEF would be an appropriate forum for the U.S. and negotiating partners to commit to a “climate peace clause,” which would be a legally binding commitment by the parties that they will not use or permit the use of trade or investment rules in any of their international agreements, including IPEF to challenge climate policies. The global community is running out of time to address the climate crisis, and governments need every policy tool in the toolbox to reduce emissions and ramp up renewable energy without fear of trade challenge. Such a “climate peace clause” should protect any measure a country takes to implement its climate commitments,

including its Nationally Determined Contribution to the Paris Agreement. This could include, for example: policies to reduce use of and reliance on fossil fuels (e.g., rejecting fossil fuel permits, bans on fossil fuel extraction, and removal of fossil fuel subsidies) and policies to ramp up the production and distribution of renewable energy and clean energy goods like electric vehicles, heat pumps, and wind turbines (e.g., subsidies, procurement policies, and domestic content preferences).

6. Transparency and Good Regulatory Practice Issues

Public Citizen urges IPEF negotiators to not include provisions from the so-called “Good Regulatory Practice” chapter found in the USMCA and recent pacts. Co-opting important values of transparency and stakeholder participation, these provisions award large corporations specific roles in virtually every step of the regulatory policymaking process and of granting corporations new avenues for attacking regulations they do not like — not only after regulations take effect, but before they are even crafted.

Per language in the USMCA, Good Regulatory Practice chapters cover all government practices “relating to the planning, design, issuance, implementation, and review of the Parties’ respective regulation.” There are requirements on everything from the creation of “Expert Advisory Groups” and “Regulatory Impact Assessments” to the use of “sound statistical methodologies” and “Retrospective Review.” Such provisions serve to slow, weaken and/or prevent public interest regulations in the areas of climate, food safety, financial regulations, consumer privacy, labor rights and more, and they must not be included in IPEF or any other pact.

7. Other Provisions That Should Not Be in IPEF

a) No Limits on Procurement Policy

As the Biden administration has taken admirable steps to reshore jobs and support domestic manufacturing, it would be counterproductive to include in IPEF the usual waiver of “Buy American” procurement preferences. Past U.S. FTAs contain terms undermining the Buy American preferences that have been in place since the Franklin D. Roosevelt administration to ensure that American-made goods are purchased when the government spends our tax dollars on infrastructure projects or purchases vehicles, computers and other products.^{viii} These previous trade-pact terms also forbid the U.S. government from requiring that firms operating government call centers or providing other government services employ U.S. workers. These rules offshore our tax dollars rather than investing them to create jobs and innovation at home. They also limit conditions for procurement contracts, like requiring workers on infrastructure and construction contracts be paid ‘prevailing wages’ or requiring recycled content in goods or renewable energy. If the U.S. government – or a state – does not conform its policies to these constraints, then the other countries that are part of the agreement can challenge our policies in foreign tribunals that can impose trade sanctions against the United States until the laws are eliminated or changed. The exclusion of procurement terms from IPEF or any future U.S. trade pact should not be controversial. For many years, domestic manufacturers and many members of Congress have

noted that given the much greater value of U.S. government procurement relative to almost every other trading partner, providing some U.S. firms with opportunities to bid on a smaller amount of government contracting in other countries did not seem like a sound trade-off for providing preferential access for foreign goods and firms to our larger pool of government contracts.

b) No Investor-State Dispute Settlement (ISDS)

After decades of raising awareness around the controversial trade policies that empower corporations to attack public interest laws, Public Citizen was pleased to hear President Biden say:

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.^{ix}

As such, we look forward to IPEF excluding ISDS, and hope to see USTR work to remove ISDS from our existing agreements.

c) No Rules Undermining Access to Medicines

With his historic May 5, 2021 announcement of support for a waiver of Trade-Related Aspects of Intellectual Property Rights (TRIPS) obligations for COVID-19 vaccines, President Biden has recognized the limits TRIPS creates for global access to medicines. While Public Citizen encourages the U.S. to keep working to secure a comprehensive TRIPS waiver, the administration must refrain from expanding these or TRIPS-plus terms in any other agreement.

As such, IPEF must not include additional terms on patentability standards and patent disclosure, special protections for biologic medicines, marketing exclusivity protections, linkage, or patent term extensions or other forms of patent evergreening. Nor should a pact limit the ability of participating countries to negotiate lower prices for government health programs like Medicare or Medicaid or to control the costs of pharmaceuticals or medical devices. No future U.S. trade agreement should include an intellectual property (IP) chapter that serves as a forum for powerful lobbies to continue pushing for maximalist IP standards that fail to account for the interests of Americans or those in trade partner countries.

