



**AFTINET Submission to the Department of Foreign Affairs and Trade on the  
Indo-Pacific Economic Framework**

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## Introduction

AFTINET is a national network of 60 community organisations and many more individuals supporting fair regulation of trade consistent with democracy, human rights, labour rights and environmental sustainability.

AFTINET supports the development of fair-trading relationships with all countries, based on the principles of human rights, labour rights and environmental sustainability. We recognise the need for regulation of trade through the negotiation of international rules.

AFTINET supports the principle of multilateral trade negotiations, provided these are conducted within a transparent and democratically accountable framework that recognises the special needs of developing countries and is founded upon respect for democracy, human rights, labour rights and environmental sustainability.

In general, AFTINET advocates that non-discriminatory multilateral rules are better than preferential bilateral and regional negotiations that discriminate against other trading partners. We are concerned about the continued proliferation of bilateral and regional preferential agreements and their impact on developing countries which are excluded from negotiations, then pressured to accept the terms of agreements negotiated by the most powerful players.

AFTINET welcomes the opportunity to make a submission to this inquiry on the Indo-Pacific Economic Framework (IPEF). IPEF is different from other trade agreements in that it is a US initiative in the context of US strategic and economic rivalry with China and US bipartisan congressional opposition to the US offering increased market access to its domestic markets through legally binding trade agreements.

The governments involved are the United States, Australia, Brunei Darussalam, Fiji, India, Indonesia, Japan, Republic of Korea, Malaysia, New Zealand, Philippines, Singapore, Thailand and Viet Nam.

The negotiating objectives were published in the form of four pillars on September 9, 2022.<sup>1</sup>

## General comments on IPEF and outline of submission

IPEF is the economic aspect of the US strategy to strengthen its influence in the region in the context of economic and strategic rivalry with China. Australia is part of the US alliance but also should maintain its independent relationships in the region.

We note and welcome the government's policy about Australia's independent foreign policy and the need for Australia to develop independent economic, diplomatic, security, aid and development relationships with ASEAN and other countries, supporting "a regional order in which all states can contribute to a strategic equilibrium, rather than be forced to choose sides".<sup>2</sup> Australia should maintain this position in the IPEF context.

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<sup>1</sup> See the links to the Four Pillars documents at Office of the United State Trade Representative (2022), United States and Indo-Pacific framework partners announce negotiation objectives, September 9. <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/september/united-states-and-indo-pacific-economic-framework-partners-announce-negotiation-objectives>.

<sup>2</sup> Penny Wong, (2022) Statement to ASEAN-Australia Ministerial meeting, August 4, Cambodia, <https://www.foreignminister.gov.au/minister/penny-wong/speech/statement-asean-australia-ministerial-meeting>.

The US appears to be proposing that enforceable government-to-government agreements may be reached outside of the usual trade agreement framework. It is not clear what mechanism will be used for this. One possible form is the Memorandum of Understanding (MOU), which can be changed by either party and have no disputes processes or trade penalties. Many of the IPEF negotiating objectives are admirable, for example, high standards for labour rights and environmental protection, including for measures to achieve reductions in carbon emissions. But without legally binding enforceability, these will remain aspirational only.

However, for the Trade Pillar (Pillar 1), there is speculation that there will be some form of trade agreement or agreements. It seems likely that such agreements may be based on text used in other US trade agreements like the US-Mexico-Canada Agreement (USMCA).

It also appears that since the US is not offering market access to its own markets through binding trade agreements, the incentives for other countries to participate in IPEF may take the form of US or other corporate investment projects or training projects. For example, when the negotiating objectives were announced, there was a parallel announcement from the Department of Commerce that US technology companies, including Amazon and Apple, would offer an IPEF Upskilling Initiative for training in digital skills to women in developing countries.<sup>3</sup> There was no information about whether the training would be specific to the products of the corporations, or whether it would involve transferable skills that could be used across different platforms.

Investment projects can have benefits. However, if the model is direct negotiation between corporations and governments this raises the question of how unions and civil society groups may be involved, and the mechanisms for binding commitment or accountability from corporations to abide by the labour, environmental and other inclusivity standards and objectives in the IPEF four pillars.

This submission makes recommendations for a transparent and democratically accountable process for negotiations in line with current government policy. It also comments on the negotiating objectives published in the four pillars documents, with more detailed comments on Pillar I Trade, which may have binding agreements.

There are also some comments on Pillar II Supply Chain, Pillar III Clean Economy and Pillar IV Fair Economy, which may not have legally binding agreements.

The submission recommends special and differential treatment for developing countries in IPEF. It recommends the highest standards for agreements on labour rights and environmental regulation, and for rights of Indigenous Peoples, gender rights, and rights of people with disabilities which should be fully enforceable through government-to-government agreements. It also comments on other aspects of Pillar 1 and the other pillars and identifies aspects of previous trade agreements that should not be included in IPEF agreements.

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<sup>3</sup> US Commerce Department (2022) Commerce Department Launches the Indo-Pacific Economic Framework for Prosperity (IPEF) Upskilling Initiative, September 8, <https://www.commerce.gov/news/press-releases/2022/09/commerce-department-launches-indo-pacific-economic-framework-prosperity>.

## Summary of recommendations

### Meaningful consultation during the IPEF negotiating process

#### **General**

- ***A clear statement to parliament of Australia's negotiating objectives for IPEF, with an independent evaluation of the costs and benefits to Australia.***
- ***Access to the content of negotiating texts to allow detailed feedback from all stakeholders including civil society groups.***
- ***In addition to written submissions, opportunities for presentations and questions to negotiators from all stakeholders and regular briefings from negotiators to answer questions about the texts.***
- ***Publication of the final texts and independent evaluation of economic, social and environmental costs and benefits before agreements are signed.***
- ***Parliament to vote on the whole agreement, not just enabling legislation.***

#### **During negotiating meetings:**

- ***Stakeholder accreditation for both civil society and business groups.***
- ***Adequate notice (at least four weeks) of the meeting so that civil society groups can book to attend the meeting***
- ***Presentations by civil society groups to negotiators with equal time for both business and civil society groups to make presentations (at least 10 minutes per presentation).***
- ***Participation in informal opportunities to meet negotiators in meal breaks or receptions.***

### Pillar 1: Trade

#### *Labour Rights*

***IPEF Labour rights objectives should be implemented through enforceable commitments by all parties to implement agreed international standards on labour rights, including the International Labour Organisation's (ILO) Declaration on Fundamental Principles and Rights at Work and the Fundamental Conventions. These include:***

- ***The right of workers to freedom of association and the effective right to collective bargaining (ILO Conventions 87 and 98)***
- ***The elimination of all forms of forced or compulsory labour (ILO Conventions 29 and 105)***
- ***The effective abolition of child labour (ILO Conventions 138 and 182), and***
- ***The elimination of discrimination in respect of employment and occupation (ILO Conventions 100 and 111)***
- ***A safe and healthy working environment (ILO Conventions 185 and 187).***

***Each country should also develop appropriate minimum standards for working hours, wages and health and safety, based on ILO principles.***

***The implementation of these basic rights should be enforced through the government-to-government dispute processes contained in the agreement, in the same way as other chapters and provisions of the agreement.***

## Environment

**IPEF environmental objectives can best be achieved through legally binding commitments from governments to implement United Nations multilateral environmental agreements, including**

- **the Montréal Protocol on Hydrofluorocarbons**
- **the International Convention for the Prevention of Pollution from Ships 1973 as modified by the Protocol of 1978**
- **the UN Convention on International Trade in Endangered Species**
- **the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (in force as from 11 December 2001)**
- **the United Nations Framework Convention on Climate Change 1992, the Paris Agreement 2015, and subsequent Climate Change Agreements at COP 26 2021 and COP 27 2022.**

**The implementation of these agreements should be enforced through the government-to-government dispute processes contained in the agreement, in the same way as other chapters and provisions of the agreement.**

*Meaningful participation by indigenous peoples, women and people with disabilities*

**Meaningful participation by Indigenous Peoples in IPEF will require meaningful consultation with Indigenous groups in the IPEF negotiations, the adoption of clear standards and measurable targets and timeframes set for improvement of participation, and evaluation of outcomes against those targets.**

