

Congress of the United States

Washington, DC 20515

April 21, 2023

Ambassador Katherine Tai
United States Trade Representative
Executive Office of the President
600 17th Street NW
Washington, DC 20508

The Honorable Gina Raimondo
Secretary
Department of Commerce
1401 Constitution Avenue NW
Washington, DC 20230

Dear Ambassador Tai and Secretary Raimondo:

We write regarding our concerns with digital trade negotiations in the proposed Indo-Pacific Economic Framework for Prosperity (IPEF). President Biden has issued a government-wide order directing agencies to pursue policies to rein in monopoly power and promote competition in all sectors of the economy,¹ and lawmakers and regulators are working to restore competition and protect consumers, workers, and small businesses, particularly when it comes to Big Tech platforms. Given the impact that skewed trade rules would have, we ask that you ensure new digital trade rules complement—rather than conflict with—our efforts to promote competition in the digital economy, regulate artificial intelligence, and protect online privacy.

The United States launched IPEF last year, including negotiations led by the U.S. Trade Representative (USTR) with input from the U.S. Commerce Department on a trade pillar with a digital trade chapter.² The U.S. is conducting these negotiations with representatives from Australia, Brunei Darussalam, Fiji, Indonesia, Japan, Korea, Malaysia, New Zealand, the Philippines, Singapore, Thailand, and Vietnam.³

While we appreciate your commitment that digital trade negotiations will not conflict with the federal government's active work on tech policy,⁴ we remain concerned that Big Tech companies are advocating for an approach to digital trade that will do just that.

Corporations are advocating that the U.S. government include rules in IPEF that would tie Congress's and regulators' hands⁵ and conflict with President Biden's whole-of-government

¹ The White House, "Executive Order on Promoting Competition in the American Economy," press release, July 9, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

² Office of the U.S. Trade Representative, "Trade Pillar," Indo-Pacific Economic Framework for Prosperity (IPEF), <https://ustr.gov/trade-agreements/agreements-under-negotiation/indo-pacific-economic-framework-prosperity-ipef/trade-pillar>.

³ Office of the U.S. Trade Representative, "Ministerial Text for Trade Pillar of the Indo-Pacific Economic Framework for Prosperity," September 2022, [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).

⁴ Senate Committee on Finance, "The President's 2023 Trade Policy Agenda," March 23, 2023, <https://www.finance.senate.gov/hearings/the-presidents-2023-trade-policy-agenda>; Council on Foreign Relations, "C. Peter McColough Series on International Economics With Katherine Tai," December 19, 2022, <https://www.cfr.org/event/c-peter-mccolough-series-international-economics-katherine-tai>.

effort to promote competition.⁶ Big Tech wants to include an overly broad provision that would help large tech firms evade competition policies by claiming that such policies subject these firms to “illegal trade discrimination.”⁷ This language would provide a basis for Big Tech firms, as well as foreign governments, to attack tech policies as “illegal trade barriers” simply because they may disproportionately impact “digital products” of dominant companies that happen to be headquartered in the U.S.⁸ Inclusion of such provisions could undermine efforts by U.S. policymakers to pass new legislation and antitrust enforcers to crack down on anti-competitive conduct, including price fixing and self-dealing, by the largest tech companies. Tech companies could also weaponize these digital trade rules to undermine similar efforts by our trading partners.

This is not a theoretical problem. Tech industry groups, citing the specific digital anti-discriminatory language they want included in the IPEF digital negotiations, have asked USTR to go after Canada for its pending *Online News Act*,⁹ which, like a U.S. bipartisan proposal, would require Big Tech platforms to pay for the news they profit from.¹⁰ Big Tech has attacked South Korean legislation that is similar to another bipartisan congressional proposal that reins in companies like Google and Apple from using their dominant app stores to extort app developers.¹¹ And the U.S. Chamber of Commerce has attacked both the European *Digital Markets Act* and bipartisan U.S. legislation to prohibit anticompetitive self-preferencing for allegedly engaging in trade discrimination against big U.S. tech companies.¹² It is not “trade discrimination” for the U.S. government or any of our trading partners to regulate Google, Meta, Apple, Microsoft, and Amazon to protect online competition, as tech industry groups have claimed¹³—it is common sense, and trade-pact terms should in no way inhibit it.

⁵ U.S. Chamber of Commerce, “No Higher Priority: Why IPEF Must Include Strong Digital Trade Rules,” December 7, 2022, <https://www.uschamber.com/international/trade-agreements/no-higher-priority-why-ipef-must-include-strong-digital-trade-rules>.

