

MEMORANDUM

FR: Lori Wallach, Rethink Trade

RE: **USICA requires the U.S. government to investigate and undermine digital governance and anti-monopoly policies worldwide on behalf of Big Tech via a “Special 301” process**

The trade title of the Senate-passed United States Innovation and Competition Act (USICA) provides Big Tech interests with a powerful new tool to undermine governments’ efforts to counter Big Tech abuses.¹ USICA Section 71011 would newly require the Office of the U.S. Trade Representative (USTR) to monitor the digital governance and anti-monopoly policies of countries worldwide, publish annual reports of such policies deemed to be illegal trade barriers and target for elimination pro-worker, pro-consumer, pro-privacy and pro-competition policies and proposals, including policies similar to those now being developing for the United States by Congress and executive branch agencies.

Countries that refuse to eliminate policies included in the annual report could face U.S. government sanctions under “Section 301.” Section 301, which refers to U.S. trade law provisions that authorize the government to impose tariffs and other trade penalties, is the process through which tariffs are now imposed on more than \$360 billion of Chinese imports.² Often countries eliminate or change targeted policies upon the mere instigation or publication of a Section 301 investigation report, a step which is required before sanctions can be imposed. This occurred with respect to the Trump administration’s 301 investigation of countries’ digital services taxes.³

Effectively, Section 71011 establishes a new “Special 301” process for Big Tech. The pharmaceutical industry pushed for and gained what has become known as “Special 301” procedures in 1988. Pharma interests use Special 301 annual reports, and the U.S. government’s gathering of information about other nations’ policies and practices, to attack generic medicine, compulsory licensing and other drug cost reduction policies. Special 301 reports are a pipeline for Section 301 investigations. Countries that receive the “worst” rating of “Priority Foreign Country” are subject to Section 301 investigations. Thus, simply being listed in any Special 301 “watchlist” can lead countries to eliminate or weaken policies before any formal investigation is even begun.⁴ The threat of sanctions is one reason, but also foreign investors review these reports and the U.S. government links other diplomatic and aid considerations.⁵

¹ Text of Senate-passed USICA available at <https://www.congress.gov/bill/117th-congress/senate/bill/1260?q=%7B%22search%22%3A%5B%22UNITED+STATES+INNOVATION+AND+COMPETITION+ACT%22%2C%22UNITED%22%2C%22STATES%22%2C%22INNOVATION%22%2C%22COMPETITION%22%2C%22ACT%22%5D%7D&s=2&r=4>

² Title III of the Trade Act of 1974 (Sections 301-310, codified as amended at 19 U.S.C. §§ 2411-2420) is often referred to as “Section 301.” Section 301 provides statutory authority for the U.S. government to impose penalties on countries that violate U.S. trade agreements or engage in acts that are “unjustifiable” or “unreasonable” and burden U.S. commerce. . See also: Congressional Research Service. “Section 301 of the Trade Act of 1974”. Updated Jan. 2022, available at: <https://crsreports.congress.gov/product/pdf/IF/IF11346#:~:text=Section%20301%20of%20the%20Trade%20Act%20of%201974%20grants%20the,to%20certain%20foreign%20trade%20practices>

³ USTR Releases Findings and Updates in DST Investigations, Jan. 14, 2021, available at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/january/ustr-releases-findings-and-updates-dst-investigations>

⁴ See e.g. Burcu Kilic, Public Citizen, USTR SPECIAL 301 2018 Hearing Statement, available at <https://www.citizen.org/wp-content/uploads/migration/public-citizen-statement-special-301-2018.pdf> (Among other examples, the testimony describes how Colombia reversed its intentions to issue compulsory licenses for a cancer drug (gleevec) and hepatitis C drugs after attacks in Special 301 reports. More recently, Indonesia just revoked compulsory licensing flexibilities after years of those policies being attacked in Special 301 reports.)

⁵ See e.g. Doctors Without Borders, “USTR Priority Watch List Calls Out Countries for Protecting Public Health,” Apr. 27, 2018, available at <https://msfaccess.org/ustr-priority-watch-list-calls-out-countries-protecting-public-health>

Sadly, there are several decades of evidence to substantiate how merely being listed in the Special 301 report can derail a new initiative or pressure a government to eliminate or weaken policies. Indeed, imposition of sanctions is rare: With respect to intellectual property issues, Ukraine was an unusual case after not making demanded changes related to copyrights after being designated a Priority Foreign Country. Ukraine had \$75 million in sanctions imposed from 2001-2002.

Effectively, Section 71011 would require the U.S. government to become an agent of Big Tech to undermine the best digital governance policies worldwide. This is highly problematic in many ways described below. However, to start with, a new, powerful U.S. trade enforcement tool to target specific policies worldwide, and especially policies on which Congress are currently legislating and the administration acting, should only be established after broad debate and through normal congressional procedures. In contrast, USICA Section 71011, and indeed the entire USICA trade title, was slipped into the 2376-page bill the night before final passage.

