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Preliminary analysis of the IPEF chapter on good regulatory practice*

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The Indo-Pacific Economic Framework (IPEF) seeks to impose a structure, set of procedures and criteria to govern the Parties' regulatory decision making at the central government level. The IPEF chapter on "Good Regulatory Practice" (GRP) is expected to build on recent US-led precedents, seen best in the initial draft and final chapter on "Regulatory Coherence" in the Trans-Pacific Partnership Agreement (TPPA), the chapter on "Good Regulatory Practices" of the United States-Mexico-Canada Agreement (USMCA), and to some extent in the plurilateral Joint Statement Initiatives (JSI) on services domestic regulation and investment facilitation negotiated on the margins of the World Trade Organization (WTO).[1]

These chapters impose disciplines on the making of *all* domestic regulations, reaching much further *behind the border* into the legitimate domain of national governance than "non-tariff measures" relating to trade in goods. Because the regulations on services, investment and digital technologies are more directly concerned with social, cultural, development, environmental and other non-commercial considerations, attempts to impose constraints on government decisions through "free trade" rules are much more problematic.

Their inclusion in IPEF has potentially far-reaching implications for how decisions are made in participating nations' regulatory processes, and by whom, as well as the structure and hierarchy of government agencies, the balance between commercial and non-commercial priorities, and the power of external influencers, including states and corporate lobbyists. Some of the elements might well be conducive to well-informed and consistent good decision making, but there is no need for them to be locked in through IPEF, along with other, problematic elements, when they could be adopted unilaterally without being bound to an externally defined template. Other obligations in the IPEF chapter would be burdensome and intrusive, especially for developing countries, and confer undue corporate and foreign state influence over national policy and regulatory decisions. They would also cross-fertilise with obligations in other chapters of IPEF, and other international agreements, in ways that cannot be predicted during the course of negotiations.

* This is a preliminary analysis for discussion and supplementation.

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This paper urges participants in the Pillar I (trade) negotiations for IPEF to reject any chapter on "Good Regulatory Practice" that seeks to dictate how they, as sovereign states, should conduct their domestic governance. Specifically, the paper notes that:

- Countries must reject IPEF requirements that dictate how governments should operate internally, affecting their institutional structure, the hierarchy of ministries and agencies, and how they interact with each other, including the possible establishment of a central agency to oversee the whole-of-government application of this regulatory model and assess compliance.
- Despite the apparent focus on procedures, an IPEF approach that replicates the TPPA and USMCA will be biased towards light-handed regulation that subordinates competing non-commercial priorities and international obligations outside of trade and investment agreements, and that has led to serious policy and regulatory failures in areas from financial regulation to health and safety law to the regulation of Big Tech.
- The TPPA and USMCA chapters are modelled on a neoliberal framework that was designed by developed countries in the Organisation for Economic Cooperation and Development (OECD) and promoted by them within the Asia-Pacific Economic Cooperation (APEC) forum. Well-resourced developed countries like the US, Australia and New Zealand that have been implementing this for many years still struggle to comply with its core requirements and adequately resource them.
- Implementing even a diluted version of these obligations would impose excessive compliance burdens on low-income developing countries, while largely affirming arrangements that already exist in richer countries. There is no precedent in existing agreements for development flexibilities or long-term resourcing of these complex requirements.
- The opaque nature of IPEF's structure, obligations, dispute processes and penalties creates significant risks for negotiators to assess the implications of adopting such a regime.

1. GRP: a developed-country agenda

The "good regulatory practice" being promoted in IPEF has its origins in an Anglo-American model of deregulation, light-touch, pro-market regulation and self-regulation,[2] which rose to prominence in the 1980s.[3] The Reagan Administration established the US Office of Information and Regulatory Affairs (OIRA) within the Executive Office of the President as part of the Paperwork Reduction Act 1980.[4] From 2009 it was led by "regulatory czar" Cass Sunstein who institutionalised the use of cost-benefit analyses that were intrinsically biased against public-facing regulation.[5] Variations on these regulatory principles and techniques are still applied today and underpin the US's proposals in free trade agreements (FTAs) as well as IPEF.

In Australia, the Office of Regulation Review, originally established in the Productivity Commission, became the Office of Best Practice Regulation (OBPR) in 1997. An accompanying Guide to Regulation required the use of Regulatory Impact Statements that were informed by Regulatory Impact Analyses.[6] An independent Taskforce on Reducing Regulatory Burdens on Business in 2006[7] criticised "a succession of social, environmental and economic needs and pressures" that led to "regulatory inflation" that harmed business.[8] The Federal Government adopted its recommendations for all-of-government systemic reform, including a more risk-based approach and rigorous cost-benefit analyses for regulation making at federal, state and local government levels. As in the US, this regulatory regime continued to evolve. In July 2019, the Australian Government established a Deregulation Taskforce tasked with "ensuring that, where regulation is required, it is implemented with the lightest touch – that it is designed and applied in the most efficient and timely way, with least cost on businesses".[9] This agenda was overseen by the OBPR, first under the Productivity Commission, then the Ministry of Finance *and Deregulation*,[10] and later the Department of Prime Minister and Cabinet.[11] In November 2022, the Labor Government renamed the OBPR the Office of Impact Analysis.[12]