**The same principles apply to the participation of women and people with disabilities.**

**Standards should be based on**

- **the UN Declaration on the Rights of Indigenous Peoples**
- **the UN Convention on the Elimination of All Forms of Discrimination Against Women**
- **the UN Convention on the Rights of Persons with Disabilities.**

**Measurable targets should also be enforceable, with evaluation of outcomes against those targets.**

**The implementation of these agreements should be enforced through the government-to-government dispute processes contained in the agreement, in the same way as other chapters and provisions of the agreement.**

## Agriculture

**The approach to trade in agriculture should not focus only on expanding exports and investment from Australia and other high-income countries at the expense of small farmers and the environment in developing countries. There should be special and differential treatment for developing countries and regulatory space for governments to protect livelihoods and the environment.**

## Digital Economy

**IPEF should not include provisions that:**

- **Prevent governments from regulating to address concentration of market power**

- **Prevent current and future governments from regulating the cross-border flow of data**
- **Prohibit the use of local presence requirements**
- **Prevent governments from accessing source code and algorithms and from regulating to prevent the misuse of algorithms to reduce competition and to prevent class, gender, race and other forms of discrimination**
- **Prevent governments from setting standards for cybersecurity**
- **Prevent governments from regulating to ensure that gig economy workers have the same rights as other workers.**

**IPEF should include:**

- **Full exemptions for tax policy**
- **Mandatory minimum standards for privacy and consumer protections, including where data is held offshore. These should be no weaker than Australian standards.**

## Pillar II Supply chains

**IPEF should establish a work program to assist all members to phase out production of, trade in, or use of all forms of asbestos fibres, whether or not bonded. This program should include target dates, education and funding programs to assist developing countries to meet these goals.**

**Australia should maintain its own independent trade and foreign policy in the region and work with others in IPEF to both diversify supply chains and avoid polarisation and instability in the region.**

## Pillar III Green Economy

**The achievement of IPEF environmental goals will require the active involvement of unions, environmental and other civil society organisations, and clear accountability about how such commitments will be implemented.**

**Carbon capture and storage should not be a priority for IPEF.**

**The government should clarify the relationship between IPEF and the Singapore Green Economy Agreement and clarify the accountability for how such agreements will be implemented.**

## Pillar IV Fair Economy

**The government should clarify the process of involvement of unions and other civil society groups in the goals of reducing corruption and reducing tax evasion by multinational companies and the process of accountability for how such agreements will be implemented.**

## What should not be included in IPEF

*IPEF should not extend intellectual property rights*

**There should be no extension of patents, data protection or copyright monopolies in IPEF.**

*IPEF should not restrict the regulation of public and essential services*

- **Public services should be clearly and unambiguously excluded from IPEF agreements and there should be no restrictions on the government's right to provide and regulate all services, in the public interest, including services like aged care and childcare which are publicly funded but provided by private companies**
- **IPEF should use a positive list to identify which services will be included in an agreement**

- ***If a negative list is used, governments should retain the right to regulate and re-regulate all services to meet service standards, health, environmental or other public interest objectives. This should include the right to increase regulation in services like aged care and address privatisation failures.***

*IPEF should not restrict government procurement as part of industry development programs*

- ***The government should not make any IPEF commitments on government procurement that undermine its ability, or the ability of state governments, to use government procurement to support local industry, especially the development of local renewable energy industries***
- ***The government should maintain its current government procurement exemptions for SMEs, Indigenous enterprises and for local government procurement.***

*No Investor-State Dispute Settlement (ISDS) processes*

- ***IPEF should not include any form of Investor-State Dispute Settlement (ISDS).***



## Process for the negotiations and decision-making about IPEF

The current process for negotiating trade agreements is secretive and lacks democratic accountability. Negotiations are conducted in secret, with no access to negotiating texts, and the final text is not released until after the deal is signed. There is no independent evaluation of the economic and social costs of the agreement. The review by the Joint Standing Committee on Treaties cannot change the text, but only recommend for or against the enabling legislation. Parliament only debates and votes on the enabling legislation, not the whole agreement.<sup>4</sup>

Since the announcement of the start of IPEF negotiations on September 9, 2022, we understand there may be plans to implement the government's platform policy for a more transparent and accountable process for trade negotiations.<sup>5</sup> We welcome this development.

We note that, following an FOI application from a New Zealand civil society group, a document entitled *Indo-Pacific Economic Framework Treatment of Documents Related to Negotiations* signed by the US and New Zealand governments on April 13, 2022, was released by the New Zealand government. The US government has subsequently published on its FOIA Library site<sup>6</sup> several similar documents, including a similar document signed by the US and Australian governments on June 29, 2022. The document states that all documents relating to the negotiations will be kept secret

“for five years after any instrument enters into force, or five years after the close of negotiations related to such instrument”

and that they may only be shared with

“government officials and persons outside government who participate in the government's domestic consultation processes and have a need to review certain information. Anyone given access to this information will be advised that they cannot share the information with people who are not authorised to see the information. These restrictions will not apply to the government's own information, which the participant may disclose, provided that any reference positions of other participants or to agreed texts is not included in the disclosure.”<sup>7</sup>

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<sup>4</sup> AFTINET (2021) AFTINET submission to the Joint standing Committee inquiry into certain aspects of the treaty-making process with respect to trade agreements, <http://aftinet.org.au/cms/node/1904>.

<sup>5</sup> Australian Labor Party (2021) ALP National Platform, pp. 90-91 <https://alp.org.au/media/2594/2021-alp-national-platform-final-endorsed-platform.pdf>.

<sup>6</sup> See United States Trade Representative (2022) FOIA Library Site, Indo-Pacific Economic Framework, <https://ustr.gov/about-us/reading-room/freedom-information-act-foia/foia-library>.

<sup>7</sup> See United States Trade Representative (2022) Indo-Pacific Economic Framework Treatment of Documents Related to Negotiations between the United States and Australia, June 29, [https://ustr.gov/sites/default/files/foia/US-Australia%20Signed%20IPEF%20Trade%20Pillar%20Confidentiality%20Agreement\\_06292022.pdf](https://ustr.gov/sites/default/files/foia/US-Australia%20Signed%20IPEF%20Trade%20Pillar%20Confidentiality%20Agreement_06292022.pdf).

This is a more restrictive secrecy agreement than that applied to the CPTPP negotiations, which kept information secret for four years after the negotiations.<sup>8</sup>

This agreement runs counter to the current government's policy for a more transparent process for trade negotiations. We continue to advocate for a more transparent process which will involve sharing of texts and information about texts with all stakeholder groups, including civil society organisations and parliament.

We also understand that Australia may host an IPEF meeting in December 2022. We recommend the following elements of a more transparent and accountable process. We believe that all of these elements would contribute to a more transparent and democratic process from a wider range of stakeholders, which in turn would result in better quality agreements.

***Recommendations:***

***During the negotiations about IPEF:***

- ***A clear statement to parliament of Australia's negotiating objectives for IPEF, with an independent evaluation of the costs and benefits to Australia.***
- ***Access to the content of negotiating texts to allow detailed feedback from all stakeholders including civil society groups.***
- ***In addition to written submissions, opportunities for presentations and questions to negotiators from all stakeholders and regular briefings from negotiators to answer questions about the texts.***
- ***Publication of the final texts and independent evaluation of economic, social and environmental costs and benefits before agreements are signed.***
- ***Parliament to vote on the whole agreement, not just enabling legislation.***

***During negotiating meetings:***

- ***Stakeholder accreditation for both civil society and business groups.***
- ***Adequate notice (at least four weeks) of the meeting so that civil society groups can book to attend the meeting***
- ***Presentations by civil society groups to negotiators with equal time for both business and civil society groups to make presentations (at least 10 minutes per presentation).***
- ***Participation in informal opportunities to meet negotiators in meal breaks or receptions.***

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<sup>8</sup> See the confidentiality conditions on the title page of the draft Investment Chapter at Wikileaks (2015) Secret Trains-Pacific Partnership Agreement (TPP) draft Investment Chapter, March 25, <https://wikileaks.org/tpp-investment/>.

## General Comments on the IPEF Four Pillars Negotiating Objectives

The negotiating objectives for the four IPEF Pillars were announced on September 9, 2022.<sup>9</sup> They are expressed as summary points at a high level of generality, and sometimes contain points which appear without further elaboration to be contradictory.

Because of these limitations, this submission will deal with general principles. The following section comments on Pillar 1 Trade, which is most likely to include some form of legally binding commitments,<sup>10</sup> possibly based on existing trade agreements like the US-Mexico-Canada Agreement (USMCA).

