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**Big Tech’s “Digital Trade” Sneak Attack**

**Lessons from Big Tech’s Effort to Hijack the U.S. “Special 301” Trade Enforcement Tool to Protect Their Monopoly Power & Evade Regulation**

**How to Address Digital Censorship Without Undermining Digital Governance Globally**

Section 71011 of the Senate’s United States Innovation and Competition Act (USICA) of 2021 would have empowered Big Tech interests to employ extraordinary Special 301 trade enforcement tools to undermine digital governance worldwide. While the proposal was framed as being about online censorship, its actual provisions focused on protecting U.S. firms’ commercial interests, such as market access. **What was accurately described as a “Special 301 for Big Tech” proposal became very controversial and was not included in the final** **Creating Helpful Incentives to Produce Semiconductors (CHIPS) Act** **that Congress enacted in August 2022. The debate about the proposal made more people aware of Big Tech’s effort to hijack trade jargon and enforcement tools to undermine critically needed policies to counter digital giants’ monopolistic abuses, such as tracking us and trading in our personal data, discriminatory artificial intelligence design, and abuse of workers.**

The Special 301 for Big Tech proposal almost slipped under the radar. Its provisions were buried in the 1000-page-plus USICA bill in a section labeled as countering Chinese government online censorship. The ban on access to vast swaths of internet content and platforms within China based on political content and the “coerced censorship” that aims to silence foreign criticism on platforms outside of China is a problem. But the Special 301 for Big Tech terms would not have remedied it. (As described in a detailed memo on the proposal, it would have applied to the entire world and focused on unrestricted “market access” for U.S. digital entities, not censorship in China.) **In this memo, we propose a way to get at the actual censorship concerns by using a human rights approach that focuses on the right to free speech and right to access to information and punishing those who deny those rights.** This approach contrasts with USICA Section 71011’s focus on digital firms’ market access, which in some key regards conflicted with the human rights perspective.

With respect to the core premises of USICA Section 71011, the provisions focused on punishing nations that established or maintained digital governance policies that the proposal defined as limiting “market access” and as “barriers to digital trade” for U.S. digital companies. This approach would not counter abuses of free speech or access to information rights. But it would have falsely designated as illegal trade barriers many legitimate policies to counter monopolistic abuses of Big Tech, as well as other common forms of digital governance. In letters and statements, Members of Congress as well as business, labor, consumer, anti-censorship, privacy, digital governance and other organizations expressed concerns that the proposal would undermine gig worker labor rights, policies against racial and other forms of digital discrimination, anti-monopoly rules, artificial intelligence accountability proposals, consumer privacy protections, and/or other digital policies in effect in the European Union and other parts of the world. Many of these same policies are now being promoted here by the U.S. Congress and government agencies.

Concerns about extending the Special 301 trade enforcement mechanism to digital corporations were bolstered by the record of Big Pharma interests hijacking the Special 301 mechanism since getting access to it via a trade law amendment in 1988. Most Democrats find Big Pharma’s abuse of trade enforcement tools­ – from the annual Special 301 reports listing countries’ generic medicine policies as illegal trade barriers to the threats of sanctions to enforce their monopolies and related price gouging — to be highly problematic. By exploiting trade tools, Big Pharma has simultaneously undermined Democrats’ goal of ensuring broad access to affordable medicines and undermined public support for trade. Many congressional Democrats, consumer and labor organizations, and important business groups expressed their concerns about empowering another category of monopolistic corporations by twisting trade policies to benefit another special interest. This is especially the case among many congressional Democrats and base groups given the Special 301 process of annual country-by-country reporting and trade sanction threats has never been applied to promote the national interest – for instance, applied with respect to matters directly related to trade, such as damaging labor or environmental practices in other countries that actually distort prices and trade and investment incentives. Indeed, it is now 30 years after then-President Clinton promised now-Speaker Pelosi to address her concerns about labor rights violations in Mexico in the context of NAFTA’s approval by extending the Special 301 process to labor rights enforcement. Of course, this never happened.