New Zealand's regulatory neoliberalism followed a similar pattern. A crude focus on cutting red tape in the 1980s gave way to a more technocratic model of "rational decision making" in the mid-1990s, with mandatory Regulatory Impact Analyses and Statements.[13] In 2009 the New Zealand Government adopted a strongly ideological policy of "Less Regulation, Better Regulation" that was reinforced in an equally ideological Productivity Commission report in 2014.[14] Subsequent governments have maintained the core framework while slightly adapting the guidelines for "regulatory stewardship".[15]

These and other affluent countries actively promoted this model through the OECD, couched in the benign language of “regulatory reform” and “best practice regulation”. The same template has informed a series of APEC initiatives, notably the Information Notes on Good Practices for Technical Regulation 2000 and the APEC/OECD Integrated Checklist on Regulatory Reform.[18]

Elements of these obligations began appearing in free trade agreements as means to widen their adoption and entrench their application. An early version of the Regulatory Coherence chapter of the TPPA that was leaked in 2011 would have bound Parties to highly prescriptive and enforceable obligations to adopt certain institutional structures, processes and regulatory priorities and criteria.[19] A number of developing countries rejected this attempt. The final chapter in the TPPA, and successor treaty the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), omitted or diluted some key institutional and substantive constraints, and the chapter is unenforceable.

The USMCA has adopted the strongest version of regulatory “disciplines” in any FTA to date, going beyond rules the US proposed in the draft TPPA chapter, and is enforceable. Elements of this that favour light-handed regulation, self-regulation or voluntary compliance by corporations, and rights to influence decision making in the name of “transparency” are also evident in the Joint Statement Initiatives on services domestic regulation, investment facilitation and e-commerce being negotiated by some WTO Members, and in digital trade chapters in various FTAs.

Negotiating parties in IPEF therefore need to read the proposals on good regulatory practice alongside the texts and analyses of other agreements already in effect or under negotiation, as well as other substantive and institutional chapters of IPEF.

2. Constraints on governments’ regulatory autonomy

Before examining the details of those texts, it is important to note the underlying issues with light-handed, risk-based, market-driven, pro-corporate regulation. Three related features stand out.

The first is the underlying presumption that regulation is intrinsically problematic and to be avoided whenever possible, that profit-driven corporations whose principal responsibility is to their shareholders are best left to regulate themselves, and that regulatory failures are just collateral damage in the quest for greater efficiency, incentives and innovation. The flaws in these assumptions are obvious when they are spelt out in such blunt terms, hence the use of euphemisms like “good regulatory practice”, “best practice regulation” and “good governance” that we see repeated in IPEF.

Second, this approach prioritises commercial interests ahead of competing social, economic, environmental, developmental and other non-commercial objectives for which governments are primarily responsible, including in their constitutions, to the electorate and in international law.

Third, the assumption that these “best practice” procedures and criteria will result in the best regulation has been repeatedly proved wrong. Regulatory failures developed through this model have caused significant and sustained harms in many sectors, including systemic financial crises,[20] accumulation of private power by digital mega-corporations,[21] and the deepening climate crisis.[22] Despite this, the US wants governments to commit themselves under IPEF to adopting and maintaining this regulatory regime for the indefinite future.

Reassurances in the relevant TPPA/CPTPP and USMCA chapters that governments retain the right to regulate need to be read very carefully. The General Provisions in the final version of the TPPA/CPTPP regulatory coherence chapter talk of facilitating governments to achieve their domestic policy objectives, and enhancing cooperation to achieve those objectives as well as international trade and investment, economic growth, and employment.[23] They also affirm the Parties’ “sovereign right to identify its regulatory priorities and establish and administer regulatory measures to address these priorities, at the level the Party considers appropriate.” But the chapter does not protect their absolute right to determine which measures will best achieve their policy objectives. Instead, it constrains

their options by requiring them, and their regulatory authorities, to follow a skewed process and biased criteria specified by the chapter when they decide on those regulatory measures.

The General Provisions article of the USMCA is broadly similar: a Party is not prevented from pursuing its public policy objectives at the level it considers appropriate and determining the appropriate method of implementing its obligations within its legal system and institutions, as well as adopting additional good regulatory practices.[24] But the process and criteria for these decisions favour light-handed, risk-based approaches that have frequently failed, and they preference commercial interests (for example, they refer only to compliance with international trade and investment obligations, not other international obligations).