### Comments on Pillar 1 Trade

#### IPEF should include special and differential treatment for developing countries

IPEF countries vary greatly in economic wealth and levels of economic development from high income industrialised economies to low and middle-income countries with large low-income rural populations. They include Fiji which as a small Pacific Island economy has unique development needs and is already badly affected by climate change.

We note in Pillar 1 the recognition of “different levels of economic development capacity constraints” and the commitment to “considering flexibilities where appropriate and working with partners on providing for technical assistance and capacity building.”<sup>11</sup>

This would require legally binding commitments to recognise special and differential treatment for developing countries, flexible time frames for implementation and specific commitments for technical assistance and capacity building.

#### IPEF should support the highest standards of workers’ rights

Pillar 1<sup>12</sup> objectives include each country adopting, maintaining and enforcing laws based on internationally-recognised labour rights, based on the ILO Declaration on Fundamental Principles and Rights at Work, which IPEF governments have adopted, including with respect to workers in the digital economy. We note that the ILO Declaration is also mentioned in the negotiating objectives for the other pillars.

We note that on 10 June 2022 the ILO adopted a resolution to add the principle of a safe and healthy working environment to the International Labour Organization’s (ILO) Fundamental Principles and Rights at Work. These are the Occupational Safety and Health Convention, 1981 (No. 155) and the Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187). These are now considered as fundamental Conventions.

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<sup>9</sup> United States Embassy and consulates in Indonesia (2022) Ministerial Statements for the four IPEF pillars, September 9, <https://id.usembassy.gov/ministerial-statements-for-the-four-ipef-pillars-trade-supply-chains-clean-economy-and-fair-economy/>.

<sup>10</sup> United States Trade Representative (2022) Pillar I, trade, September 9, [https://ustr.gov/sites/default/files/2022-09/IPEF%20Pillar%201%20Ministerial%20Text%20\(Trade%20Pillar\)\\_FOR%20PUBLIC%20RELEASE%20\(1\).pdf](https://ustr.gov/sites/default/files/2022-09/IPEF%20Pillar%201%20Ministerial%20Text%20(Trade%20Pillar)_FOR%20PUBLIC%20RELEASE%20(1).pdf).

<sup>11</sup> *ibid*, p. 1.

<sup>12</sup> *ibid*, p. 1.

## **Recommendations**

***IPEF Labour Rights objectives should be implemented through enforceable commitments by all parties to implement agreed international standards on labour rights, including the International Labour Organisation's (ILO) Declaration on Fundamental Principles and Rights at Work and the Eight Fundamental Conventions. These include:***

- ***The right of workers to freedom of association and the effective right to collective bargaining (ILO Conventions 87 and 98)***
- ***The elimination of all forms of forced or compulsory labour (ILO Conventions 29 and 105)***
- ***The effective abolition of child labour (ILO Conventions 138 and 182), and***
- ***The elimination of discrimination in respect of employment and occupation (ILO Conventions 100 and 111***
- ***a safe and healthy working environment (ILO Conventions 185 and 187).***

***Each country should also develop appropriate minimum standards for working hours, wages and health and safety, based on ILO principles.***

***The implementation of these basic rights should be enforced through the government-to-government dispute processes contained in the agreement, in the same way as other chapters and provisions of the agreement.***

IPEF should support the highest environmental standards based on multilateral agreements and action to reduce carbon emissions

Pillar 1 states that there will be a focus on provisions that

*“relate to meaningfully contributing to environmental protection and to responses to our common sustainability challenges, including climate change through: effective enforcement of our respective environmental laws and strengthening environmental protection; protection of the marine environment; biodiversity conservation; combating wildlife trafficking and illegal logging and associated trade; climate change solutions that build on existing commitments.”*

This section also mentions “implementation of our respective obligations under multilateral environmental agreements: and enhanced environmental cooperation.”<sup>13</sup>

## **Recommendations**

***IPEF environmental objectives can best be achieved through legally binding commitments from governments to implement United Nations multilateral environmental agreements, including***

- ***the Montréal Protocol on Hydrofluorocarbons***
- ***the International Convention for the Prevention of Pollution from Ships 1973 as modified by the Protocol of 1978***
- ***the UN Convention on International Trade in Endangered Species***
- ***the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (in force as from 11 December 2001)***

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<sup>13</sup> Ibid, p.p.1-2

- ***the United Nations Framework Convention on Climate Change 1992, the Paris Agreement 2015, and subsequent Climate Change Agreements at COP 26 2021 and COP 27 2022.***

***The implementation of these agreements should be enforced through the government-to-government dispute processes contained in the agreement, in the same way as other chapters and provisions of the agreement.***

We also support the objectives of “enhancing renewable energy, energy efficiency, zero and low carbon sourcing: green investment and finance: circular economy approaches: promoting an environmentally sustainable digital economy and responsible business conduct,” but note that these appear to rely on voluntary consultation and cooperation rather than binding commitments.

IPEF should support the highest standards for inclusion of Indigenous Peoples, minorities, women, people with disabilities and rural populations

We note that the Pillar 1 negotiating goals include “expanding meaningful access to participation in the regional economy for all sectors of society including indigenous peoples, people with disabilities, minorities, women, rural populations and local communities.”<sup>14</sup>

We note that the government has recently called for expressions of interest for an Ambassador for First Nations Peoples. This person will lead policy development to embed Indigenous perspectives, experiences and interests into Australian foreign and trade policy.<sup>15</sup>

This policy should inform Australia’s participation in IPEF.

Meaningful participation by Indigenous Peoples in IPEF will require meaningful consultation with Indigenous groups in the IPEF negotiations, the adoption of clear standards and measurable targets and timeframes set for improvement of participation, and evaluation of outcomes against those targets.

The same principles apply to the participation of women and people with disabilities.

#### ***Recommendations***

***Meaningful participation by indigenous peoples in IPEF will require meaningful consultation with Indigenous groups in the IPEF negotiations, the adoption of clear standards and measurable targets and timeframes set for improvement of participation, and evaluation of outcomes against those targets.***

***The same principles apply to the participation of women and people with disabilities.***

***Standards should be based on the UN Declaration on the Rights of Indigenous Peoples, the UN Convention on the Elimination of All Forms of Discrimination Against Women and the UN Convention on the Rights of Persons with Disabilities.***

***Measurable targets should also be enforceable, with evaluation of outcomes against those targets***

***The implementation of these agreements should be enforced through the government-to-government dispute processes contained in the agreement, in the same way as other chapters and provisions of the agreement.***

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<sup>14</sup> *ibid*, p.3

<sup>15</sup> Penny Wong, (2022) Media Release: Ambassador for First Nations People, September 21, <https://www.foreignminister.gov.au/minister/penny-wong/media-release/ambassador-first-nations-people>.

## Agriculture

We note the commitments to “advancing food security and sustainable agricultural practices,” and the aim to “help contribute to climate change mitigation and adaptation, food security and resiliency.”<sup>16</sup>

This is an especially sensitive area given the continuing unfair subsidies and other assistance to domestic agriculture in countries like the US and Japan, which have not been addressed by WTO rules in the WTO Agreement on Agriculture. This was acknowledged by the WTO Director-General at a recent meeting which discussed the challenges of food insecurity for developing countries which have been exacerbated by climate change-induced weather events and the war in Ukraine.<sup>17</sup>

Demands from agribusiness and the agro-chemical industry in high-income countries to open up land for agribusiness investment can adversely affect small farmers and the environment in developing countries.

Fair trade in agriculture requires the application of the principles of special and differential treatment for developing countries to enable policies to ensure food security and for equitable and sustainable development of agriculture.

These issues are exacerbated by the impacts of more intense weather events and rising sea levels resulting from climate change that have a disproportional impact on small farmers.

### **Recommendations**

***The approach to trade in agriculture should not focus only on expanding exports and investment from Australia and other high-income countries at the expense of small farmers and the environment in developing countries. There should be special and differential treatment for developing countries and regulatory space for governments to protect livelihoods and the environment.***

## IPEF should not place Big Tech interests above users’ rights and government right to regulate

Pillar 1 also has the objectives of “advancing digital trade by building an environment of trust and confidence in the digital economy; enhancing access to online information and use of the Internet; facilitating digital trade; addressing discriminatory practices; and advancing resilient and secure digital infrastructure platforms.”<sup>18</sup>

Digital trade is a complex area of trade law that is directly tied to provisions relating to financial services and broader trade in services. The digital trade agenda in trade agreements is highly influenced by the US tech industry lobby, which seeks to codify rules that suit the dominant tech industry companies. These rules were the basis of the USA’s negotiating position during the Trans-

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<sup>16</sup> IPEF Pillar 1, p.2.