⁶ The White House, “Executive Order on Promoting Competition in the American Economy,” press release, July 9, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

⁷ Rethink Trade, “Big Tech ‘Digital Trade’ Plan for IPEF Could Undermine Key Congressional and Administration Privacy, Anti-Monopoly, and AI Accountability Initiatives,” January 23, 2023, pp. 25-30, https://rethinktrade.org/wp-content/uploads/2023/01/2023.01.23-Conflicts-between-key-digital-proposals-and-prospective-IPEF-digital-trade-terms_for-lay-out-003.pdf; Office of U.S. Senator Amy Klobuchar, “Klobuchar, Kennedy Introduce Bipartisan Legislation To Save Local Journalism,” March 31, 2023, <https://www.klobuchar.senate.gov/public/index.cfm/2023/3/klobuchar-kennedy-introduce-bipartisan-legislation-to-save-local-journalism>.

⁸ *Id.*

⁹ The Globe and Mail, “Biden urged to raise Canadian bills’ impact on Google, Facebook, Netflix, Disney,” Marie Woolf, March 22, 2023, <https://www.theglobeandmail.com/politics/article-biden-urged-to-raise-canadian-bills-impact-on-google-facebook-netflix/>.

¹⁰ Regulations.gov, “Comments of the Computer & Communications Industry Association Regarding Foreign Trade Barriers to U.S. Exports for 2023 Reporting,” October 28, 2022, p. 42, <https://www.regulations.gov/comment/USTR-2022-0013-0047>.

¹¹ Rethink Trade, “‘Digital Trade’ Doublespeak: Big Tech’s Hijack of Trade Lingo to Attack Anti-Monopoly and Competition Policies,” Daniel Rangel, Taylor Buck, Erik Peinert, Lori Wallach, November 2022, pp. 6-9, <https://rethinktrade.org/wp-content/uploads/2022/11/20221101-AELP-DocLayout-v7.pdf>.

¹² U.S. Chamber of Commerce, “Striking Similarities: Comparing Europe’s Digital Markets Act to the American Innovation and Choice Online Act,” June 17, 2022, <https://www.uschamber.com/finance/antitrust/striking-similarities-dma-american-innovation-act>.

Big Tech is also calling for IPEF to include a provision that would limit governments' ability to regulate artificial intelligence (AI) domestically. Companies are increasingly outsourcing important decisions to AI, in spite of clear evidence that it can discriminate on a massive scale.¹⁴ The implications are huge: black box algorithms can create inhumane and unsafe working conditions, make life-altering employment decisions, reject loan applicants for having Black-sounding names, and misidentify women of color in police footage.¹⁵ Americans' embrace of technology relies on their government's ability to protect their data security and prevent digital discrimination, and Congress and regulators have taken steps to do so.¹⁶ Yet Big Tech firms continue to advocate for IPEF digital secrecy terms that could thwart U.S. government attempts to address these concerns.¹⁷

Similarly, Big Tech is pushing for trade rules that would allow Americans' sensitive personal data to be sent anywhere—with little ability for Congress to limit such transfers or require that critical data be kept in the U.S.¹⁸ While seemingly innocuous, this means that sensitive medical records, business secrets, or critical national security information could be sent and stored anywhere in the world. This only benefits Big Tech firms seeking unlimited control over our sensitive, personal data.

Our concerns about the contents of the IPEF digital text are heightened by the speed at which negotiations are proceeding. The administration only began to share some classified draft digital text for feedback in late January 2023. Even then, only a few cleared advisors, Members of Congress, and their staff with security clearances were allowed to see that text due to its classification status, hindering the ability of Congress and the public to meaningfully engage. We understand that you plan to share additional digital text with IPEF partner countries in soon—text which you have yet to share with Congress or the public. Furthermore, reports indicate that you plan to finalize the framework by November 2023,¹⁹ not even a year after the limited sharing

¹³ Regulations.gov, “Comments of the Computer & Communications Industry Association Regarding Foreign Trade Barriers to U.S. Exports for 2023 Reporting,” October 28, 2022, p. 42, <https://www.regulations.gov/comment/USTR-2022-0013-0047>; U.S. Chamber of Commerce, “Striking Similarities: Comparing Europe's Digital Markets Act to the American Innovation and Choice Online Act,” June 17, 2022, <https://www.uschamber.com/finance/antitrust/striking-similarities-dma-american-innovation-act>.

¹⁴ The White House, “Algorithmic Discrimination Protections,” <https://www.whitehouse.gov/ostp/ai-bill-of-rights/algorithmic-discrimination-protections-2/>.

¹⁵ AFL-CIO, “A Worker-Centered Digital Trade Agenda,” February 7, 2023, <https://aflcio.org/worker-centered-digital-agenda>.