The USMCA has other hidden biases. "Regulatory cooperation" is defined as "an effort" to *prevent*, *reduce or eliminate* "unnecessary" regulatory differences between jurisdictions. So it anticipates not only not introducing new regulation, but also changing existing regulations to align with other Parties' regulations. "Unnecessary" (used in relation to regulatory differences) is a term of art in trade jurisprudence that favours the minimalist approach to achieve the purpose of a measure. In the USMCA, the stated purpose is to facilitate trade and promote economic growth, while maintaining or enhancing standards of public health and safety and environmental protection. Those are the only two factors referred to. Other policy priorities, such as development, addressing the digital divide, or indigenous and other human rights, are not included in this balancing exercise,[25] even though they are recognised as public policy objectives elsewhere in the chapter.[26]

3. Expected scope of the GRP chapter in IPEF

The obligations in the final TPPA[27] and USMCA[28] chapters apply to each Party's *planning, design, issuing, implementation and review* of its regulatory measures. As noted above, a government can decide the level to which it wishes to achieve certain policy objectives, but the chapters circumscribe the means by which it decides what regulation is appropriate to achieve that outcome, what factors must be considered and who has a right of input into that decision-making process.

The TPPA and the USMCA take different approaches to define the chapter's reach. The final version of the TPPA/CPTPP applies to a *measure* of *general application* that relates to *any matter covered by the agreement* that is *adopted by a regulatory agency* and for which *compliance is mandatory*. "Measures" is defined very broadly in the agreement. However, each Party can determine the scope of such "measures" for the purpose of the chapter, with an expectation of "significant coverage". It must notify the scope of its "covered" measures to the other Parties within one year of the agreement's entry into force.[29] That enables Parties to decide which levels of government, agencies, policy areas, subject matter and affected communities might be covered and which are not, and to do so once they have had the opportunity to assess the potential implications of the chapter. Crucially, the entire chapter is not enforceable.

The USMCA defines a "regulation" as an *existing* or *future* government *measure* of general application that *must be complied with*. The chapter covers all *legally enforceable* regulations that are developed by regulatory agencies at *central* government level (the US has particular sensitivities about binding state legislatures), but not developed by legislatures or courts.[30] Each Party lists in an annex the measures that are not considered "regulations" for the purpose of the chapter (in other words, a negative list). Country-specific exceptions relate to particular categories, such as national security and foreign affairs, public sector management and responsibilities, pensions, agreements with aboriginal (indigenous) peoples, and agrarian, labour justice, taxation and anti-money-laundering measures. The negative list for all Parties includes all general statements of policy or guidance that are not enforceable, which reinforces the chapter's application only to enforceable regulations.

4. How GRP redesigns Parties' institutions of government

The IPEF requirements are expected to go deep behind the border into the way that governments operate internally, affecting their institutional structure, the hierarchy of ministries and agencies, and how they interact with each other. In particular, the US is likely to propose a central agency or mechanism to oversee the whole-of-government application of this regulatory model and assess compliance.

The proposal in the original TPPA chapter for a national coordinating mechanism or process, and oversight body with specified characteristics, functions and resourcing, was a major concern for developing countries in the TPPA negotiations. Aside from the cost, this would have meant realigning the institutional structure, roles and responsibilities of government agencies, and imposed budgetary obligations on governments. Many of these elements were removed from the obligations in the final version of the unenforceable Regulatory Coherence chapter.[31] The USMCA provision is much less detailed because the Parties already have such a mechanism, so they committed to maintaining their existing bodies that perform that function.[32]

IPEF may involve a hybrid approach. For example, Australia, New Zealand and the United States all have long-established agencies of this kind:

- The Reagan Administration established OIRA within the Executive Office of the President in 1980. That has been reviewed under successive administrations to adopt a more nuanced, but still highly neoliberal, model.[33]
- The Australian Commonwealth Office of Impact Analysis (previously Office of Best Practice Regulation) is tasked with implementing Australia's "best practice guidelines".[34]
- The New Zealand government policy, once called "Less Regulation, Better Regulation",[35] is administered through the Regulatory Impact Assessment Team of the New Zealand Treasury with a detailed set of guidelines.[36]

Most developing countries in IPEF do not have such bodies, or they have much less complex functions and resourcing. This means the burden of new obligations would fall on developing countries in IPEF.

5. How GRP dictates national regulatory processes

Judging by the existing agreements, the US is likely to propose, under IPEF, an elaborate domestic process that a Party's regulatory authorities must comply with. The USMCA *requires* governments to adopt or maintain *processes or mechanisms* to pursue an inclusive (i.e., non-exhaustive) list of objectives.[37] Governments *must* publish a description of those processes or mechanisms. Those objectives include:

- promoting government-wide adherence and improvements to "good regulatory practices" including those in the chapter;
- identifying and preventing inconsistent requirements across regulatory authorities;
- supporting compliance with international trade and investment obligations, including international standards and regulations (with no reference to other international obligations);
- promoting consideration of regulatory impacts including burdens on small enterprises; and
- encouraging approaches that avoid "unnecessary" restrictions on competition in the marketplace (presumably including state enterprises, monopolies and universal service obligations among those restrictions).

This list makes it clear that, far from simple "procedures", this chapter has the potential to impose substantive constraints on the orientation of all government regulation.