<sup>17</sup> World Trade Organisation (2022) DG Okonjo-Iweala urges update to WTO rules to address global food market challenges, October 24 [https://www.wto.org/english/news\\_e/news22\\_e/agri\\_24oct22\\_e.htm](https://www.wto.org/english/news_e/news22_e/agri_24oct22_e.htm)

<sup>18</sup> IPEF Pillar, p.2.

Pacific Partnership negotiations<sup>19</sup> and the USMCA, and are known as the Digital2Dozen principles.<sup>20</sup>

The aim of this digital trade agenda is to secure the free flow of cross-border data and to establish an international regulatory framework that prevents governments from regulating the digital domain and the operations of big tech companies. This is particularly concerning given the recent issues arising from the lack of regulation of digital platforms and the business practices of big tech companies including:

- Facebook and Google's data abuse scandals<sup>21</sup>
- Uber classifying itself as a technological platform to avoid regulation and enable its exploitation of workers<sup>22</sup>
- Apple's tax avoidance<sup>23</sup>
- Anti-competitive practices by Facebook, Google and Amazon.<sup>24</sup>

The Australian Competition and Consumer Commission's (ACCC) *Digital Platforms Report*, released in July 2019, identified the need for regulatory reform in Australia to address concerns about the market power of large digital platform companies, the inadequacy of consumer protections and laws governing data collection, and the lack of regulation of digital platforms.<sup>25</sup> In its response to the ACCC report in December 2019, the government "accepted the overriding conclusion that there was a need for reform" and has outlined a plan for immediate and long-term action.

Concerns were raised at the time that the government's response to the ACCC inquiry did not go far enough to address existing and emerging gaps in Australia's regulatory framework and that additional reform may be required.<sup>26</sup>

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<sup>19</sup> Kelsey, J (2017a) E-commerce - The development implications of future proofing global trade rules for GAFA, Paper to the MC11 Think Track, 'Thinking about a Global Governance of International Trade for the 21st Century; Challenges and Opportunities on the eve of the 11th WTO Ministerial Conference', Buenos Aires, Argentina, 13 December 2017. Via: <https://bestbits.net/wp-uploads/2017/12/Kelsey-paper-for-MC11-Think-Track.pdf>.

<sup>20</sup> Office of the United States Trade Representative (2016) The Digital2Dozen, via: <https://ustr.gov/about-us/policy-offices/press-office/reports-and-publications/2016/digital-2-dozen>.

<sup>21</sup> Waterson, J (2018) UK fines Facebook £500,000 for failing to protect user data, The Guardian, October 25, via: <https://www.theguardian.com/technology/2018/oct/25/facebook-fined-uk-privacy-access-user-data-cambridge-analytica>.

<sup>22</sup> Bowcott, O, (2017) Uber to face stricter EU regulation after ECJ rules it is transport firm, The Guardian, December 21, via: <https://www.theguardian.com/technology/2017/dec/20/uber-european-court-of-justice-ruling-barcelona-taxi-drivers-ecj-eu>.

<sup>23</sup> Drucker, J and Bowers, S., (2017) After a Tax Crackdown, Apple Found a New Shelter for Its Profits, The New York Times, November 7, via: <https://www.nytimes.com/2017/11/06/world/apple-taxes-jersey.html>.

<sup>24</sup> Ho, V., (2019) Tech monopoly? Facebook, Google and Amazon face increased scrutiny, The Guardian, June 4, via: <https://www.theguardian.com/technology/2019/jun/03/tech-monopoly-congress-increases-antitrust-scrutiny-on-facebook-google-amazon>.

<sup>25</sup> Australian Competition and Consumer Commission (2019) Digital Platforms Inquiry final report, June 2019, via: <https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report>.

<sup>26</sup> Kemp, K and Nicholls, R (2019) The federal government's response to the ACCC's Digital Platforms Inquiry is a let down, 2019, via: <http://theconversation.com/the-federal-governments-response-to-the-acccs-digital-platforms-inquiry-is-a-let-down-128775>.



### *Digital trade rules and concentration of market power*

The need to regulate the market power of large digital platform companies was confirmed when, following advice from the ACCC, the previous government in March 2021 passed legislation for the News Media Bargaining Code, a mandatory code of conduct which governs commercial relationships between Australian news businesses and digital platforms which benefit from a significant bargaining power imbalance. The code enables news media companies to reach agreements for payment from digital platforms for their use of news media information.<sup>27</sup> Addressing this imbalance was seen as necessary to support the sustainability of the Australian news media sector, which is essential to a well-functioning democracy.

We note that US digital companies Google and Meta strongly objected to this regulation and claimed it violated the non-discrimination rules in the Australia-US Free Trade Agreement by discriminating against US companies.<sup>28</sup> The government argued that the legislation was not discriminatory, but addressed power imbalances and persisted with the legislation without adverse trade consequences. However, IPEF will apply to US companies. If IPEF adopted the digital trade provisions of the USMCA, those provisions would be more restrictive of such legislation, and could limit future regulation in this area.

In this rapidly changing digital environment, IPEF must not include digital trade provisions that restrict policy flexibility for the Australian government to regulate to address the concentration of market power.

### *Digital trade rules, privacy rights and consumer protections*

The risk of digital trade rules to privacy rights and consumer protections has been widely documented and casts doubt on assurances that digital trade rules are compatible with privacy and consumer protections.<sup>29</sup> Privacy rights and data security are undermined by rules that restrict the regulation of electronic transmissions, preventing governments from requiring encryption of personal data and other security measures. See the section on cybersecurity below.

Rules that lock-in the free cross-border flow of data also enable companies to move data, including personal data, to jurisdictions where privacy laws are more limited, effectively evading privacy legislation. The assertion that the inclusion of privacy and consumer protections in digital trade chapters, which require parties to have/enact privacy and consumer laws, is enough to ensure privacy is upheld, is misleading. Unless these provisions outline a minimum standard for this legislation there is no guarantee that once data is moved and stored offshore it will be subject to the same privacy standards as in Australia.<sup>30</sup> For example, in March 2020 it was revealed that Chow Tai

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<sup>27</sup> Australian Competition and Consumer Commission (2021) News Media Bargaining Code, <https://www.accc.gov.au/focus-areas/digital-platforms/news-media-bargaining-code/news-media-bargaining-code>.

<sup>28</sup> Disruptive Competition Project's "The Dangers of Australia's Discriminatory Media Code" (Feb. 19, 2021). <https://www.project-disco.org/21st-century-trade/021921-the-dangers-of-australias-discriminatory-media-code/>

<sup>29</sup> Greenleaf, G (2018) Free Trade Agreements and data privacy: Future perils of Faustian bargains, in Svantesson, D and Kloza D (eds.) Transatlantic Data Privacy Relationships as a Challenge for Democracy, 2018, Intersentia, via: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2732386](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2732386).

<sup>30</sup> *ibid.*



Fook Enterprises (CTFE), the Hong Kong company that owned the privatised Australian Alinta Energy company, was storing sensitive personal data from Australian customers in Singapore and New Zealand without adequate privacy protections. The company had breached undertakings made at the time of privatisation to store the data in Australia.<sup>31</sup>

#### *Digital trade rules, cybersecurity and security standards*

Trade agreements are increasingly including provisions that impact on the regulations of electronic transactions and data storage, which could increase cybersecurity risks. For example, the CPTPP includes provisions that restrict governments from setting security standards for electronic transactions.<sup>32</sup> This could reduce security across a range of sectors, including impacting credit card data, online banking, and healthcare data amongst others.<sup>33</sup> The impact of electronic transactions rules is worsened when combined with digital trade rules that enable the free flow of cross-border data, as governments are restricted in their ability to ensure that this data is encrypted when it is transferred or that it is stored securely.<sup>34</sup>

The recent massive hacking of personal data of millions of Australians held by the Singapore-owned Optus telecommunications company and the Medibank Private health insurance company, revealed a gap between both community and government expectations about the companies' data security measures and the actual practices of the companies. Both government and digital experts criticised the companies' lack of effective data security measures.<sup>35</sup> The government has since flagged that it is reviewing cybersecurity regulation, with the Minister saying "we need a whole-of-nation effort of improving the security around data protection, around cyber security, so that we are better equipped in the 21st century."<sup>36</sup>

It is clear that governments must retain the ability to regulate cybersecurity standards. The rapid emergence of new technologies in this space creates new cybersecurity risks requiring new regulatory frameworks.