Section 71011 is at best unrelated to and perhaps contrary to the ostensible purpose of the legislation, which is improving U.S. competitiveness *vis à vis* China. It has never been subject to committee mark up or even discussion. Recently five Democratic Senators, including four from the Senate Finance Committee, wrote Leader Schumer and Speaker Pelosi to announce their preference for the House America Creating Opportunities for Manufacturing, Pre-Eminence in Technology, and Economic Strength (COMPETES) Act⁶ trade title, which does not include Special 301 for Big Tech.⁷

Establishing an annual search-and-destroy list of the best digital policies worldwide

As a technical matter, all but a few words of Section 71011 are framed as an amendment to the Trade Act of 1974. This makes it confusing, especially to people not familiar with U.S. trade law. Perhaps the clearest way to understand what Section 71011 achieves is to consider the clerical amendment in Section 71011(c). It clarifies that the new language adds Special 301 for Big Tech as a new Section 183 of the Trade Act of 1974 that is located just under Big Pharma's Special 301 at Section 182. (See 19 U.S.C. 2242.⁸) There is a side-by-side of the Big Pharma and Big Tech language at the end of this memo, which shows it is the same program. The clerical amendment also identifies the new Section 183 with the title: "Identification of countries that disrupt digital trade."

The other reason Section 71011 is confusing is because the only place one can find the provision's accurate name is in the clerical amendment. In the actual USICA text, Section 71011 is labeled "Censorship as a Trade Barrier." Given the provision is located in the middle of the Senate's "China" legislation, it would be logical to assume Section 71011 is about countering the Chinese government's internet censorship, which is a real problem. Alas, in reality, Section 71011 applies to the entire world and would probably hit European Union policies, such as the Digital Markets Act and Digital Services Act,⁹ most severely. Moreover, the Office of the USTR already has authority to investigate barriers to actual electronic commerce, defined as commercial transactions conducted

⁶ The text of the House-passed COMPETES Act is available at <https://www.congress.gov/bill/117th-congress/house-bill/4521>

⁷ See <https://www.casey.senate.gov/news/releases/democratic-senators-urge-congressional-leaders-to-include-trade-provisions-in-china-competitiveness-bill-that-level-the-playing-field-for-american-workers>

⁸ See <https://www.law.cornell.edu/uscode/text/19/chapter-12/subchapter-1/part-8> to review the structure of the law.

⁹ See <https://www.europarl.europa.eu/news/en/headlines/society/20211209STO19124/eu-digital-markets-act-and-digital-services-act-explained>

online.¹⁰ And, USTR also already has authority under Section 301 to impose sanctions for China’s practice of censoring U.S. platforms within China, which undermine U.S. commercial interests.

Rather, Section 71011’s terms target policies that, “disrupt digital trade” or “deny fair and equitable market access to digital service providers that are United States persons.” But key terms used throughout, such as “censorship” or “digital trade” or “extra-judicial data access” are not defined at all, much less to target the Chinese government’s “censorship” via bans on access within China based on political content, or “coerced censorship” that targets the Chinese government’s interest in silencing foreign criticism of its practices.

The failure to define “censorship” is especially problematic: Big Tech firms claim that they are communications platforms not retail, transportation, hotel or other service providers. And if they lose their operating permits or are otherwise shut down by governments as a penalty for failing to meet domestic regulatory standards, they claim that they have been censored.

What does Section 71011 mean in practice?

USTR is required to “identify, in accordance with subsection (b) [of 19 U.S.C. 2241], foreign countries that are trading partners of the United States that engage in acts, policies, or practices that “disrupt digital trade activities...” and prepare an annual report to be published by a set date each year. Notably, 19 U.S.C. 2241, which is a provision of the Trade Act of 1974 that requires the USTR to prepare an annual report of barriers to U.S. trade called the National Trade Estimate, already covers barriers to “electronic commerce.”¹¹

In existing law, electronic commerce is defined to mean: “any transaction conducted over the Internet or through internet access, comprising the sale, lease, license, offer, or delivery of property, goods, services, or information, whether or not for consideration, and includes the provision of Internet access.” Thus, the scope of the new report is intended to extend to policies governing matters beyond online sales and provisions of internet access, such as storage and processing of data and its security, data flows, liability issues, competition policy, policies relating to code and algorithms and more.

Section 71011 refers to preparing a report consistent with the terms of 19 U.S.C. 2241(b). For non-trade-wonks, this is a reference to an annual report called the “National Trade Estimate”. Under this provision, USTR is required to not only identify and write an annual report on what it deems to be barriers to trade, but also to make recommendations “with respect to action being taken.” The recommendations clause in 19 U.S.C. 2241(b) includes another reference by statutory citation to a “Section 241.” Section 241 is the provisions triggering the Section 301 sanctions process!¹² Thus, the

¹⁰ See 19 U.S.C.2241 (a)(1) (A)(iii)

¹¹ 19 U.S.C.2241 (a)(1) (A) identify and analyze acts, policies, or practices of each foreign country which constitute significant barriers to, or distortions of— (i) United States exports of goods or services (including agricultural commodities; and property protected by trademarks, patents, and copyrights exported or licensed by United States persons), (ii) foreign direct investment by United States persons, especially if such investment has implications for trade in goods or services; and (iii) United States electronic commerce^{fn}, [fn for purposes of this section, the term “electronic commerce” has the meaning given that term in section 1104(3) of the Internet Tax Freedom Act.]