6. Likely notification and comment obligations

The US will also want IPEF to impose onerous and intrusive processes for notification of regulations and review of existing regulations. Under the USMCA, Parties are *required* to publish annually a list of regulations that they reasonably expect to adopt or propose in the next year. The list should include a concise description of the planned regulation, a contact point, an indication of sectors likely to be affected, whether the regulation is likely to have a significant effect on trade and investment, and an expected timetable including for public comment.[38] This is much more detailed and prescriptive than the equivalent provision in the draft TPPA, and the final TPPA/CPTPP version provided even more flexibility.[39]

The USMCA sets out a mandatory, prescriptive and detailed process for developing specific regulations covered by the chapter. *Before* a Party finalises its work on a regulation, it *must* "under normal circumstances" publish: the text, any regulatory impact assessment, an explanation of the objectives, how the text would achieve those objectives, the rationale for its main features, any major alternatives considered, explanation of the data and analyses relied on, any risk assessment, and a contact person.[40] "Normal circumstances" is defined in a footnote to exclude situations when publication would render the regulation ineffective, situations of urgency, or if the regulation has no substantial public impact.[41] The timing must enable the regulatory authority to take into account comments received and make any consequent changes to the text.[42]

Once this information is published, there is a positive obligation on the Party to ensure that *any person*, wherever they are domiciled, has an opportunity to make a written submission on the same basis as a national, and the Party must accept a submission made electronically.[43]

Where the draft regulation is expected to have a significant impact on "trade" (which can include the broad sweep of services, investment and digital), the period for making submissions should normally not be less than 60 days after publication and can be longer if the regulation is complex. The period for submissions should be at least four weeks where a "trade" impact is not expected. These periods may be extended on request. The comments should be promptly published on the "dedicated website" the Party is required to maintain,[44] or, if that is impracticable, at least the website of the regulatory agency concerned, unless the comment is withheld for confidentiality or inappropriate content. The regulatory authority *must* "evaluate" all the written comments it receives.[45]

When the USMCA Party has concluded its work on a regulation (when it is formally promulgated), the text, any final impact assessment and other items must be published, preferably in a format that allows digital searching.[46] While regulations should be in plain language to ensure the public can understand them to the extent that technicalities permit,[47] there is no explicit reference to language or translations.

The USMCA requires each Party to maintain a single publicly available website that contains all information required by the above process "to the extent practicable". That can involve a single web portal that provides access to more than one website.[48]

7. Reviews of existing regulations

The IPEF chapter is also expected to mandate retrospective reviews of existing regulations to determine whether they should be modified or repealed. While these reviews may be initiated internally by a regulatory authority, they may also be proposed by external influencers, including foreign corporations.

The original TPPA chapter asked governments to establish processes for periodic reviews of their stock of existing significant regulatory measures to make them more effective, including by relying more on regulatory cooperation. A version of this made it to the final TPPA/CPTPP.[49]

The USMCA is much more explicit that retrospective reviews[50] may be triggered by "suggestions for improvement" when any "interested person" (including a foreign corporation or industry association) submits written suggestions that a regulation has become ineffective at protecting health, welfare or safety, is more burdensome than necessary to achieve its objective, fails to take account of changed circumstances, or relies on incorrect or outdated information.[51]

8. A prescriptive regulatory methodology

The US proposal for IPEF is expected to include specific mechanisms for assessing different regulatory options. In the USMCA, regulatory authorities are encouraged to seek the best, reliably obtainable relevant information, rely on information that is appropriate in the particular context and identify its sources of information, as well as any significant assumptions and limitations.[52] Any survey information routinely collected for regulatory purposes should be analysed through "sound" statistical methodologies and minimise the burdens on those being surveyed.

Regulatory Impact Assessments

More specifically, the "best practice" regulatory toolkit requires government agencies to conduct Regulatory Impact Assessments (RIAs) or analyses of proposed regulations and issue Regulatory Impact Statements of compliance. There is some flexibility in both the original and final TPPA text and the USMCA about whether and when to use RIAs. All "encourage" the use of RIAs where anticipated costs or impacts of a proposed regulation exceed undefined "thresholds" established by each Party. The TPPA/CPTPP refers to "economic" or "other regulatory" impact,[53] whereas the USMCA leaves its scope open.[54] In the event that an RIA is carried out, the final TPPA/CPTPP lists four factors that the RIA *should* consider; this list omits the original references to assessing the costs and benefits of not regulating and the use of non-regulatory or voluntary means to achieve the objectives.[55] The USMCA goes further; it lists *mandatory* considerations in any RIA, including not regulating and voluntary options, and cost-benefit analysis, but does provide for consideration of non-commercial impacts when assessing the costs and benefits of various options.[56]

There are several problems with this approach. It *is* good practice to define clearly the problems a regulator is seeking to solve, weigh up the costs and benefits of various options, and draw on good-quality available evidence. But this tool is weighted too heavily in favour of business interests and economic factors, and therefore de- or light-handed regulation. Second, compliance with this *process* becomes the benchmark for "good regulation", rather than the substance of the regulation itself. Third, RIAs are complex and costly, especially for developing countries, and even OECD countries that have operated this regime for years often fail to comply.