This became the poison pill in the 2018 NAFTA 2.0 text. The initial revised NAFTA included special privileges designed to shield pharmaceutical firms from the market competition that brings down medicine prices for consumers.^x Those terms extended far beyond WTO terms and beyond the original NAFTA IP terms to lock in bad U.S. policies that keep prescription drug prices high and export those policies to Mexico and Canada. Such terms cannot be included in any future U.S. trade agreement. The 2018 NAFTA 2.0 text would have required at least 10 years of government-granted marketing exclusivity – that is, longer monopoly protections – for cutting-edge biologic medicines, such as many new cancer treatments. The 10-year exclusivity period would have locked the United States into its current bad system that keeps cancer

medicine prices sky-high and exported it to Mexico, which does not provide any additional exclusivity period for biologic medicines, and to Canada, which now has an eight-year period. This was a shocking development given that a five-year biologics exclusivity term that was included in the TPP was considered so controversial that the remaining countries – including Mexico and Canada – suspended the provision after the United States withdrew from the TPP.

Terms in that text also violated the “May 10, 2007” agreement that established a floor for access to medicines standards, which U.S. trade pacts largely met until the TPP. The 2018 deal not only established special marketing exclusivity periods for biologic drugs, but it also included expansive patent evergreening policies, each intended to provide additional monopoly protections to new uses, forms and combinations of older medicines. The countries were required to offer multi-year extensions on patent terms when reviews at the regulatory or patent office take longer than terms deemed “unreasonable,” while the public gets no reduction in patent terms when these processes move quickly. That text also included provisions on patent linkage, a regulatory mechanism that links drug marketing approval to patent status. Under patent linkage, even spurious patents may function as barriers to generic drug registration. Patent linkage can facilitate abuse, since the financial benefits to patent holders of deterring generic market entry may outweigh risks of penalties.

Thanks to a concerted effort from the public and Congress, these harmful provisions were removed before the USMCA was passed. Public outcry over the inclusion of these terms in the 2018 NAFTA 2.0 made clear that Big Pharma monopolies have no business in a “trade” deal. Nor should any trade deal undermine this or future Congresses’ ability to ensure Americans have access to affordable medicine.

However, the final USMCA that Congress passed still comes dangerously close to enforcing limits on the U.S. government’s ability to negotiate for lower prices for Medicare and Medicaid. The U.S.-Korea FTA imposes requirements that government health care programs pay “market-derived” prices to pharmaceutical firms. While that may sound uncontroversial, in fact it means that governments are obligated to pay the high prices pharmaceutical firms extract using the protection of lengthy patent monopolies, rather than governments being able to negotiate a discount for bulk purchases. The pharmaceutical industry pushed for these terms, which increase the costs to taxpayers of government health programs, to be included in the USMCA. The inclusion of such terms was so controversial in the TPP that the pricing standard was not made mandatory, and all of the provisions on so-called “transparency” on medicine and medical device pricing were excluded from being subject to enforcement. The USMCA annex on “Transparency and Procedural Fairness for Pharmaceutical Products and Medical Devices” requires processes that reflect the current U.S. practice of giving drugmakers opportunities to intervene in and challenge some government healthcare programs’ reimbursement decisions. It does not include the sort of pricing obligations found in the Korea FTA. But, unlike the similar terms in the TPP, the USMCA terms are subject to state-to-state enforcement. Such terms simply should not be included in future agreements at all, but if they are, they should not be subject to enforcement claims.

d) No TRIPS-Plus Copyright Terms

Similarly, copyright terms in any new U.S. trade agreement should not extend beyond the terms in the WTO TRIPS text, which requires protection for 50 years after the death of the author. The terms of the USMCA should not be replicated in new agreements, meaning neither extended copyright terms nor vague limitations and exceptions should be locked in via a new U.S. trade agreement. Many elements of the copyright rules in the USMCA were derived from controversial provisions in the TPP that were strongly opposed by those in the education and library fields. By requiring a copyright term of “life of the author plus 70 years,” the USMCA copyright terms dramatically lengthened Canada’s copyright term by 20 years. Including such terms in the USMCA also locks the United States into long copyright terms that keep classic literary and artistic works of cultural importance under the monopoly control of Hollywood and recording and publishing giants. Any IPEF or future U.S. trade agreement must break from past pacts’ tendency to shift the balance of interests towards more protection of and less access to copyright protected works. In particular, developing countries need a balanced copyright system that reflects local realities and promotes access to knowledge and education. Thus, for instance, to the extent any U.S. trade pact includes copyright terms, it also must include terms that provide the flexibilities afforded by the U.S. fair use principle. As well, any such terms in IPEF must include explicit exceptions for educational uses, libraries and archives. Future U.S. trade agreements must also exclude provisions requiring the protection of “trade secrets” with respect to products that pose threats to public health, safety or the environment.