¹⁶ New York Times, “Why Lawmakers Aren't Rushing to Police A.I.,” Andrew Ross Sorkin et al., March 3, 2023, <https://www.nytimes.com/2023/03/03/business/dealbook/lawmakers-ai-regulations.html>; Rethink Trade, “Big Tech ‘Digital Trade’ Plan for IPEF Could Undermine Key Congressional and Administration Privacy, Anti-Monopoly, and AI Accountability Initiatives,” January 23, 2023, https://rethinktrade.org/wp-content/uploads/2023/01/2023.01.23-Conflicts-between-key-digital-proposals-and-prospective-IPEF-digital-trade-terms_for-lay-out-003.pdf.

¹⁷ Regulations.gov, “Comments of the Computer & Communications Industry Association (CCIA),” Request for Comments on the Proposed Fair and Resilient Trade Pillar of an Indo-Pacific Economic Framework, April 11, 2022, pp. 9-10, <https://www.regulations.gov/comment/USTR-2022-0002-1254>.

¹⁸ Rethink Trade, “Big Tech ‘Digital Trade’ Plan for IPEF Could Undermine Key Congressional and Administration Privacy, Anti-Monopoly, and AI Accountability Initiatives,” January 23, 2023, pp. 14-15, https://rethinktrade.org/wp-content/uploads/2023/01/2023.01.23-Conflicts-between-key-digital-proposals-and-prospective-IPEF-digital-trade-terms_for-lay-out-003.pdf.

¹⁹ Inside U.S. Trade, “Fiji minister: IPEF talks expected to conclude in November after six more rounds,” Maydeen Merino, March 29, 2023, <https://insidetrade.com/daily-news/fiji-minister-ipef-talks-expected-conclude-november->

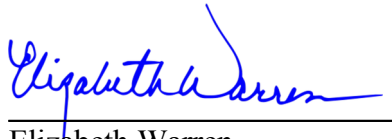
of digital text began. An artificial deadline must not come before ensuring that the deal fulfills the Biden Administration’s commitments to promote competition in the economy, to protect digital privacy, and to advance a worker-centered trade policy.

If trade agreements contain rules that allow tech companies to plead “illegal trade discrimination” to avoid accountability for monopolistic and discriminatory behavior, not only will personal privacy and consumers’ trust in the Internet be threatened, but the United States’ economic and national security as well. Consistent with President Biden’s whole-of-government approach to promoting competition in the U.S. economy, we urge you not to put up for negotiation or discussion any digital trade text that conflicts with that agenda. Additionally, we request that you respond to the following questions by May 8, 2023, and prior to tabling any further digital trade text or holding any further discussions on digital trade with IPEF partners:

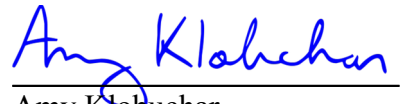
1. Are you contemplating including in IPEF any terms that could conflict with legislation, regulation, or other government actions relating to digital governance of any kind, including on algorithm and source code secrecy, cross border data flows, location of computing facilities, and non-discriminatory treatment of digital products? If so, please detail the types of legislation, regulation, or actions that could raise potential conflicts under your draft digital trade text if adopted by the U.S. government or our trading partners. If you cannot detail any, please explain why you are including the digital trade provisions.
2. To the extent that you are including in IPEF negotiations any constraints on government legislation, regulation, or other action against Big Tech, what exceptions are you proposing to include? What is the history of successful and unsuccessful uses of these (or similar) exceptions?
3. If there is little or no precedent for any exceptions to restrictions that you contemplate in IPEF on governments’ ability to regulate digital products and companies, or a pattern of rejections of relevant exceptions language by trade tribunals, how can we know these exceptions will be interpreted to safeguard legitimate digital government measures for the public interest?
4. Were officials from federal agencies whose work could be impacted by these digital trade rules, such as the U.S. Department of Justice and Federal Trade Commission, called upon to assist with the initial development and drafting of the IPEF digital trade chapter? If not, have they had the opportunity subsequently to fully review the text of the IPEF digital trade chapter and give feedback?
5. What feedback, if any, have these agencies given you? Have you fully incorporated this feedback into the text? If not, should negotiations on the IPEF digital trade chapter be paused to allow sufficient time for review and revisions?

Sincerely,

after-six-more-rounds.



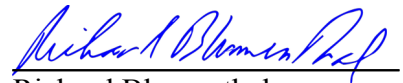
Elizabeth Warren
United States Senator



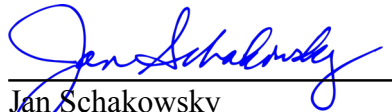
Amy Klobuchar
United States Senator



Sherrod Brown
United States Senator



Richard Blumenthal
United States Senator



Jan Schakowsky
Member of Congress
Ranking Member,
Subcommittee on Innovation,
Data, and Commerce



David N. Cicilline
Member of Congress



Rosa L. DeLauro
Member of Congress

CC:

Jonathan Kanter, Assistant Attorney General for the Antitrust Division, Department of Justice
Lina Khan, Chair, Federal Trade Commission