Assessing compliance

For some years, Australia, New Zealand and the US subjected their RIAs to independent compliance audits, with embarrassing results that suggest a combination of scepticism, wilful non-compliance and lack of capacity. This practice of independent audits appears to have ceased. The earlier findings are nevertheless important indicators for IPEF participants to understand the difficulties that even countries with well-established systems have faced in complying with these obligations and the costs associated with implementing them. Again, it is important to remember that these are assessments of compliance with the regulatory *process* and do not review the quality of the policy analysis and advice, presumably based on the assumption that the process, if properly performed, will lead to best-quality decisions.

Compliance audits in 2008 and 2009 in New Zealand revealed that half the Regulatory Impact Statements failed to meet the quality criteria; by 2012 this had slightly improved, with 36% of the 50 statements assessed having fully met the criteria, while half had partially complied and 14% were totally non-compliant.[57] A 2013 review of Regulatory Impact Statements, which are based on RIAs, concluded there had been improvements. But a review in 2015 found non-compliance was higher than in some previous reviews, suggesting the quality had not improved over time.[58] Of the 50 statements that Treasury (which oversees the RIA process) identified for that review, only 15 met the quality assurance criteria, 25 did so partially, and 10 did not meet the criteria. The report stressed it was reviewing the conduct of the analysis, not the substantive merits of the policy options. A different approach in 2016 (the last compliance analysis this author was able to locate) considered which factors most influenced the "quality" of the RIS and identified failure to embed the RIS in the policy process; external impacts, especially ministerial preferences and independent reviews; and the author's experience of the RIS process and policy area.[59]

The independent review conducted of Australia's compliance in 2012 reported "substantial dissatisfaction by all major stakeholder groups with the RIA Process" and, notwithstanding recent modifications, there was "widespread lack of acceptance of and commitment to the RIA process by ministers and agencies."[60] Compliance in 2010 and 2011 had fallen to its lowest level in percentage terms since the current approach was introduced in 1997.

Subsequent reviews suggest a better record of compliance, but that appears to reflect a different methodology and documents under review. A review of regulatory proposals that were announced in 2011-12 found that 69 of the 78 RISs required at the decision-making stage were prepared and assessed as adequate, giving a compliance rate of 88%. This improved on the compliance rate of 75% achieved in 2010-11.[61] The most recent *independent* audit identified in Australia,[62] for 2014-15, was conducted against a new criterion of "best practice" that included

consistency with the government's requirements and whether core questions in the RIS were addressed. The report found 78% of the 55 RISs examined satisfied that standard.[63] Subsequent assessments appear to have been conducted internally by the OBPR, not independently of the government. However, the Australian Government Budget Review of 2020-21, while still heralding a "deregulation agenda", identified a series of regulatory failures that occurred under its "best practice" regulatory regime.[64]

The US itself struggled to meet its domestic criteria, which are embedded in the USMCA. According to a review of Regulatory Impact Analysis from 2008 to 2013:[65]

> "The Regulatory Report Card reveals that the quality and use of regulatory analysis by federal agencies do not live up to the standards articulated in executive orders and guidance the Office of Management and Budget has created for agencies. The average Report Card score for recent regulations [reviewed in the study] barely exceeds 50 percent."[66]

Resourcing compliance

Compliance with the regulatory regime also has financial and opportunity costs by diverting revenue and public sector personnel from other activities. A decade ago, a researcher estimated that complex and sophisticated new studies by the US Environmental Protection Agency cost close to US$2 million.[67] The Australian Government's budget for a cross-portfolio "JobMaker – Deregulation" Package in 2020-21 amounted to a staggering A$92.1 million over four years.[68] This included:

- A$18.5 million over four years to streamline approval processes into a single application across jurisdictions, allowing for faster establishment of new early childhood education and care businesses, and employment of their staff;
- A$17.9 million over three years to modernise the Therapeutic Goods Administration business systems to streamline processes for the medicines and medical devices industry (costs to be met from within the existing Department of Health budget);
- A$7.2 million over four years to streamline the agricultural levy legislative framework;
- A$2.0 million over two years from 2020-21 to improve the accountability and transparency of regulator performance, build regulator capability, share best practice and drive a culture of regulator excellence; and an additional A$6.4 million over three years from 2020-21 to upskill and further build the capability of regulators, with an initial focus on agricultural export regulators to improve the delivery of services; and
- A$13.4 million over two years from 2020-21 to continue funding the Deregulation Taskforce to support and deliver the National Deregulation Agenda.

Research published in 2020 found the US Government, which is the lead proponent of GRP in IPEF, itself had a major capacity deficit that seriously undermined the ability of its Office of Information and Regulatory Affairs to deliver on its obligations. The authors report that:

> "Since 1981, OIRA's regulatory review responsibilities have waxed and waned with the volume of regulations subject to review. Over that same time period, the office acquired major new responsibilities, such as production of the annual report to Congress on the benefits and costs of federal regulations. Since April 2018, a Memorandum of Agreement between the Department of the Treasury and the OMB also tasked OIRA with reviewing Internal Revenue Service rules, which it did not previously review. Yet OIRA's staff has shrunk from 97 in 1980 to about 56 today, while the number of regulators in agencies grew from 115,000 in 1980 to 201,170 in 2010 – an increase of 75 percent. Regulatory agency staff outnumbers OIRA staff by almost 3600 to 1. Given the enormous disparities in resources and the significant potential reductions in human welfare if regulation is not adequately informed by economic analysis, this is truly a matchup of David versus Godzilla."[69]

Even if the GRP regime was genuinely "best practice", there is no indication that IPEF would provide flexibilities for developing countries who would bear the brunt of establishing it from scratch, or that they would be resourced on an ongoing basis to implement and maintain both the processes and related institutions.