e) No Terms Undermining Food Security

The IPEF must exclude any terms undermining efforts to achieve food security and alleviate hunger. IPEF negotiators must respect the ability of governments to implement programs that ensure farmers and other food workers receive fair compensation, and that consumers have access to safe and affordable foods and the right to know where and under what conditions their food is produced. Likewise, nations must be able to protect themselves from dumping, land grabs and other unfair trade practices that force farmers off their land. The IPEF’s agriculture terms must be designed with the goal of achieving balanced trade that supports fair and sustainable rural economies and food supplies. All nations must have the right to democratically establish domestic farm policies that ensure that farmers are paid fairly for their crops and livestock, and other farm and food policies that protect farmers and consumers such as inventory management, strategic food reserves and import surge protections, and other mechanisms to protect the right of each country to prevent dumping of agricultural commodities at below the cost of production.

Conclusion

It is Public Citizen’s view that negotiating a traditional U.S. FTA in the Indo-Pacific is an idea with catastrophic policy and political repercussions. We have been encouraged by Ambassador Tai’s comments that this IPEF is not intended to replicate the past model, and that the full range of stakeholders – not just large corporations – will be consulted in developing U.S. positions. We

urge USTR to withstand pressure both within and outside the administration to turn this negotiation into a TPP-style exercise.

These comments describe the limited-scope pact that has the best chance of promoting President Biden’s worker-centered approach to trade that will complement the administration’s efforts to build a more resilient economy. Public Citizen will closely monitor the negotiations and outcomes. We will ensure the public is apprised of how terms of a potential IPEF will affect peoples’ jobs, health and safety and the environment. We will fight fiercely to sustain the improvements for which we have long advocated that were included in the USMCA and to promote the critical improvements that remain to be made so that any new U.S. trade agreement actually benefits most people, rather than replicating past failed trade-pact models that have benefited large commercial interests to the detriment of most.

Simply put, for a prospective IPEF to succeed in terms of policy or politics, it cannot merely mirror past U.S. agreements. If there is to be an IPEF that can enjoy broad support, it must build from the floor set by the final, approved USMCA and meet the additional criteria described in these comments.

ⁱ The President’s 2022 Trade Policy Agenda: Hearing Before the U.S. Senate Finance Committee, 117th Cong. (2022) <https://www.finance.senate.gov/hearings/the-presidents-2022-trade-policy-agenda>

ⁱⁱ Howard Schneider, “Trade deals a closely held secret, shared by more than 500 advisers,” Washington Post, Feb. 28, 2014. Available at: https://www.washingtonpost.com/business/economy/trade-deals-a-closely-held-secret-shared-by-more-than-500-advisers/2014/02/28/7daa65ec-9d99-11e3-a050-dc3322a94fa7_story.html

ⁱⁱⁱ “Remarks of Ambassador Katherine Tai on Digital Trade at the Georgetown University Law Center Virtual Conference,” USTR, 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>

^{iv} “Organizational Sign-On Letter to President Biden on Digital Trade,” Trade Justice Education Fund, Nov. 2, 2021. Available at: https://tradejusticeedfund.org.files.wordpress.com/2021/11/digitaltradeletter_final_110221-1.pdf?eType=EmailBlastContent&eId=406552ae-0f07-4cc5-8ebb-9a8fb7e0cfc7

^v Larry Liebert, “Tech Liability Shield Has No Place in Trade Deals, Groups Say,” Bloomberg Law, May 27, 2021. Available at: <https://news.bloombergtax.com/international-trade/tech-liability-shield-has-no-place-in-trade-deals-groups-say>

^{vi} United States Trade Representative, “2022 National Trade Estimate Report on Foreign Trade Barriers,” March 31, 2022. Available at: <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/march/ustr-releases-2022-national-trade-estimate-report-foreign-trade-barriers>

^{vii} “Discussion Paper: A New Climate-Friendly Approach to Trade,” Sierra Club, 2016. Available at: <https://www.sierraclub.org/sites/www.sierraclub.org/files/uploads-wysiwig/climate-friendly-trade-model.pdf>

^{viii} “How Overreaching ‘Trade’ Pact Rules Can Undermine Buy American and Other Domestic Preference Procurement Policies,” Public Citizen, July 2021. Available at: <https://www.citizen.org/wp-content/uploads/BAA-Backgrounder-updated-July-2021.pdf>

^{ix} “Candidate Questionnaire,” United Steelworkers Political Action Fund, May 17, 2020. Available at: <https://www.uswvoices.org/endorsed-candidates/joe-biden>

^x “Big Pharma Rigged the Revised NAFTA to Keep Drug Prices High,” Public Citizen. Available at: <https://www.citizen.org/wp-content/uploads/NAFTA-Meds-Fact-Sheet-Final.pdf>