¹² 19 U.S.C. 2241(b)(2) “REPORTS TO INCLUDE INFORMATION WITH RESPECT TO ACTION BEING TAKEN The Trade Representative shall include in each report submitted under paragraph (1) information with respect to any action taken (or the reasons for no action taken) to eliminate any act, policy, or practice identified under subsection (a), including, but not limited to— (A) any action under section 2411 of this title...” [19 U.S.C. 2411 is “Section 301”.]

crux of Section 71011 is buried in a statutory reference buried in a statutory reference buried in an amendment to the Trade Act of 1974. The bottomline is that if a country's digital governance or anti-monopoly policy ends up in the new annual USTR hit-list report, and the policy is not eliminated, altered, or, in the case of a proposal, dust-binned, the country can face trade sanctions.

The language describing what domestic policies could be deemed illegal trade barriers is also confusing. First, it is tangled up with the undefined use of the term "censorship." But also an initial section provides general guidance, while a following section provides specific indicators. The first section targets countries that:

"engage in acts, policies, or practices that disrupt digital trade activities, including— coerced censorship in their own markets or extraterritorially; and"(2) other eCommerce or digital practices with the goal, or substantial effect, of promoting censorship or extrajudicial data access that disadvantages United States persons." (emphasis added.)

First, consider the very broad plain meaning of this clause: Forbidden are **"acts, policies, or practices that disrupt digital trade activities."** The two follow-on clauses are offered as examples ("including"), rather than as limitations on the first clause.

Second, they are broad examples, given, as noted above, the lack of definition for "censorship" and digital firms' regular use of the "censorship" frame to attack policies that in any way affect their business model or operations. The second clause is even broader, covering "other eCommerce or digital practice with the... substantial effect of promoting censorship." The use of the term "effect" is a classic trade trap that makes an unintended outcome a violation rather than focusing on the intent of a policy. Also note that the prohibited effect in the second clause is not actual censorship, but "promoting censorship."

Even if these language issues were fixed, the underlying problem is that there are legitimate reasons that a government policy might condition digital communication on compliance with certain competition policy, privacy protection or other standards. And, a government would have legitimate enforcement reasons to deny operating permissions for firms that refuse to meet such standards. Yet, such policies could be captured as forbidden acts, policies and practices that disrupt digital trade as the actual language encompasses any government action that has the effect of limiting digital operations.

The general clause identifying forbidden trade barriers is followed by more detailed provisions on "Requirements for Identification" that specify that USTR identify countries that:

"disrupt digital trade in a discriminatory or trade distorting manner with the goal, or substantial effect, of promoting censorship or extrajudicial data access;" or

"deny fair and equitable market access to digital service providers that are United States persons with the goal, or substantial effect, of promoting censorship or extrajudicial data access;" or

engage in coerced censorship or extrajudicial data access so as to harm the integrity of services or products provided by United States persons in the market of that country, the United States market, or other markets. (emphasis added)

As noted above, the focus on effect is extremely problematic, especially when combined with

“discriminatory,” “trade distorting” and “fair and equitable market access.” Particularly “fair and equitable market access” is a broad, subjective notion, but all three clauses are standard trade-pact “trap” language. The terms are designed to capture and forbid policies of general application that may have a bigger impact on some entities because those firms are dominant players in a market.

For example, under this language, a policy that conditions any and all ride sharing firms’ operating permission on registering as transportation companies and meeting labor and safety standards would have a discriminatory *effect* on dominant player Uber relative to smaller local firms. Notably, unlike most existing trade obligations, this language does not specify what is the object of comparison to determine discrimination. For instance, in the World Trade Organization (WTO) agreements, discrimination is assessed with respect to ‘*like domestic products*’ or ‘*like domestic service suppliers*.’ The language for a new Big Tech Special 301 does not have such limitations. Under this construct, denying operating rights for failing to comply could clearly be considered a denial of fair and equitable market access to digital service providers that are U.S. persons with the substantial effect of promoting censorship.

It is not just that this prioritizes giving free reign to digital firms over labor and environmental considerations, which it does. It’s easy to imagine scenarios where this proposal will elevate digital firms’ interests in ways that *harm* labor. Again, imagine the EU, or a member state, proposes pro-labor regulations of the ‘gig economy’ that apply across all sectors. This proposal does not refer to ride-sharing, but it would still disproportionately impact Uber, since Uber has a giant footprint in so many Western markets.

Given the lack of definition for “coerced censorship,” the final limitation is also problematic. This overly broad clause captures not only bans on, for instance, child pornography, the violation of which would result in a site being shut down. Ironically, it also captures the strict enforcement against pirated films, music and the like that is U.S. policy. Under this language, a country enforcing one U.S. policy demand – policing against piracy – would violate another.

Thus, the “Requirements for Identification” provision clarifying that the “only” conduct that would lead to foreign countries being listed by USTR does not, in fact, limit the innumerable policies that meet the definition of forbidden conduct that would result in countries and policies being included.

The next provision requires identification of “**priority foreign countries**” that

“engage in the most onerous or egregious acts, policies, or practices that have the greatest impact on the United States; and are not negotiating or otherwise making progress to end those acts, policies, or practices.”

This is the same language found in Big Pharma’s Special 301 as the classification that requires that a Section 301 investigation be initiated with respect to the country and policy. Such an investigation is the pathway to imposing sanctions under Section 301.