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<sup>31</sup> Ferguson A. and Gillett C. (2020) "Credit cards, addresses and phone numbers vulnerable: More than one million energy customers' privacy at risk", *Sydney Morning Herald*, March 1, <https://www.smh.com.au/business/companies/credit-cards-addresses-and-phone-numbers-vulnerable-more-than-one-million-energy-customers-privacy-at-risk-20200228-p545bw.html>.

<sup>32</sup> Department of Foreign Affairs and Trade (2018) Comprehensive and Progressive Agreement for Trans-Pacific Partnership text, Article 14.6, via: <https://dfat.gov.au/trade/agreements/in-force/cptpp/official-documents/Documents/14-electronic-commerce.pdf>.

<sup>33</sup> Reid Smith, S (2018) Preliminary note: Electronic authentication: some implications, via: <http://ourworldisnotforsale.net/2018/esignatures2018-9.pdf>.

<sup>34</sup> *ibid.*

<sup>35</sup> Baird, L., and di Stephano, M., (2022) Optus' 'opaque' Singapore owner faces scrutiny over hacking attack, *Australian Financial Review*, September 30, <https://www.afr.com/companies/telecommunications/optus-opaque-singapore-owner-faces-scrutiny-over-hacking-attack-20220930-p5bm5u>. See also Taylor, J., (2022) Medibank confirms hacker had access to data of all 3.9 million customers, *the Guardian*, October 26, <https://www.theguardian.com/technology/2022/oct/26/medibank-confirms-all-39-million-customers-had-data-accessed-in-hack>.

<sup>36</sup> Varghese, S., O'Neil hammers Coalition over 'useless' cyber-security laws, October 2, <https://itwire.com/business-it-news/security/o-neil-hammers-coalition-over-useless-cyber-security-laws.html>.

### *Digital trade rules and government access to source code and algorithms*

The use of algorithmic systems to collect and analyse data is a fundamental aspect of the digital economy. However, there is growing evidence that demonstrates that algorithms can be used by companies to reduce competition<sup>37</sup> and that algorithmic bias can result in race, gender, class or other discrimination.<sup>38</sup>

For governments and regulators that are responsible for identifying and responding to concerns in relation to competition law and algorithmic bias, access to source code and algorithms is an important tool in this process. Regulators may require access to source code in a range of situations, including for example, to determine whether practices contravene competition law or to detect if algorithms are discriminatory.<sup>39</sup> Digital trade rules that prevent governments from requiring that companies transfer or give access to their source code can undermine government efforts to identify and respond to anti-competitive practices and algorithmic bias.

### *Digital trade rules and workers' rights*

Trade rules that enable global corporations, including those operating in the gig economy, to access Australian markets without a local presence, could worsen the situation for workers and undermine Australian employment law. By enabling global corporations, including those operating in the gig economy, to access Australian markets without a local presence, digital trade rules could worsen the situation for workers and undermine Australian employment law.

The International Trade Union Confederation (ITUC) argues that “without a local presence of companies, there is no entity to sue and the ability of domestic courts to enforce labour standards, as well as other rights, is fundamentally challenged.”<sup>40</sup> Concerns have also been raised about the impact that new technologies and artificial Intelligence can have in recruitment practices and on work conditions.<sup>41</sup>

The rise of the digital economy can undermine workers' rights by enabling digital platform-based companies like Uber or Deliveroo to classify workers as contractors or individual businesses, thus removing the responsibility to provide basic rights like minimum wages, maximum working hours, safe working conditions and workers' compensation entitlements.

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<sup>37</sup> European Commission (2017) Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service, June 2017, via: [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_17\\_1784](https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1784).

<sup>38</sup> Mittelstadt, B et al. (2016) The ethics of algorithms: Mapping the debate, *Big Data & Society*, July–December 2016, via: <https://journals.sagepub.com/doi/pdf/10.1177/2053951716679679>.

<sup>39</sup> Reid-Smith, S (2017) Some preliminary implications of WTO source code proposal – MC11 briefing paper, via: [https://ourworldisnotforsale.net/2017/TWN\\_Source\\_code.pdf](https://ourworldisnotforsale.net/2017/TWN_Source_code.pdf).

<sup>40</sup> International Trades Union Confederation (2019) E-commerce push at WTO threatens to undermine labour standards, via: <https://www.ituc-csi.org/e-commerce-push-at-wto-undermines-workers>.

<sup>41</sup> The Centre for Future Work (2019) Turning 'Gigs' Into Decent Jobs – Submission to: Inquiry into the Victorian On-Demand Workforce. Available at [https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/8815/5669/1362/The\\_Australia\\_Institute.pdf](https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/8815/5669/1362/The_Australia_Institute.pdf).

The report of the Victorian Government’s Inquiry into the Victorian On-Demand Workforce made recommendations in 2020 for changes in regulation to both the Commonwealth and Victorian governments.<sup>42</sup>

The current Australian government has foreshadowed legislation in 2023 that seeks to ensure that digital platform-based companies cannot evade these responsibilities and that gig economy workers have the same rights as other workers, through establishing “minimum wages and conditions for ‘employee-like’ workers.”<sup>43</sup>

It is essential that digital trade rules in IPEF do not restrict the government’s ability to implement regulation of labour rights and working conditions for gig economy workers.

**Recommendations:**

***IPEF should not include provisions that:***

- ***Prevent governments from regulating to address concentration of market power.***
- ***Prevent current and future governments from regulating the cross-border flow of data.***
- ***Prohibit the use of local presence requirements.***
- ***Prevent governments from accessing source code and algorithms and from regulating to prevent the misuse of algorithms to reduce competition and to prevent class, gender, race and other forms of discrimination.***
- ***Prevent governments from setting standards for cybersecurity.***
- ***Prevent governments from regulating to ensure that gig economy workers have the same rights as other workers.***

***IPEF should include:***

- ***Full exemptions for tax policy.***
- ***Mandatory minimum standards for privacy and consumer protections, including where data is held offshore. These should be no weaker than Australian standards.***

## Comments on other Pillars

We understand that while Pillars II, III and IV will not be legally binding trade agreements could be other types of agreements like Memoranda of Understanding, which are diplomatic agreements that are not legally enforceable and can be changed by either party.

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<sup>42</sup> Industrial Relations Victoria (2020) Report of the Inquiry into the Victorian On-Demand Workforce, June 12, Victorian Government, Melbourne, pp. 189-206 [https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/4915/9469/1146/Report\\_of\\_the\\_Inquiry\\_into\\_the\\_Victorian\\_On-Demand\\_Workforce-reduced\\_size.pdf](https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/4915/9469/1146/Report_of_the_Inquiry_into_the_Victorian_On-Demand_Workforce-reduced_size.pdf)

<sup>43</sup> Alderman, P., (2022) The Secure Jobs, Better Pay Bill is here: What are the proposed changes to Australia’s industrial relations landscape? October 31, <https://www.lexology.com/library/detail.aspx?g=086b0c75-fbda-4b9d-933f-9f87d41b8b66>.

## Supply chains Pillar II

We note the commitment to improving transparency, diversity, security and sustainability in supply chains to make them more resilient, robust and well-integrated.<sup>44</sup>

We welcome the intention to “promote labour rights based on the ILO declaration on fundamental principles and rights at work, which the partners have adopted support”,<sup>45</sup> but note that these may not be legally enforceable in the context of Pillar II.

### Towards a ban on production and trading of asbestos products in IPEF supply chains

IPEF could provide the opportunity to lift the standards of occupational health and safety in the region by banning the production of, trade in, or use of all forms of asbestos fibres, whether or not bonded.