**The Human Rights Versus Trade/Commercial Interests Frameworks**

In July 2022, the U.S. International Trade Commission (ITC) published a report, the second in a series that the Finance Committee requested on digital censorship. The ITC reports explicitly state that the analysis and reporting is premised exclusively on commercial access for U.S. online firms, not the human right to free speech or to access information. In describing what it is and is not reviewing, the ITC provided a very clear description of both approaches and made clear that the Senate Finance Committee was focused on impacts on U.S. businesses, not on human rights. The very name of the first ITC report makes this clear: **“Foreign Censorship, Part 1: Policies and Practices Affecting U.S. Businesses**.” In describing the scope of investigation, the first report states:

This report identifies and describes various foreign government censorship policies and practices, including examples that U.S. businesses consider impediments to trade and investment. It is the first of two reports requested by the U.S. Senate Committee on Finance (Committee) in its letter to the U.S. International Trade Commission (Commission) dated April 7, 2021. **The Committee stated that censorship and its impact on the flow of information and services are critical issues for the digital economy** and requested that this first report include detailed information on the following: **Identification and descriptions of various foreign censorship practices, in particular any examples that U.S. businesses consider to impede trade or investment in key foreign markets.**[[1]](#footnote-1)(*emphasis added*)

The ITC report also provides a useful overview of the human rights framework on censorship, although that approach is explicitly described in the text as outside the scope of the report. A sidebar enumerates the human rights approach as guaranteeing fundamental rights to free speech and access to information and clarifies the legal basis for assessing whether a government policy that may limit these rights is designed or implemented in contravention of the obligations established under the international human rights law framework. This is an entirely different approach to the market access/U.S. commercial interest approach underlying the Special 301 trade enforcement concept and the ITC reports.

**Box 1.1 International Human Rights Law Framework[[2]](#footnote-2)**

The international human rights law (IHRL) framework regarding freedom of expression is derived from two primary sources: the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR).a Article 19 of the UDHR provides a “right to freedom of opinion and expression,” though Article 29(2) of the UDHR allows this right to be limited as “determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”b While not technically legally binding as a United Nations General Assembly Resolution, the UDHR is broadly considered customary international law and thus legally binding universally through general acceptance and state practice.c

The ICCPR is the primary basis for assessing whether a censorship measure is designed or implemented in contravention of the obligations established under the IHRL framework.d It built on the UNDR and formalized many of its provisions as a binding, multilateral treaty currently ratified by 173 countries, including the United States. Countries that have signed but not ratified the ICCPR, like China, are still obligated to respect its “object and purpose”—that is, they are bound to not contradict the essential goals of the agreement.e

Article 19 of the ICCPR, like the UNDR, provides a right to freedom of opinion and expression. In this context, freedom of expression includes “freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”f However, these rights are not absolute; the ICCPR allows for governments to limit an individual’s right to freedom of expression if three criteria are met.g These criteria are legality, necessity, and legitimacy.h

The legality criterion in the IHRL framework asks whether the law provides clear direction without allowing broad and vague discretion by the state. Other key factors to examine when assessing legality are whether the law was enacted through the regular legal process and drafted with significant precision. The necessity criterion questions whether the censorship measure is implemented in the least restrictive means and imposed in a proportional manner. The standard for proportionality operates on a sliding scale based on the kind of speech in question, which often requires in-depth analysis and balancing of the interests involved to properly assess. The legitimacy criterion asks whether a censorship measure is justified by an enumerated exception.i The ICCPR allows for exceptions to the individual right to freedom of expression on the grounds of respecting “the rights or reputations of others . . . [or] the protection of national security or of public order . . . , or of public health or morals.”j

Courts, human rights bodies, and other experts have applied the IHRL framework criteria to assist in distinguishing between legitimate suppression of harmful speech and the overly burdensome repression of the freedom of expression that often also acts as an impediment to trade and investment.k As an example of the former, France’s Gayssot Act that criminalized speech denying the holocaust was ruled to not violate France’s obligations under the ICCPR despite the resulting suppression of speech because the law satisfied the criteria of legality, necessity, and legitimacy. l As an example of the latter, France’s more recent Avia Law targeted at combating hate speech on the internet was struck down for violating the same criteria, particularly due to overly burdensome takedown timelines imposed on websites ranging from a single hour to a single day.m [[3]](#footnote-3)

**An Alternative Mechanism to Address Online Censorship**

While extending extraordinary Special 301 trade enforcement powers to Big Tech would not address online censorship and would undermine other important digital policy goals, there are real problems with censorship of internet content and platforms, including with respect to the government of China, which also issues threats against individuals outside of China about content the government opposes.

One way that Senate Finance Committee members interested in censorship, rather than only U.S. firms’ digital market access, could proceed would involve directly targeting Chinese government censorship and sanctioning officials involved. This path would involve partnering with the Foreign Relations Committee, which could be fruitful given Finance Committee members such as Sens. Menendez and Cardin are on both committees and care about these issues. The concept would be to include censorship and coerced censorship, defined as government suppression of communications based on content, as Section 7031(c) or Global Magnitsky Act violations.