Establishing Special 301 powers for Big Tech not only contradicts the Biden administration’s Executive Order on Promoting Competition in the American Economy.¹³ It also snubs efforts by scores of Senate and House Democrats and GOP and Biden administration agencies to fight Big Tech abuses of workers,

¹³ See <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>

consumers and smaller firms. Instead of promoting labor rights and consumer protections in the digital sphere, which U.S. Trade Representative Katherine Tai spotlighted as administration goals¹⁴, this provision could undermine the best public interest protections around the world just as the U.S. Congress and agencies are trying to catch up on digital governance.

USICA's inclusion of Special 301 for Big Tech to attack the best anti-monopoly and digital governance policies worldwide is accompanied by new conditions that USICA would add to the Generalized System of Preferences (GSP) to condition trade benefits for poor countries on their not regulating Big Tech.¹⁵ Finally, USICA, in contrast to the House COMPETES Act, does not close the "Amazon loophole" that allows millions of imported packages arriving daily of online-purchased goods to skirt all safety inspections, taxes and normal customs procedures.

Combining what is included in and excluded from USICA, it become apparent that USICA is weighed down with controversial Big Tech giveaways not only unrelated to improving U.S. competitiveness *vis à vis* China, but antithetical to it.

BIG PHARMA'S SPECIAL 301 VS. PROPOSED BIG TECH SPECIAL 301 BOONDOGGLE

¹⁴ See <https://ustr.gov/about-us/policy-offices/press-office/speeches-and-remarks/2021/november/remarks-ambassador-katherine-tai-digital-trade-georgetown-university-law-center-virtual-conference>

¹⁵ See USICA Section 74001 (a)(2)(C)

Sec. 182: Big Pharma Special 301

(a) **IN GENERAL** By no later than the date that is 30 days after the date on which the annual report is submitted to Congressional committees under [section 2241\(b\) of this title](#), the United States Trade Representative (hereafter in this section referred to as the “Trade Representative”) shall identify—

- (1) those foreign countries that—
 - (A) deny adequate and effective protection of intellectual property rights, or
 - (B) deny fair and equitable market access to United States [persons that rely upon intellectual property protection](#), and
- (2) those foreign countries identified under paragraph (1) that are determined by the Trade Representative to be priority foreign countries.

(b) SPECIAL RULES FOR IDENTIFICATIONS

- (1) In identifying priority foreign countries under subsection (a)(2), the Trade Representative shall only identify those foreign countries—
 - (A) that have the most onerous or egregious acts, policies, or practices that—
 - (i) deny adequate and effective intellectual property rights, or
 - (ii) deny fair and equitable market access to United States [persons that rely upon intellectual property protection](#),
 - (B) whose acts, policies, or practices described in subparagraph (A) have the greatest adverse impact (actual or potential) on the relevant United States products, and
 - (C) that are not—
 - (i) entering into good faith negotiations, or
 - (ii) making significant progress in bilateral or multilateral negotiations, to provide adequate and effective protection of intellectual property rights.
 - (2) In identifying priority foreign countries under subsection (a)(2), the Trade Representative shall—
 - (A) consult with the Register of Copyrights, the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office, other appropriate officers of the Federal Government, and
 - (B) take into account information from such sources as may be available to the Trade Representative and such information as may be submitted to the Trade
- SEC. 71011 - “Sec. 183. Identification of countries that disrupt digital trade.**

“(a) **IN GENERAL.**—Not later than 60 days after the date on which the National Trade Estimate is submitted under section 181(b), the United States Trade Representative (in this section referred to as the ‘Trade Representative’) shall identify, in accordance with subsection (b), foreign countries that are trading partners of the United States that engage in acts, policies, or practices that disrupt digital trade activities, including—
“(1) coerced censorship in their own markets or extraterritorially; and “(2) other eCommerce or digital practices with the goal, or substantial effect, of promoting censorship or extrajudicial data access that disadvantages United States persons.

“(b) **REQUIREMENTS FOR IDENTIFICATIONS.**—In identifying countries under subsection (a), the Trade Representative shall identify only foreign countries that—
“(1) disrupt digital trade in a discriminatory or trade distorting manner with the goal, or substantial effect, of promoting censorship or extrajudicial data access;
“(2) deny fair and equitable market access to digital service providers that are United States persons with the goal, or substantial effect, of promoting censorship or extrajudicial data access; or
“(3) engage in coerced censorship or extrajudicial data access so as to harm the integrity of services or products provided by United States persons in the market of that country, the United States market, or other markets.

“(c) **DESIGNATION OF PRIORITY FOREIGN COUNTRIES.**—
“(1) **IN GENERAL.**—The Trade Representative shall designate as priority foreign countries the foreign countries identified under subsection (a) that—
“(A) engage in the most onerous or egregious acts, policies, or practices that have the greatest impact on the United States; and
“(B) are not negotiating or otherwise making progress to end those acts, policies, or practices.

Representative by interested persons, including information contained in reports submitted under [section 2241\(b\) of this title](#) and petitions submitted under [section 2412 of this title](#).

(3) The Trade Representative may identify a foreign country under subsection (a)(1)(B) only if the Trade Representative finds that there is a factual basis for the denial of fair and equitable market access as a result of the violation of international law or agreement, or the existence of barriers, referred to in subsection (d)(3).

(4) In identifying foreign countries under paragraphs (1) and (2) of subsection (a), the Trade Representative shall take into account—

(A) the history of intellectual property laws and practices of the foreign country, including any previous identification under subsection (a)(2), and

(B) the history of efforts of the United States, and the response of the foreign country, to achieve adequate and effective protection and enforcement of intellectual property rights.