9. Formalising influence of foreign states and corporations

The original TPPA, final TPPA/CPTPP and USMCA all stress the benefit that input from “interested persons” can bring to the quality of regulatory decisions. In theory, this can apply to a wide range of stakeholders concerned about areas of public policy, including environmental protection and climate change, workers’ rights and health and safety, indigenous rights and gender equity. In practice, however, the proposed mechanisms provide structured opportunities for well-resourced, predominantly foreign corporations and their lobby groups to influence regulatory decisions at the national level and coherence of pro-corporate regulation across the Parties.[70]

Rights of comment

The draft TPPA referred to a “wide range of stakeholder input”.[71] That was replaced by “input from interested persons” in the final version.[72] As noted earlier, the USMCA is much more explicit about ensuring rights to input on regulatory proposals. Parties have a positive obligation to ensure that any “interested person”, wherever domiciled, can make written comments on a proposed regulation,[73] and to evaluate any such comments before final decisions are made.

The African, Caribbean and Pacific Group of States (ACP) opposed similar “transparency” provisions that would allow foreign companies to comment on proposed new measures in the strongest possible terms at the WTO:

> “any future disciplines must not contain prior comment requirements either in a legally binding or best endeavour form. This is also supported by the fact that such requirements may be contrary to constitutional structures and legal systems in many developing countries as well as result in granting foreign-service suppliers opportunities to exert undue pressure on domestic decision making process, which is the core of sovereignty.”[74]

Under the USMCA, proposals for introduction, amendment or repeal of a regulation may also be triggered by “suggestions for improvement” when any “interested person” submits written suggestions that a regulation has become ineffective at protecting health, welfare or safety, has become more burdensome than necessary to achieve its objective, fails to take account of changed circumstances, or relies on incorrect or outdated information.[75]

There may be further avenues for influence depending on the institutional arrangements adopted in IPEF. In the final TPPA, the Committee of the Parties is required to establish “appropriate mechanisms” for opportunities for continuing inputs from “interested persons” of the Parties to enhance “regulatory coherence”.[76] Their cooperation activities may include dialogue with interested persons, including small and medium enterprises, of the other Parties.[77] The final TPPA/CPTPP text dilutes initial proposals that the first meeting of the Committee must establish mechanisms to ensure meaningful opportunities to provide views to enhance regulatory coherence under the chapter.[78] The functions of the inter-Party Committee in the USMCA go further, and include “considering suggestions from stakeholders regarding opportunities to strengthen the application of good regulatory practices”[79] and providing opportunities for nationals, including locally established corporations, to provide views on the implementation of the chapter.[80] Given the intrinsic pro-corporate bias in the chapter, that further skews the “democracy” and “inclusiveness” of the domestic regulatory process.

Expert advisory groups

The USMCA makes specific provision for a Party to establish “expert advisory groups” that include non-governmental persons to provide advice and recommendations to a regulatory authority on the preparation or implementation of regulations.[81] Membership is encouraged to reflect a diversity of views, and the existence, membership, functions, upcoming meeting dates and summary outcomes are “encouraged” to be publicly notified. Parties should “endeavour” to make documents prepared by or for such expert groups publicly available and recognise the importance of enabling interested persons to provide input to them. This process is expected to complement the public comment process. The obligations here are soft, probably because the US Trade Representative (USTR)’s own advisory committees are predominantly made up of corporate members who have privileged access to information and influence on government policies and decisions with limited transparency.[82]

Cross-reference to other chapters

Concepts of transparency and inclusive decision making feature in IPEF more broadly, and in "good regulatory practice" specifically. The provisions on GRP need to be read in conjunction with "transparency" provisions in the rest of IPEF that will guarantee foreign state Parties and their corporations the right to comment on proposed laws and regulations, and hence to lobby for or against them. It is possible that transparency chapters or provisions may empower only interested commercial actors, and provide no equivalent access rights to public interest groups that may have contrary views. But even notional parity would obscure the disparities of resources and influence between the former and the latter. The leverage of other states and their corporations would be further enhanced by their ability to threaten potential disputes for breaches of other aspects of IPEF, where that is provided for, or other free trade and investment agreements involving the same Parties.

