

**Letter from American Economic Liberties Project, Center for Democracy & Technology, Consumer Reports, Farm Action, iFixit, National Farmers Union, The Repair Association, Public Knowledge, and U.S. PIRG on “Digital Trade” Implications for Right to Repair**

The Honorable Joseph R. Biden  
President of the United States  
The White House  
1600 Pennsylvania Avenue NW  
Washington, DC 20500

September 12, 2023

Dear President Biden:

As public interest, small businesses, consumer, digital, and farm organizations working on right to repair policies, we write to express concern about “digital trade” negotiations underway as part of the proposed Indo-Pacific Economic Framework (IPEF). It is essential that such rules fully preserve the rights of the U.S. Congress, state legislatures, and regulatory agencies to adopt and implement the policies needed so that consumers, farmers, and small business owners have access to the necessary tools, parts, and information to repair their electronics-enabled equipment and devices.

We were heartened by your administration’s Executive Order 14036 “Promoting Competition in the American Economy,” which included instructions to the Federal Trade Commission (FTC) to craft rules to prevent manufacturers from preventing repairs performed by owners or independent repair shops. We fully support the FTC’s determination to enforce right to repair as federal policy and its commitment to take action against companies that unfairly restrict the type of repair work that can be done at independent repair shops. In addition to those efforts, our organizations are working steadfastly to promote right to repair laws across the country both at the federal and the state levels. A bipartisan coalition of Members of Congress, for instance, cosponsor the REPAIR Act, which was introduced earlier this year and has received strong support. Several lawmakers have also expressed interest in crafting reforms to Section 1201 of the Digital Millennium Copyright Act (DMCA) to clarify that access to software in a device for purposes of repair does not implicate copyright protections and should not be prohibited. Just last month, in the House Judiciary Committee’s hearing “Is there a right to repair?”, lawmakers expressed interest in crafting reforms of Section 1201 to create a market for repair tools. With software-enabled products, repairers routinely need to circumvent digital locks. Right now, the invention and distribution of these essential tools is prohibited as trafficking in circumvention technology. In the past three years, the right to repair movement has achieved important victories with state legislatures passing repair reforms in New York, Colorado, and Minnesota. Additionally, this year 30 states have introduced right to repair reforms.<sup>1</sup>

An essential element of the right to repair agenda is guaranteeing consumers and small businesses access to the schematics and diagnostics necessary to conduct repairs. This includes granting access to diagnostic software and to keys that unlock software locks or digital rights management (DRM) systems, and even sharing firmware needed to keep products operational

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<sup>1</sup> <https://www.repair.org/history>.

after originators have abandoned them as obsolete to push newer versions. U.S. trade agreements must be consistent with, and not undermine, these policies and the values they are advancing.

We understand that some in the tech industry are pushing for the inclusion of a so-called “source code” provision in the digital trade component of IPEF. They want an IPEF “source code” clause modeled after the language included in Article 19.16 of the United States-Mexico-Canada Agreement (USMCA). We are concerned that this “source code” language is being read by some to guarantee corporations broad new secrecy rights over not only software’s source code, but algorithmic specifications and descriptions as well. Indeed, unlike the few other international pacts with similar language regarding source code, USMCA Article 19.16 includes algorithms, which are defined as “*a defined sequence of steps, taken to solve a problem or obtain a result.*” The incredible breadth of the definition of an algorithm in USMCA means that Article 19.16 could even cover a diagnostic test that is coded into devices’ firmware.

In all, this rule could thwart right to repair requirements imposed on manufacturers, including obligations to grant access to diagnostics software and the sharing of digital “keys” needed to fix equipment. The exception included in the second paragraph of USMCA Article 19.16 does nothing to safeguard such policies, as it is related to source code and algorithmic disclosure to governments in the course of regulatory or judicial proceedings.

Thus, inclusion in U.S. trade pacts of language that could be read as a broad, potentially open-ended ban on policies that require firms to give fair access to software’s source code and algorithms would undermine our efforts to ensure that consumers and small businesses can fix their own devices and equipment.

We appreciate that the Biden administration has recognized the threats posed by such secrecy rules and did not include this provision in its initial draft IPEF digital trade text shared with the other countries in February. **We urge you to hold firm on this, and not include any language modeled after USMCA Article 19.16 in IPEF or in any future pacts. And we also urge you, when the USMCA comes up for review, to modify this provision so that it cannot be used against right to repair policies.**

Members of the U.S. Senate and House of Representatives, labor unions, civil rights and other civil society organizations, and other businesses including those in the Coalition for App Fairness have previously written to the administration describing the potential for domestic digital governance policies here and in other countries to be preempted by binding digital trade terms established in international agreements.

Given the myriad ways that digital trade rules could affect domestic policy, it is critical that the public is able to meaningfully scrutinize U.S. proposals for IPEF or any U.S. trade agreement, which means being able to review the drafts of digital trade chapters as negotiations proceed. **We join the hundreds of U.S. organizations and the numerous members of Congress that have urged the administration to open the process of IPEF negotiations.** It is not acceptable that 500 selected U.S. trade advisors that mainly represent corporate interests have access to the draft IPEF digital trade text, yet U.S. public interest, small businesses, consumer, digital, and farm organizations are locked out.

We urge the administration not to submit or agree to any IPEF source code and algorithm secrecy digital trade proposals until the proposed text and any changes have been made public, the administration has obtained feedback from a wider set of potentially affected parties, and adjustments are made to the text as warranted. Because the IPEF includes 14 nations covering 40% of the global economy, and any IPEF agreement will likely set a model for numerous other proposed Biden administration trade negotiations with Latin American, Caribbean, African and other nations, it is vital that IPEF digital trade rules represent the broad public interest.

We believe that if the IPEF negotiating process is made more inclusive and transparent – including by making available for public scrutiny and input the text of what would be digital policies binding on the U.S. Congress, state legislatures, and regulators – a balanced approach that targets foreign unfair commercial practices, but also preserves domestic regulatory policy space can be developed.

Sincerely,

American Economic Liberties Project  
Center for Democracy & Technology  
Consumer Reports  
Farm Action  
iFixit  
National Farmers Union  
The Repair Association  
Public Knowledge  
U.S. PIRG

cc:

Secretary of Commerce Gina Raimondo  
U.S. Trade Representative Katherine Tai  
National Economic Council Director Lael Brainard  
National Security Advisor Jake Sullivan  
Federal Trade Commission Chair Lina Khan