There is unequivocal evidence of the causal link between all forms of asbestos—including chrysotile—and human disease, specifically mesothelioma and other deadly cancers, as well as chronic lung disease (asbestosis). All forms of asbestos, including chrysotile, are hazardous to human health. Approximately half of the deaths from occupational cancer are estimated to be caused by asbestos. In addition, it is estimated that several thousand deaths annually can be attributed to exposure to asbestos in the home.<sup>46</sup>

The Chrysotile Information Centre (CIC)<sup>47</sup>, acts for producers in the world's two big exporting nations, Russia and Kazakhstan. Not only has the CIC been determined to block efforts to ban chrysotile in Asian markets, it also actively promotes white asbestos as a ‘safe product,’ which is contrary to all reputable health evidence.

According to the World Health Organisation (WHO), there is no safe threshold level of asbestos exposure that has been established below which all individuals would be free from cancer risk—including those exposed to chrysotile. The greater the exposure, the greater the risk of developing any asbestos-related disease. The WHO recommends that “the most efficient way to eliminate asbestos-related diseases is to stop the use of all types of asbestos.”<sup>48</sup>

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<sup>44</sup> US Commerce Department (2022) Ministerial Statement on Pillar II of the Indo-Pacific Framework for Prosperity, Pillar II, p.1 <https://www.commerce.gov/sites/default/files/2022-09/Pillar-II-Ministerial-Statement.pdf>.

<sup>45</sup> *ibid*, p.1.

<sup>46</sup> World Health Organisation (2018) Fact Sheet on Asbestos” February 15, <https://www.who.int/news-room/fact-sheets/detail/asbestos-elimination-of-asbestos-related-diseases>.

<sup>47</sup> See the CIC website <https://www.chrysotile-asia.com/>

<sup>48</sup> *ibid*, p. 1.

The World Trade Organisation (WTO) permitted banning of asbestos products on health grounds in March 2001<sup>49</sup> and 67 countries have now banned them, including IPEF members Australia, Japan, South Korea and Brunei Darussalam,<sup>50</sup>

The Asian Infrastructure Development Bank (AIIB) in 2021 added all asbestos-containing materials to its exclusion list. This means the AIIB will not knowingly finance projects involving the production of, trade in, or use of all asbestos fibres.<sup>51</sup>

The Asian Development Bank (ADB) is also moving towards banning asbestos products. In April 2022 the ADB released the *Good Practice Guidance for the Management and Control of Asbestos: Protecting Workplaces and Communities from Asbestos Exposure Risks*.<sup>52</sup> This publication represents step one in a two-step process to exclude asbestos from all ADB-financed projects. The policy is expected to come into effect in 2023.

It is clear that international financial organisations in the region are phasing out asbestos use in projects they finance. IPEF members should also work towards the goal of banning all asbestos products.

### **Recommendation**

***IPEF should establish a work program to assist all members to phase out production of, trade in, or use of all forms of asbestos fibres, whether or not bonded. This program should include target dates, education and funding programs to assist developing countries to meet these goals.***

Mutual cooperation in supply chains and avoiding regional polarisation and instability

We note that specific commitments to establish criteria for critical sectors and goods, increased resiliency and investment in critical sectors of goods, establish an information-sharing crisis response mechanism, strengthen supply chain logistics and improve supply chain transparency will all depend on mutual cooperation between IPEF participants.

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<sup>49</sup> World Trade Organisation (2001) Report of the WTO Appellate Body, European Communities measures affecting asbestos and asbestos-containing products, WT/DS135/AB/R. 12 March [https://www.wto.org/english/tratop\\_e/dispu\\_e/135abr\\_e.pdf](https://www.wto.org/english/tratop_e/dispu_e/135abr_e.pdf).

<sup>51</sup> Australian Government Asbestos Safety and Eradication Agency, Countries with Asbestos Bans, Canberra. <https://www.asbestossafety.gov.au/importing-advice/countries-asbestos-bans>.

<sup>51</sup> Asian Infrastructure Development Bank, (2021) Environmental and Social Framework, May, pp 77-8, <https://www.aiib.org/en/policies-strategies/download/environment-framework/AIIB-Revised-Environmental-and-Social-Framework-ESF-May-2021-final.pdf>.

<sup>52</sup> Asian Development Bank, (2022) Good Practice Guidance for the Management and Control of Asbestos: Protecting Workplaces and Communities from Asbestos Exposure Risks, March' <https://www.adb.org/sites/default/files/publication/783636/good-practice-management-control-asbestos.pdf>.

It is not clear how the unilateral US ban on US exports associated with the manufacturing of computer chips to China announced on October 7,<sup>53</sup> the day before the IPEF negotiating objectives were announced, fits into this cooperative framework. The US will also apply secondary sanctions to other countries which export these products to China. It is not clear to what extent other IPEF members were consulted about this and what its impacts will be on their economies.

We note again Australia's policy to develop independent economic, diplomatic, security, aid and development relationships with ASEAN and other countries, supporting "a regional order in which all states can contribute to a strategic equilibrium, rather than be forced to choose sides."<sup>54</sup>

Singapore's prime minister, Lee Hsien Loong, has warned that greater decoupling between the US and China would create a "less stable world. The Biden administration's latest move is a very serious one, I'm sure they have considered it carefully. It can have very wide ramifications."<sup>55</sup>

ANU Crawford School of Public Policy Associate Professor Andrew Kennedy said it was crucial for the US to keep its allies on board, saying, "There's been concern that the US was balancing these considerations fairly well up to this point, but now it seems like it might be going for a more blanket approach. And if they did go with a kind of more blanket approach [to restrictions], they risk alienating the allies."<sup>56</sup>

While diversification of supply chains is a worthy aim, completely decoupling from trade with China is not achievable for Australia and many other IPEF countries, and would be destabilising for the region.

### ***Recommendation***

***Australia should maintain its own independent trade and foreign policy in the region and work with others in IPEF to both diversify supply chains and avoid polarisation and instability in the region.***

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<sup>53</sup> US Bureau of Industry and Security (2022) Commerce Implements New Export Controls on Advanced Computing and Semiconductor Manufacturing Items to the People's Republic of China (PRC), October 7, <https://www.bis.doc.gov/index.php/documents/about-bis/newsroom/press-releases/3158-2022-10-07-bis-press-release-advanced-computing-and-semiconductor-manufacturing-controls-final/file>.

<sup>54</sup> Penny Wong, (2022) Statement to ASEAN-Australia Ministerial meeting, August 4, Cambodia, <https://www.foreignminister.gov.au/minister/penny-wong/speech/statement-asean-australia-ministerial-meeting>.

<sup>55</sup> Dzedzic, S., (2022) Singapore's Prime Minister Lee Hsien Loong avoids comments on Australia and China relations during meeting with Anthony Albanese, ABC online news, October 18, <https://www.abc.net.au/news/2022-10-18/singapore-australia-china-beijing-lee-hsien-loong-albanese/101548248>.

<sup>56</sup> Mann, T., How the US is trying to maintain dominance of the advanced semiconductor industry and limit China's ability to develop its own, September 25, ABC online news, <https://www.abc.net.au/news/2022-09-25/us-microchip-ban-limit-china-technical-advances-semiconductor/101461042>.

## Clean economy Pillar III

AFTINET supports the objectives of “cooperation on research, development, commercialisation, availability, accessibility and deployment of clean technology and climate friendly technologies.”<sup>57</sup>

AFTINET supports the recognition of “the need to promote just transitions through the creation of decent work, quality jobs and labour rights based on the ILO Declaration on Fundamental Principles and Rights at Work, which the partners have adopted.”

We support the intention to “promote provisions and initiatives that will accelerate climate action and sustainable growth across the region, and to reduce greenhouse gas emissions across priority sectors in pursuit of our respective pathways to net zero.”

We note that carbon capture and storage is also mentioned as a priority. We do not recommend priority being given to technologies for carbon capture and storage, as this is not a proven technology for effectively reducing emissions, is very costly and resources spent on it could detract from the main goal which is the reduction of carbon emissions.<sup>58</sup>

### **Recommendations**

***The achievement of IPEF environmental goals will require the active involvement of unions, environmental and other civil society organisations, and clear accountability about how such commitments will be implemented.***

***Carbon capture and storage should not be a priority for IPEF.***

We note that the Singapore-Australia Green Economy Agreement launched on October 18, 2022, appears to be in the form of a Memorandum of Understanding, which is not legally binding and can be amended by either party at any time.<sup>59</sup>

The is a very general framework with good objectives but the main specifics so far are about reduction of trade barriers on environmental goods and services. There are a wide range of other important objectives which will be fleshed out though consultation, presumably in parallel with the IPEF process.