The Joint Statement Initiative on services domestic regulation

There is also overlap with other agreements that the US proposes for inclusion in IPEF. Notably, the US proposes to "build on" the Joint Statement Initiative Reference Paper on Services Domestic Regulation[83] that some, but not all, of the countries participating in Pillar I of IPEF have adopted.[84] The Reference Paper disciplines apply to licensing requirements and procedures, qualification requirements and procedures, and technical standards "affecting" trade in services.[85] It is important to note that this contains additional procedural, notification and implementation requirements as well as "reasonable opportunities" for foreign states and "interested persons" to comment on proposed "measures".[86]

Importing these obligations into IPEF alongside the other "regulatory practice" obligations would extend the influence of foreign, especially US, corporations far beyond services to proposed laws and other "measures" involving regulation of genetically modified organisms, intellectual property, health, digital trade, taxation, mining, environment and climate change mitigation. That is precisely what US corporate lobbyists such as BIO (the industry association for Bayer, Eli Lilly etc), US Chamber of Commerce, Coalition of Services Industries, Computer and Communications Industry Association, and tech industry giants like Google, etc have been urging the USTR to deliver through the Good Regulatory Practice chapter.[87]

10. Enforcement

The structure of any IPEF agreement and the nature and enforceability of binding obligations remain opaque.

The initial TPPA Regulatory Coherence chapter was subject to the formal dispute process, but only relating to "the obligation to have processes or mechanisms to facilitate central coordination and review of certain new regulatory measures".[88] An actionable breach would have required a violation of that obligation and a demonstrably adverse effect on trade and investment between the two Parties. This implied that a government could be challenged for taking inadequate steps to "endeavour to ensure" such a process, mechanism or body was established. The final version of the chapter in the TPPA/CPTPP is not enforceable.[89]

The USMCA dispute settlement chapter applies one year after the agreement entered into force, allowing for complaints involving a sustained or recurring course of action or inaction that breaches the Party's obligations. Before deciding to bring a formal dispute, the complainant must "exercise its judgement" as to whether that would be "fruitful".[90] Of course, that does not stop it from then deciding to bring a dispute.

Without clarity about whether IPEF will be enforceable, and if so what form that would take and what penalties might be imposed, negotiating governments face significant risks in agreeing to these intrusive, onerous and unbalanced obligations.

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Endnotes

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3 Jane Kelsey, "'Regulatory Responsibility': Embedded Neoliberalism and its Contradictions", *Policy Quarterly*, 6(2), 2010, 36. Available at: https://ojs.victoria.ac.nz/pq/article/view/4332

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5 Celia Wexler, "Who's Afraid of Cass Sunstein?", BlueTent, 5 February 2021. Available at: https://bluetent.us/articles/governing/cass-sunstein-biden-white-house-oira/

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7 Australian Government, *Rethinking Regulation. Report of the Taskforce on Reducing Regulatory Burdens on Business*, January 2006. Available at: https://www.pc.gov.au/research/supporting/regulation-taskforce/report/regulation-taskforce2.pdf

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9 Jonathan Curtis, Deregulation Agenda. Budget Review 2020-2021, Parliament of Australia. Available at: https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/BudgetReview202021/DeregulationAgenda

10 See Government of Australia, *Best Practice Regulation Handbook*, August 2007. Available at: https://regulationbodyofknowledge.org/wp-content/uploads/2013/03/AustralianGovernment_Best_Practice_Regulation.pdf

11 The Budget Review of 2020-2021 allocated funding to a "new Deregulation Agenda". See https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/BudgetReview202021/DeregulationAgenda. "The term 'deregulation' implies removing regulations – which is certainly an element – but the program has a broader focus of decreasing the regulatory compliance burden on industry through: repealing regulations that are no longer considered necessary; streamlining and harmonising regulations across jurisdictions; and (a major feature of many measures) maximising the use of technology." The budget allocations show developing countries the potential cost to them of attempting to implement this model.

12 See https://oia.pmc.gov.au/

13 Jane Kelsey, "'Regulatory Responsibility': Embedded Neoliberalism and its Contradictions", *Policy Quarterly*, 6(2), 2010, 36. Available at: https://ojs.victoria.ac.nz/pq/article/view/4332

14 For the ministerial statement and associated Cabinet minutes, see http://www.treasury.govt.nz/economy/regulation/statement/release

15 https://www.mbie.govt.nz/cross-government-functions/regulatory-stewardship/regulatory-systems/

16 See OECD, *Regulatory Policies in OECD Countries: From Interventionism to Regulatory Governance*, 2002, OECD Reviews of Regulatory Reform, OECD, Paris.

17 https://www.apec.org › 2000 › 00_scsc3_017

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19 https://www.citizenstrade.org/ctc/wp-content/uploads/2011/10/TransPacificRegulatoryCoherence.pdf. For analysis by this author, see https://www.itsourfuture.org.nz/wp-content/uploads/2013/09/JK-Memo-on-Reg-Coh.pdf, and Jane Kelsey, "The Trans-Pacific Partnership Agreement: A Gold-Plated Gift to the Global Tobacco Industry", *American Journal of Law and Medicine*, 39 (2013), 237 at 246-249. Available at: https://itsourfuture.org.nz/wp-content/uploads/2013/09/Kelsey-TPPA-A-Gold-Plated-gift-to-the-US-Tobacco-industry.pdf