(c) REVOCATIONS AND ADDITIONAL IDENTIFICATIONS

(1) The Trade Representative may at any time—

(A) revoke the identification of any foreign country as a priority foreign country under this section, or

(B) identify any foreign country as a priority foreign country under this section, if information available to the Trade Representative indicates that such action is appropriate.

(2) The Trade Representative shall include in the semiannual report submitted to the Congress under [section 2419\(3\) of this title](#) a detailed explanation of the reasons for the revocation under paragraph (1) of the identification of any foreign country as a priority foreign country under this section.

(d) DEFINITIONS For purposes of this section—

(1) The term “[persons that rely upon intellectual property protection](#)” means persons involved in—

(A) the creation, production or licensing of works of authorship (within the meaning of sections 102 and 103 of title 17) that are copyrighted, or

(B) the manufacture of products that are patented or for which there are process patents.

(2) A foreign country denies adequate and effective protection of intellectual property rights if the foreign country denies adequate and effective means under the laws of the foreign country for persons who are not citizens or nationals of such

“(2) REVOCATIONS AND ADDITIONAL IDENTIFICATIONS.—

“(A) IN GENERAL.—The Trade Representative may at any time, if information available to the Trade Representative indicates that such action is appropriate—

“(i) revoke the identification of any foreign country as a priority foreign country under paragraph (1); or

“(ii) identify any foreign country as a priority foreign country under that paragraph.

“(B) REPORT ON REASONS FOR REVOCATION.—The Trade Representative shall include in the semiannual report submitted to Congress under section 309(3) a detailed explanation of the reasons for the revocation under subparagraph (A) of the identification of any foreign country as a priority foreign country under paragraph (1) during the period covered by the report.

foreign country to secure, exercise, and enforce rights relating to patents, process patents, registered trademarks, copyrights, trade secrets, and mask works.

(3) A foreign country denies fair and equitable market access if the foreign country effectively denies access to a market for a product protected by a copyright or related right, patent, trademark, mask work, trade secret, or plant breeder's right, through the use of laws, procedures, practices, or regulations which—

(A) violate provisions of international law or international agreements to which both the United States and the foreign country are parties, or

(B) constitute discriminatory nontariff trade barriers.

(4) A foreign country may be determined to deny adequate and effective protection of intellectual property rights, notwithstanding the fact that the foreign country may be in compliance with the specific obligations of the Agreement on Trade-Related Aspects of Intellectual Property Rights referred to in [section 3511\(d\)\(15\) of this title](#).

(e) PUBLICATION

The Trade Representative shall publish in the Federal Register a list of foreign countries identified under subsection (a) and shall make such revisions to the list as may be required by reason of action under subsection (c).

“(d) PUBLICATION.—The Trade Representative shall publish in the Federal Register a list of foreign countries identified under subsection (a) and foreign countries designated as priority foreign countries under subsection (c) and shall make such revisions to the list as may be required by reason of action under subsection (c)(2).

(f) SPECIAL RULE FOR ACTIONS AFFECTING UNITED STATES CULTURAL INDUSTRIES

(1) IN GENERAL By no later than the date that is 30 days after the date on which the annual report is submitted to Congressional committees under [section 2241\(b\) of this title](#), the Trade Representative shall identify any act, policy, or practice of Canada which—

(A) affects [cultural industries](#),

(B) is adopted or expanded after December 17, 1992, and

(C) is actionable under article 32.6 of the USMCA (as defined in [section 4502 of this title](#)).

(2) SPECIAL RULES FOR IDENTIFICATIONS For purposes of [section 2412\(b\)\(2\)\(A\) of this title](#), an act, policy, or practice identified under this subsection shall be treated as an act, policy, or

practice that is the basis for identification of a country under subsection (a)(2), unless the United States has already taken action pursuant to article 32.6 of the USMCA in response to such act, policy, or practice. In deciding whether to identify an act,

policy, or practice under paragraph (1), the Trade Representative shall—

(A) consult with and take into account the views of representatives of the relevant domestic industries, appropriate committees established pursuant to [section 2155 of this title](#), and appropriate officers of the Federal Government, and

(B) take into account the information from such sources as may be available to the Trade Representative and such information as may be submitted to the Trade Representative by interested persons, including information contained in reports submitted under [section 2241\(b\) of this title](#).

(3) **CULTURAL INDUSTRIES** For purposes of this subsection, the term “[cultural industries](#)” means persons engaged in any of the following activities:

(A) The publication, distribution, or sale of books, magazines, periodicals, or newspapers in print or machine readable form but not including the sole activity of printing or typesetting any of the foregoing.

(B) The production, distribution, sale, or exhibition of film or video recordings.

(C) The production, distribution, sale, or exhibition of audio or video music recordings.

(D) The publication, distribution, or sale of music in print or machine readable form.

(E) Radio communications in which the transmissions are intended for direct reception by the general public, and all radio, television, and cable broadcasting undertakings and all satellite programming and broadcast network services.

(g) SPECIAL RULES FOR FOREIGN COUNTRIES ON THE PRIORITY WATCH LIST

(1) ACTION PLANS

(A) In general

Not later than 90 days after the date on which the Trade Representative submits the National Trade Estimate under [section 2241\(b\) of this title](#), the Trade Representative shall develop an action plan described in subparagraph (C) with respect to each foreign country described in subparagraph (B).