### **Recommendation**

***The government should clarify the relationship between IPEF and the Singapore Green Economy Agreement and clarify the accountability for how such agreements will be implemented.***

## Fair Economy Pillar IV

AFTINET supports measures to “level the playing field for businesses and workers” by “preventing and combating corruption, curbing tax evasion and improving domestic resource mobilization. and

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<sup>57</sup> US commerce Department (2022) Ministerial Statement on Pillar III of the Indo-Pacific Framework for Prosperity, Pillar III, p.1, <https://www.commerce.gov/sites/default/files/2022-09/Pillar-III-Ministerial-Statement.pdf>.

<sup>58</sup> Centre for International Environmental Law (2021) Confronting the Myth of Carbon-Free Fossil Fuels: Why Carbon Capture Is Not a Climate Solution, July, Washington, <https://www.ciel.org/reports/carbon-capture-is-not-a-climate-solution>.

<sup>59</sup> Department of Foreign Affairs and Trade (2022) Singapore-Australia Green Economy Agreement, October 18, Canberra, <https://www.dfat.gov.au/geo/singapore/singapore-australia-green-economy-agreement/singapore-australia-green-economy-agreement-text#commencement>.



the references to the United Nations Convention Against Corruption, the standards of the Financial Action Task Force and the OECD Anti-Bribery Convention.

We note the references to the ILO declaration on fundamental principles and rights at work, and to the role of local and other communities, women and Indigenous Peoples. However, it is not clear how these groups will be meaningfully involved in the process.

We also support the goal of enhancing “cooperation and capacity building technical assistance and innovative implementation approaches, recognising the different levels of development and capacity needs of each country.”

We support the aims of reducing corruption and of reducing tax evasion by multinational corporations.

### **Recommendation**

***The government should clarify the process of involvement of unions and other civil society groups in the goals of reducing corruption and reducing tax evasion by multinational companies and the process of accountability for how such agreements will be implemented.***

## **What should not be included in IPEF**

### IPEF should not extend intellectual property rights

Intellectual property rights as expressed in patent and copyright law are monopolies granted by states to patent and copyright holders to reward innovation and creativity. However, intellectual property law should maintain a balance between the rights of patent and copyright holders and the rights of consumers to have access to products and created works at reasonable cost. This can be a matter of life or death in the case of affordable access to essential medicines. Trade agreements should not be the vehicle for extension of monopolies which contradict basic principles of competition and free trade.<sup>60</sup>

The 2010 Productivity Commission Report on Bilateral and Regional Trade Agreements concluded that, since Australia is a net importer of patented and copyrighted products, the extension of patents and copyright imposes net costs on the Australian economy. The Commission also concluded that extension of patent and copyright can also impose net costs on most of Australia's trading partners, especially for developing countries in areas like access to medicines.<sup>61</sup> Based on this evidence, the Productivity Commission Report recommended that the Australian government should avoid the inclusion of intellectual property matters in trade agreements. This conclusion was reinforced by a second report in 2015.<sup>62</sup> Since that time, proposals were made in the original Trans-Pacific Partnership for longer data protection monopolies for biologic medicines which are in addition to patent monopolies and would delay the production of cheaper versions of biologic medicines. A study of the costs of biologic medicines in Australia found that the longer data

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<sup>60</sup> Stiglitz J. (2015) “Don’t trade away our health,” News York Times, January 15. Available at <http://www.nytimes.com/2015/01/31/opinion/dont-trade-away-our-health.html? r=0>.

<sup>61</sup> Productivity Commission (2010) Bilateral and Regional Trade Agreements Final Report, Productivity Commission, Canberra, December, via: <https://www.pc.gov.au/inquiries/completed/trade-agreements/report>.

<sup>62</sup> Productivity Commission (2015) Trade and Assistance Review 2013-14, June. Available at <http://www.pc.gov.au/research/recurring/trade-assistance/2013-14>.



protection monopolies proposed in the Trans-Pacific Partnership (TPP) would cost the Pharmaceutical Benefits Scheme (PBS) hundreds of millions of dollars per year.<sup>63</sup>

Other studies indicate additional costs resulting from longer monopolies in other bilateral agreements.<sup>64</sup> Public health experts have also demonstrated how successive trade agreements have strengthened patent and other monopoly rights on medicines to the benefit of global pharmaceutical companies and to the detriment of access to affordable medicines, especially in developing countries.<sup>65</sup>

This has been confirmed by a more recent systematic review of studies which showed that stronger pharmaceutical monopolies created by intellectual property rules greater than those in the WTO TRIPs agreement (TRIPs-plus rules) are generally associated with increased drug prices, delayed availability and increased costs to consumers and governments.<sup>66</sup>

***Recommendation:***

***There should be no extension of patents, data protection or copyright monopolies in IPEF.***

IPEF should not restrict the regulation of public and essential services

IPEF should not undermine the ability of governments to regulate in the public interest, particularly regarding essential services like health, education, aged-care and other social services, water and energy.

Trade in Services chapters often use a negative list structure, which means that *all* services, including new services which may be developed in future, are included, except those which governments list as specific exclusions.

To the extent that services are included in any trade agreement, a positive list rather than a negative list system should be used. A positive list allows governments and the community to know clearly what is included in the agreement, and therefore subject to the limitations on government regulation under trade law. It also avoids the problem of inadvertently including in the agreement future service areas which are yet to be developed. This means that governments retain their right to develop new forms of regulation needed when circumstances change, as has occurred with the need for financial regulation following the Global Financial Crisis, the Royal Commission into the

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<sup>63</sup> Gleeson D. et al (2017) Financial Costs Associated with Monopolies on Biologic Medicines in Australia, *Australian Health Review* 43, no.1: 36-42.

<sup>64</sup> Gleeson D. and Labonté, R. (2020) Trade Agreements and Public Health. London: Palgrave Studies in Public Health Policy Research, pp 47-52.

<sup>65</sup> Lopert, R, and Gleeson, D (2013) The high price of “free” trade: US trade agreements and access to medicines. *Journal of Law, Medicine and Ethics*, 41(1): 199-223, via: <http://onlinelibrary.wiley.com/doi/10.1111/jlme.12014/abstract>.

<sup>66</sup> Tenni, B., et al, What is the impact of intellectual property rules on access to medicines? A systematic review, *Global Health*, 2022; 18: 40, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9013034/>.

Banking and Financial Services Industry, the Royal Commission on Aged Care Quality and Safety, and governments' responses to climate change.<sup>67</sup>

Services chapters also use a 'ratchet' structure which treats the regulation of services as if it were a tariff, to be frozen at current levels and not raised in future, unless particular services are specifically exempted from this structure. This can prevent governments from addressing the failures of privatisation or deregulation. For example, the deregulation and privatisation of vocational education services in Australia resulted in failures in service delivery for students and fraudulent use of public funds, and the government had to re-regulate to address these failures in 2016.<sup>68</sup>

The inclusion of essential services, like health, water and education in trade agreements limits the ability of governments to regulate these services by granting full 'market access' and 'national treatment' to transnational service providers of those services. This means that governments cannot specify any levels of local ownership or management, and there can be no regulation regarding numbers of services, location of services, numbers of staff or relationships with local services. Governments should maintain the right to regulate to ensure equitable access to essential services, service standards and staffing levels, and to meet social and environmental goals.

Public services should be clearly excluded from trade agreements. This requires that public services are defined clearly. AFTINET is critical of the definition of public services in many trade agreements which defines a public service as "a service supplied in the exercise of governmental authority ... which means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers." This definition results in ambiguity about which services are covered by the exemption. In Australia, as in many other countries, some public and private services are provided side-by-side.

Even when essential services are not publicly provided, governments need clear rights to regulate them to ensure equitable access to them, and to meet other social and environmental goals.

***Recommendations:***

***Public services should be clearly and unambiguously excluded from IPEF agreements and there should be no restrictions on the government's right to provide and regulate all services, in the public interest, including services like aged care and childcare which are publicly funded but provided by private companies.***

***IPEF should use a positive list to identify which services will be included in an agreement.***

***If a negative list is used, governments should retain the right to regulate and re-regulate all services to meet service standards, health, environmental or other public interest objectives. This should include the right to increase regulation in services like aged care and address privatisation failures.***

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<sup>67</sup> United Nations (2009) Report of the Commission of Experts of the President of the United Nations General Assembly on Reforms of the International Monetary and Financial System (the Stiglitz Commission) New York, via: [https://www.un.org/en/ga/econcrisissummit/docs/FinalReport\\_CoE.pdf](https://www.un.org/en/ga/econcrisissummit/docs/FinalReport_CoE.pdf).