20 More than a decade after the catastrophic and contagious "global financial crisis", which was driven by US light-touch regulation, International Monetary Fund (IMF) researchers are writing that "countries still need to keep pushing to lower risks and strengthen the tools to manage future crises, and ultimately to reduce fluctuations tied to economic cycles." Tobias Adrian and Jay Surti, "Capital Markets Regulation is Stronger, but Some Gaps Still Must be Closed", IMF Blog, 29 June 2022. Available at: https://www.imf.org/en/Blogs/Articles/2022/06/29/capital-markets-regulation-is-stronger-but-some-gaps-still-must-be-closed

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23 Article 25.2

24 Article 28.2

25 Article 28.1

26 E.g., Article 28.2.1

27 Article 25.2

28 Article 28.2.2

29 Article 25.3

30 Article 28.1

31 Article 25.4

32 Article 18.3

[33] At the time of the TPPA regulatory coherence negotiations, the US government adopted an Executive Order, Identifying and Reducing Regulatory Burdens (the 2012 Order), that requires agencies to give priority to initiatives that will produce significant savings in regulatory burden and called on agencies to invite, on a regular basis, public input on regulations in need of retrospective review.

[34] Council of Australian Governments, "Best Practice Regulation. A Guide for Ministerial Councils and National Standard Setting Bodies", October 2007.

[35] New Zealand Treasury, "Government Statement on Regulation: Better Regulation, Less Regulation", August 2009. Available at: https://www.treasury.govt.nz/information-and-services/economic-policy/regulatory-reform-regulation/information-releases

[36] New Zealand Treasury, "Impact analysis requirements for regulatory proposals". Available at: https://www.treasury.govt.nz/information-and-services/regulation/impact-analysis-requirements-regulatory-proposals

[37] Article 28.4

[38] Article 28.6

[39] Article 25.5.7

[40] Article 28.9.1

[41] Article 28.9.1, Fn 2

[42] Article 28.9.2

[43] Article 28.9.3

[44] Article 28.7

[45] Article 28.9.7

[46] Article 28.9.9

[47] Article 28.8

[48] Article 28.7

[49] Article 25.5.6

[50] Under Article 28.13

[51] Article 28.14

[52] Article 28.5

[53] Article 25.5.1

[54] Article 28.11.1

[55] Article X.3.1

[56] Article 28.11.2

[57] Castalia Strategic Advisers, *Regulatory Impact Analysis Evaluation 2012*, June 2012, 6-7. Available at: https://www.treasury.govt.nz/publications/ria/regulatory-impact-analysis-evaluation-2012

[58] Vhari McWha, Jo Smith and Kieran Murray, *Regulatory Impact Analysis Evaluation 2015*, July 2015, Sapere Group, vii. Available at: https://srgexpert.com/wp-content/uploads/2017/11/ria-review-2015.pdf

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[61] Government of Australia, *Best Practice Regulation Report 2011-2012*, Department of Finance and Deregulation. Available at: https://oia.pmc.gov.au/sites/default/files/2021-09/best-practice-regulation-report-11-12.pdf

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[63] *Government of Australia, Best Practice Regulation Report 2014-2015*, Department of Finance and Deregulation. Available at: https://oia.pmc.gov.au/best-practice-regulation-report-2014-15

[64] The Australian Government document cites: the 2019 *Royal Commission into Aged Care Quality and Safety Interim Report*; the earlier 2017 Review of National Aged Care Quality Regulatory Processes; the 2019 Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services industry; the 2020 *Interim report of the Review into the EPBC Act* and a 2020 ANAO performance audit report *Referrals, assessments and approvals of Controlled Actions under the Environmental Protection and Biodiversity Conservation Act 1999*; the Senate Education and Employment Committee October 2015 report into the operation, regulation and funding of private vocational education and training (VET) providers in Australia; the September 2018 Review of the Regulatory Capability and Culture of the Department of Agriculture and Water Resources in the Regulation of Live Animal Exports; the 2017 independent investigation into NSW water management and compliance; and the NSW Parliament Public Accountability Committee to inquire into regulation of building standards, building quality and building disputes. Available at: https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/BudgetReview202021/DeregulationAgenda

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[72] Article 25.2(d)

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[74] WTO, Communication from the African, Caribbean and Pacific Group of States (ACP), "Pro-Development Principles for GATS Article VI:4 Negotiations", JOB(06)/136/Rev.1, quoted in Kinda Mohamadieh, "Reference Paper on Services Domestic Regulations: Overview of main content and regulatory implications", Third World Network, November 2021, Fn 39. Available at: https://www.twn.my/title2/briefing_papers/MC12/briefings/Reference%20paper%20on%20SDR%20TWNMC12BP%20Nov%202021%20Mohamadieh.pdf

[75] Article 28.14

[76] Article 25.8

[77] Article 27.1(b)

[78] Article X.6

[79] Article 28.18.3(d)

[80] Article 28.18.4

[81] Article 28.10

[82] https://ustr.gov/about-us/advisory-committees

[83] Declaration on the Conclusion of Negotiations on Services Domestic Regulation, WT/L/1129, 2 December 2021.

[84] Brunei Darussalam, Fiji, Indonesia and Viet Nam are not signatories.

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[88] Article X.8

[89] Article 25.11

[90] Article 28.20