(B) Foreign country described The Trade Representative shall develop an action plan under subparagraph (A) with respect to each foreign country that—

(i) the Trade Representative has identified for placement on the [priority watch list](#); and

(ii) has remained on such list for at least one year.

(C) Action plan described An action plan developed under subparagraph (A) shall contain the benchmarks

described in subparagraph (D) and be designed to assist the foreign country—

(i) to achieve—

(I) adequate and effective protection of intellectual property rights; and

(II) fair and equitable market access for United States [persons that rely upon intellectual property protection](#); or

(ii) to make significant progress toward achieving the goals described in clause (i).

(D) Benchmarks described

The benchmarks contained in an action plan developed pursuant to subparagraph (A) are such legislative, institutional, enforcement, or other actions as the Trade Representative determines to be necessary for the foreign country to achieve the goals described in clause (i) or (ii) of subpara (C).

(2) FAILURE TO MEET ACTION PLAN BENCHMARKS

If, as of one year after the date on which an action plan is developed under paragraph (1)(A), the President, in consultation with the Trade Representative, determines that the foreign country to which the action plan applies has not substantially complied with the benchmarks described in paragraph (1)(D), the President may take appropriate action with respect to the foreign country.

(3) PRIORITY WATCH LIST DEFINED

In this subsection, the term “[priority watch list](#)” means the [priority watch list](#) established by the Trade Representative pursuant to subsection (a).

(h) ANNUAL REPORT Not later than 30 days after the date on which the Trade Representative submits the National Trade Estimate under [section 2241\(b\) of this title](#), the Trade Representative shall submit to the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate a report on actions taken under this section during the 12 months preceding such report, and the reasons for such actions, including—

(1) a list of any foreign countries identified under subsection (a);

(2) a description of progress made in achieving improved intellectual property protection and market access for persons relying on intellectual property rights; and

(3) a description of the action plans developed under subsection (g) and any actions taken by foreign countries under such plans.

“(e) ANNUAL REPORT.—Not later than 30 days after the date on which the Trade Representative submits the National Trade Estimate under section 181(b), the Trade Representative shall submit to the Committee on Finance of the Senate and the Committee on Ways and Means of the House of Representatives a report on actions taken under this section during the one-year period preceding that report, and the reasons for those actions, including—

“(1) a list of any foreign countries identified under subsection (a); and

“(2) a description of progress made in decreasing disruptions to digital trade.”.

Trade Act of 1974, as added by subsection (a), the United States Trade Representative may consider information contained in the findings from the investigation of the United States International Trade Commission entitled “Foreign Censorship: Trade and Economic Effects on U.S. Businesses”

(c) CLERICAL AMENDMENT.—The table of contents for the Trade Act of 1974 is amended by inserting after the item relating to section 182 the following: “Sec. 183. Identification of countries that disrupt digital trade.”.

(b) SENSE OF CONGRESS.—It is the sense of Congress that, in carrying out any revocations or identifications under section 183(c)(2)(A) of the

TEXT OF SECTION 301

19 U.S. Code § 2411 - Actions by United States Trade Representative

(a) MANDATORY ACTION

(1) If the United States [Trade Representative](#) determines under [section 2414\(a\)\(1\) of this title](#) that—

(A) the rights of the United States under any trade agreement are being denied; or

(B) an act, policy, or practice of a [foreign country](#)—

(i) violates, or is inconsistent with, the provisions of, or otherwise denies benefits to the United States under, any trade agreement, or

(ii) is unjustifiable and burdens or restricts United States [commerce](#);

the [Trade Representative](#) shall take action authorized in subsection (c), subject to the specific direction, if any, of the President regarding any such action, and shall take all other appropriate and feasible action within the power of the President that the President may direct the [Trade Representative](#) to take under this subsection, to enforce such rights or to obtain the elimination of such act, policy, or practice. Actions may be taken that are within the power of the President with respect to trade in any goods or services, or with respect to any other area of pertinent relations with the [foreign country](#).

(2) The [Trade Representative](#) is not required to take action under paragraph (1) in any case in which—

(A) the Dispute Settlement Body (as defined in [section 3531\(5\) of this title](#)) has adopted a report, or a ruling issued under the formal dispute settlement proceeding provided under any other trade agreement finds, that—

(i) the rights of the United States under a trade agreement are not being denied, or

(ii) the act, policy, or practice—

is not a violation of, or inconsistent with, the rights of the United States, or

(II) does not deny, nullify, or impair benefits to the United States under any trade agreement; or

(B) the [Trade Representative](#) finds that—

(i) the [foreign country](#) is taking satisfactory measures to grant the rights of the United States under a trade agreement,

(ii) the [foreign country](#) has—

(I) agreed to eliminate or phase out the act, policy, or practice, or

(II) agreed to an imminent solution to the burden or restriction on United States [commerce](#) that is satisfactory to the [Trade Representative](#),

(iii) it is impossible for the [foreign country](#) to achieve the results described in clause (i) or (ii), as appropriate, but the [foreign country](#) agrees to provide to the United States compensatory trade benefits that are satisfactory to the [Trade Representative](#),

(iv) in extraordinary cases, where the taking of action under this subsection would have an adverse impact on the United States economy substantially out of proportion to the benefits of such action, taking into account the impact of not taking such action on the credibility of the provisions of this subchapter, or

(v) the taking of action under this subsection would cause serious harm to the national security of the United States.