<sup>68</sup> Conifer, D (2016) Parliament passes bill to scrap troubled VET loans, overhaul vocational education sector, ABC News online, December 2, via: <https://www.abc.net.au/news/2016-12-02/parliament-passes-bill-to-scrap-troubled-vet-loans/8085860>.

## IPEF should not restrict government procurement as part of industry development programmes

The new government has a Jobs and Skills policy which requires government action to support local manufacturing industry, especially the development of local renewable energy industries, and the use of government procurement policy to assist in this process.

There has been much debate in Australia about both Commonwealth and State government procurement policies. AFTINET believes that Australian procurement policy should follow the example of trading partners like South Korea and the US in that it should have policies with more flexibility to consider broader definitions of value for money, which recognise the value of supporting local firms in government contracting decisions.<sup>69</sup>

Several Australian states have developed such policies, and the Joint Select Committee Inquiry into the Commonwealth Government Procurement Framework 2017 recommended in its report, *Buying into Our Future*, that the government should not enter into any commitments in trade agreements that undermine its ability to support Australian businesses.<sup>70</sup>

Australia has maintained exemptions for Small and Medium-Sized Enterprises (SMEs) to procurement rules, including exemptions for Indigenous enterprises. Australia has also excluded local government from procurement rules in trade agreements. These exclusions should be maintained.

### **Recommendations**

***The government should not make any IPEF commitments on government procurement that undermine its ability, or the ability of state governments, to use government procurement to support local manufacturing industry, especially the development of local renewable energy industries.***

***The government should maintain its current government procurement exemptions for SMEs, Indigenous enterprises and for local government procurement.***

## IPEF should not contain any form of Investor-State Dispute Settlement (ISDS)

All trade agreements have government-to-government dispute processes. However, Investor-State Dispute Settlement (ISDS) is controversial because it is an optional, separate dispute process that gives additional legal rights to foreign investors (rights which are not available to local investors) to sue governments for compensation in an international tribunal if they can claim that a change in law or policy will harm their investment. Because ISDS cases are very costly, they are mostly used by large global companies that already have enormous market power, including tobacco, pharmaceutical, agribusiness, and fossil fuel companies.

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<sup>69</sup> AFTINET (2015) Submission to the Department of Foreign Affairs and Trade on Australia's proposed accession to the World Trade Organisation Government Procurement Agreement January 30, via: <http://aftinet.org.au/cms/sites/default/files/DFAT%20submission%20Jan%202015%20edited.pdf#overlay-context=world-trade-organisation>.

<sup>70</sup> Joint Select Committee Inquiry into the Commonwealth Government Procurement Framework 2017, [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Former\\_Committees/Government\\_Procurement/CommProcurementFramework/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/Government_Procurement/CommProcurementFramework/Report).

The number of reported ISDS cases has been increasing rapidly, reaching 1,190 as of November 2022.<sup>71</sup>

Scholars have identified that ISDS has suffered a legitimacy crisis that has grown in the last decade, with lack of confidence in the system shared by both civil society organisations and by a growing number of governments.

Criticisms of the ISDS *structure* include: the power imbalance which gives additional legal rights to international corporations that already exercise enormous market power; the lack of obligations on investors; and the use of claims for compensation for public interest regulation.

Criticisms of the ISDS *process* include: a lack of transparency; lengthy proceedings; high legal and arbitration costs; inconsistent decisions caused by a lack of precedent and appeals; third party funding for cases as speculative investments; and excessively high awards based on dubious calculations of expected future profits. Furthermore, arbitrators are not independent judges, but instead remain practising advocates with potential or actual conflicts of interest.

There have been increasing numbers of claims for compensation for public interest regulation. These include regulation of public health measures like tobacco regulation, medicine patents, environmental protections, regulation of the minimum wage and most recently, government action to reduce carbon emissions.

A comprehensive study published in the *Science* journal in May 2022<sup>72</sup> shows increasing use of ISDS clauses in trade agreements by fossil fuel companies to claim billions in compensation for government decisions to phase out fossil fuels. The study's authors recommend ISDS mechanisms be removed from trade agreements.

The Intergovernmental Panel on Climate Change (IPCC) May 2022 report *Climate Change 2022: Impacts, Adaptation & Vulnerability* also warns that ISDS clauses in trade agreements threaten action to reduce emissions.<sup>73</sup>

For example, the Westmoreland Coal Company<sup>74</sup> sought compensation from Canada over the Province of Alberta's decision to phase out coal-fired electricity generation by 2030. This US-based company, an investor in two Alberta coal mines, did so using ISDS provisions in the North American

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<sup>71</sup> UNCTAD (2022) Investment Dispute Settlement Navigator, via: <https://investmentpolicy.unctad.org/investment-dispute-settlement>.

<sup>72</sup> Rachel Thrasher *et al* (2022) How treaties protecting fossil fuel investors could jeopardize global efforts to save the climate – and cost countries billions, *The Conversation* May 6, <https://theconversation.com/how-treaties-protecting-fossil-fuel-investors-could-jeopardize-global-efforts-to-save-the-climate-and-cost-countries-billions-182135>.

<sup>73</sup> Intergovernmental Panel on Climate Change (2022) *Climate Change Impacts, Adaptation & Vulnerability*, May, <https://www.ipcc.ch/report/ar6/wg2/>.

<sup>74</sup> Investment Arbitration Reporter (2018) Canada hit with investment treaty arbitration from US coalminer, November 20, <https://www.iareporter.com/articles/canada-hit-with-investment-treaty-arbitration-from-u-s-coal-miner-relating-to-province-of-albertas-phasing-out-of-coal-fired-energy-generation/>.

Free Trade Agreement (NAFTA). Its case was unsuccessful<sup>75</sup> but only due to technicalities regarding changes in the company's ownership.

In Europe, German energy companies RWE and Uniper have ISDS cases pending<sup>76</sup> against the Netherlands (under the Energy Charter Treaty) over its moves to phase out coal-powered energy by 2030.<sup>77</sup>

Some governments are withdrawing from ISDS arrangements, the EU and the US are now negotiating trade agreements without ISDS, and the system is being reviewed by the two institutions which oversee ISDS arbitration systems. ISDS has been excluded from the Regional Comprehensive Economic Partnership (RCEP), the Australia-UK Free Trade Agreement (A-UKFTA) and the Australia-EU Free Trade Agreement (A-EUFTA) currently under negotiation.

Legal experts and the United Nations Conference on Trade and Development (UNCTAD) – the body responsible for monitoring ISDS – have recognised the danger of ISDS claims against a wide range of government actions taken during the COVID-19 pandemic, recommending means of preventing such cases.

Current revised clauses in ISDS provisions in the CPTPP and other agreements are not effective in protecting the rights of governments to regulate, since the exclusions only prevent cases in a narrow range of areas and omit important public policy areas like the environment, workers' rights and Indigenous land rights.

***Recommendation:***

***IPEF should not include any form of investor-state dispute settlement (ISDS)***

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<sup>75</sup> Investment Treaty News (2022) NAFTA tribunal in Westmoreland v. Canada declines jurisdiction, finding that the claimant did not own or control the investment at the time of the alleged breach, July 4, <https://www.iisd.org/itn/en/2022/07/04/nafta-tribunal-in-westmoreland-v-canada-declines-jurisdiction-finding-that-the-claimant-did-not-own-or-control-the-investment-at-the-time-of-the-alleged-breach/>.

<sup>76</sup> UNCTAD (2022) Investment Dispute Settlement Navigator, <https://investmentpolicy.unctad.org/investment-dispute-settlement/country/148/netherlands/respondent>.

<sup>77</sup> Kluwer Arbitration (2021) The Netherlands Coal Phase-Out and the Resulting (RWE and Uniper) ICSID Arbitrations, August 24, <http://arbitrationblog.kluwerarbitration.com/2021/08/24/the-netherlands-coal-phase-out-and-the-resulting-rwe-and-uniper-icsid-arbitrations/>.