(3) Any action taken under paragraph (1) to eliminate an act, policy, or practice shall be devised so as to affect goods or services of the [foreign country](#) in an amount that is equivalent in value to the burden or restriction being imposed by that country on United States [commerce](#).

(b) DISCRETIONARY ACTION If the [Trade Representative](#) determines under [section 2414\(a\)\(1\) of this title](#) that—

(1) an act, policy, or practice of a [foreign country](#) is unreasonable or discriminatory and burdens or restricts United States [commerce](#), and

(2) action by the United States is appropriate, the [Trade Representative](#) shall take all appropriate and feasible action authorized under subsection (c), subject to the specific direction, if any, of the President regarding any such action, and all other appropriate and feasible action within the power of the President that the President may direct the [Trade Representative](#) to take under this subsection, to obtain the elimination of that act, policy, or practice. Actions may be taken that are within the power of the President with respect to trade in any goods or services, or with respect to any other area of pertinent relations with the [foreign country](#).

(c) SCOPE OF AUTHORITY

(1) For purposes of carrying out the provisions of subsection (a) or (b) or [section 2416\(c\) of this title](#), the [Trade Representative](#) is authorized to—

(A) suspend, withdraw, or prevent the application of, benefits of trade agreement concessions to carry out a trade agreement with the [foreign country](#) referred to in such subsection;

(B) impose duties or [other import restrictions](#) on the goods of, and, notwithstanding any other provision of law, fees or restrictions on the services of, such [foreign country](#) for such time as the [Trade Representative](#) determines appropriate;

(C) in a case in which the act, policy, or practice also fails to meet the eligibility criteria for receiving [duty-free](#) treatment under subsections (b) and (c) of [section 2462 of this title](#), subsections (b) and (c) of [section 2702 of this title](#), or subsections (c) and (d) of [section 3202 of this title](#), withdraw, limit, or suspend such treatment under such provisions, notwithstanding the provisions of subsection (a)(3) of this section; or

(D) enter into binding agreements with such [foreign country](#) that commit such [foreign country](#) to—

(i) eliminate, or phase out, the act, policy, or practice that is the subject of the action to be taken under subsection (a) or (b),

(ii) eliminate any burden or restriction on United States [commerce](#) resulting from such act, policy, or practice, or

(iii) provide the United States with compensatory trade benefits that—

(I) are satisfactory to the [Trade Representative](#), and

(II) meet the requirements of paragraph (4).

(2)(A) Notwithstanding any other provision of law governing any [service sector access authorization](#), and in addition to the authority conferred in paragraph (1), the [Trade Representative](#) may, for purposes of carrying out the provisions of subsection (a) or (b)—

(i) restrict, in the manner and to the extent the [Trade Representative](#) determines appropriate, the terms and conditions of any such authorization, or

(ii) deny the issuance of any such authorization.

(B) Actions described in subparagraph (A) may only be taken under this section with respect to [service sector access authorizations](#) granted, or applications therefor pending, on or after the date on which—

(i) a petition is filed under [section 2412\(a\) of this title](#), or

(ii) a determination to initiate an investigation is made by the [Trade Representative](#) under [section 2412\(b\) of this title](#).

(C) Before the [Trade Representative](#) takes any action under this section involving the imposition of fees or other restrictions on the services of a [foreign country](#), the [Trade Representative](#) shall, if the services involved are subject to regulation by any agency of the Federal Government or of any State, consult, as appropriate, with the head of the agency concerned.

(3) The actions the [Trade Representative](#) is authorized to take under subsection (a) or (b) may be taken against any goods or economic sector—

(A) on a nondiscriminatory basis or solely against the [foreign country](#) described in such subsection, and

(B) without regard to whether or not such goods or economic sector were involved in the act, policy, or practice that is the subject of such action.

(4) Any trade agreement described in paragraph (1)(D)(iii) shall provide compensatory trade benefits that benefit the economic sector which includes the domestic industry that would benefit from the elimination of the act, policy, or practice that is the subject of the action to be taken under subsection (a) or (b), or benefit the economic sector as closely related as possible to such economic sector, unless—

(A) the provision of such trade benefits is not feasible, or

(B) trade benefits that benefit any other economic sector would be more satisfactory than such trade benefits.

(5) If the [Trade Representative](#) determines that actions to be taken under subsection (a) or (b) are to be in the form of import restrictions, the [Trade Representative](#) shall—

(A) give preference to the imposition of duties over the imposition of [other import restrictions](#), and

(B) if an import restriction other than a [duty](#) is imposed, consider substituting, on an incremental basis, an equivalent [duty](#) for such [other import restriction](#).

(6) Any action taken by the [Trade Representative](#) under this section with respect to [export targeting](#) shall, to the extent possible, reflect the full benefit level of the [export targeting](#) to the beneficiary over the period during which the action taken has an effect.

(d) **DEFINITIONS AND SPECIAL RULES** For purposes of this subchapter—

(1) The term “[commerce](#)” includes, but is not limited to—

- (A) services (including transfers of information) associated with international trade, whether or not such services are related to specific goods, and
- (B) foreign direct investment by United States persons with implications for trade in goods or services.
- (2) An act, policy, or practice of a [foreign country](#) that burdens or restricts United States [commerce](#) may include the provision, directly or indirectly, by that [foreign country](#) of subsidies for the construction of vessels used in the commercial transportation by water of goods between foreign countries and the United States.
- (3) (A) An act, policy, or practice is unreasonable if the act, policy, or practice, while not necessarily in violation of, or inconsistent with, the international legal rights of the United States, is otherwise unfair and inequitable.
- (B) Acts, policies, and practices that are unreasonable include, but are not limited to, any act, policy, or practice, or any combination of acts, policies, or practices, which—
- (i) denies fair and equitable—
- (I) opportunities for the establishment of an enterprise,
- (II) provision of adequate and effective protection of intellectual property rights notwithstanding the fact that the [foreign country](#) may be in compliance with the specific obligations of the Agreement on Trade-Related Aspects of Intellectual Property Rights referred to in [section 3511\(d\)\(15\) of this title](#),
- (III) nondiscriminatory market access opportunities for United States persons that rely upon intellectual property protection, or
- (IV) market opportunities, including the toleration by a foreign government of systematic anticompetitive activities by enterprises or among enterprises in the [foreign country](#) that have the effect of restricting, on a basis that is inconsistent with commercial considerations, access of United States goods or services to a foreign market,
- (ii) constitutes [export targeting](#),
- (iii) constitutes a persistent pattern of conduct that—
- (I) denies workers the right of association,
- (II) denies workers the right to organize and bargain collectively,
- (III) permits any form of forced or compulsory labor,
- (IV) fails to provide a minimum age for the employment of children, or
- (V) fails to provide standards for minimum wages, hours of work, and occupational safety and health of workers, or
- (iv) constitutes a persistent pattern of conduct by the government of a [foreign country](#) under which that government fails to effectively enforce commitments under agreements to which the [foreign country](#) and the United States are parties, including with respect to trade in goods, trade in services, trade in agriculture, foreign investment, intellectual property, digital trade in goods and services and cross-border data flows, regulatory practices, state-owned and state-controlled enterprises, localization barriers to trade, labor and the environment, anticorruption, trade remedy laws, textiles, and commercial partnerships.
- (C) (i) Acts, policies, and practices of a [foreign country](#) described in subparagraph (B)(iii) shall not be treated as being unreasonable if the [Trade Representative](#) determines that—
- (I) the [foreign country](#) has taken, or is taking, actions that demonstrate a significant and tangible overall advancement in providing throughout the [foreign country](#) (including any designated zone within the [foreign country](#)) the rights and other standards described in the subclauses of subparagraph (B)(iii), or
- (II) such acts, policies, and practices are not inconsistent with the level of economic development of the [foreign country](#).
- (ii) The [Trade Representative](#) shall publish in the Federal Register any determination made under clause (i), together with a description of the facts on which such determination is based.
- (D) For purposes of determining whether any act, policy, or practice is unreasonable, reciprocal opportunities in the United States for foreign nationals and firms shall be taken into account, to the extent appropriate.
- (E) The term “[export targeting](#)” means any government plan or scheme consisting of a combination of coordinated actions (whether carried out severally or jointly) that are bestowed on a specific enterprise, industry, or group thereof, the effect of which is to assist the enterprise, industry, or group to become more competitive in the export of a class or kind of merchandise.
- (F)(i) For the purposes of subparagraph (B)(i)(II), adequate and effective protection of intellectual property rights includes adequate and effective means under the laws of the [foreign country](#) for persons who are not citizens or nationals of such country to secure, exercise, and enforce rights and enjoy commercial benefits relating to patents, trademarks, copyrights and related rights, mask works, trade secrets, and plant breeder’s rights.
- (ii) For purposes of subparagraph (B)(i)(IV), the denial of fair and equitable nondiscriminatory market access opportunities includes restrictions on market access related to the use, exploitation, or enjoyment of commercial benefits derived from exercising intellectual property rights in protected works or fixations or products embodying protected works.
- (4) (A) An act, policy, or practice is unjustifiable if the act, policy, or practice is in violation of, or inconsistent with, the international legal rights of the United States.

- (B) Acts, policies, and practices that are unjustifiable include, but are not limited to, any act, policy, or practice described in subparagraph (A) which denies national or most-favored-nation treatment or the right of establishment or protection of intellectual property rights.
- (5) Acts, policies, and practices that are discriminatory include, when appropriate, any act, policy, and practice which denies national or most-favored-nation treatment to United States goods, services, or investment.
- (6) The term “[service sector access authorization](#)” means any license, permit, order, or other authorization, issued under the authority of Federal law, that permits a foreign supplier of services access to the United States market in a service sector concerned.
- (7) The term “[foreign country](#)” includes any foreign instrumentality. Any possession or territory of a [foreign country](#) that is administered separately for customs purposes shall be treated as a separate [foreign country](#).
- (8) The term “[Trade Representative](#)” means the United States [Trade Representative](#).
- (9) The term “interested persons”, only for purposes of sections 2412(a)(4)(B), 2414(b)(1)(A), 2416(c)(2),[\[1\]](#) and 2417(a)(2) of this title, includes, but is not limited to, domestic firms and workers, representatives of consumer interests, United States product exporters, and any industrial user of any goods or services that may be affected by actions taken under subsection (a) or (b).