This human rights sanctions approach would result in Chinese government officials leading the propaganda and censorship agencies noted in the State Department’s annual country report on violations of free speech and access to information rights being added to the list of perpetrators whose U.S. assets are frozen and who lose the right to enter the United States. The second U.S. ITC report notes that while many government agencies are involved in censorship in China, the two that appear to have the most impact are the Central Propaganda Department and the Cyberspace Administration of China.[[4]](#footnote-4) This same approach could be applied to other countries with online censorship practices that violate the human rights to free speech and access to information. Further, Finance and Foreign Relations Committee members could cooperate to add a new section to the annual State Department country reports on coerced censorship at a new 116(h) after section specifying the report must include review of trafficking and forced marriage.

These approaches would explicitly target human rights censorship threats to free speech and access to information. They would target the violators of those human rights. And, these approaches would not undermine legitimate digital governance policies in contrast to the trade enforcement approach of Section 71011, which focused on U.S. digital firms’ market access, as described in the next sections.

**Existing U.S. Government Reports Published Annually Thoroughly**

**Document Online Censorship Problems Delineated by Country**

Comprehensive annual country reports prepared by the State Department include investigation and reporting on “Freedom of Expression, Including for Members of the Press and Other Media”. This section of the annual reports for each country: “Evaluates whether freedom of expression, including for members of the media, is respected and describes any direct or indirect restrictions, including intimidation of journalists and censorship. The subsection Internet Freedom includes discussion of monitoring or restrictions on the exercise of freedom of expression online, including the freedom to seek, receive, or impart information, ideas, and opinions.” Another subsection, Academic Freedom and Cultural Events, includes information on restrictions, intimidation, and censorship in these fields.”I Annex 1 of this memo includes the State Department’s 2021 detailed reporting on China’s censorship and coercion related to online platforms.II This annual investigatory work by the State Department could form the basis for sanctions to counter digital censorship.

I See Methodological Notes at <https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/>

II See e.g. the U.S. Department of State China country report for 2021. <https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/china/>

**The Special 301 for Big Tech Terms Were Buried Under a Header About Digital Censorship**

Section 71011 was in a subsection titled “Censorship as a Trade Barrier,” but the amendment to U.S. law that it would have enacted instead extended to U.S. digital corporations use of the extraordinary Special 301 trade enforcement mechanism by adding to existing trade law a new section entitled “*Identification of countries that disrupt digital trade*.”

The language that accurately described Section 71011’s intent was buried in the conforming amendment that added a new section to Special 301 that was labeled “Identification of countries that disrupt digital trade.” Although the provision was described as combatting the Chinese government’s censorship practices, the amendment would have required the Office of the USTR to prepare a new annual report and threaten trade sanctions not against censorship in China, but on policies *worldwide* that could affect U.S. digital business interests. Given Section 71011’s description of targeted conduct, this global dragnet would largely capture European policies like the Digital Markets Act (DMA) and the Digital Services Act (DSA), as well as European privacy rules and similar anti-monopoly and consumer policies elsewhere. Such policies could require data disclosures to government agencies, which could fall within the broad notion of “extra-judicial data access,” or could be framed by Big Tech as measures that “harm the integrity of services or products provided by United States persons,” and thus are within the prohibited policies included in the Special 301 report and subject to eventual trade sanctions.

Effectively, Section 71011 would have required the U.S. government to act on behalf of Big Tech interests to monitor digital governance and anti-monopoly initiatives worldwide, publish annual reports listing such policies as illegal trade barriers, and target for elimination other nations’ pro-worker, pro-consumer, pro-privacy, and pro-competition policies and proposals, including those similar to current proposals from the U.S. Congress and agencies. And the proposal would have subjected countries that refused to eliminate such policies to trade sanctions unless and until they did so. This would have threated key policies now in place and chilled establishment of similar initiatives in more countries.

For instance, Section 71011’s terms target policies that “*deny fair and equitable market access to digital service providers that are United States persons*” or “*harm the integrity of services or products provided by United States persons*.” U.S. tech interests already have attacked the DSA, DMA and Korea’s App Store anti-monopoly laws with claims that they harm the integrity of services or products. Other language in Section 71011 describing what domestic policies could have been deemed illegal trade barriers was extremely broad. It targeted 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.)

Consider the 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. And 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 practices with the… substantial effect of promoting censorship.” And, as you know, the use of the term “effect” is a classic trade lingo trap that makes an unintended disparate outcome of a facially neutral policy a violation rather than focusing on the intent of a policy. Also note that the prohibited effect in the second clause was not actual censorship, but “promoting censorship.”

And even if these language issues had been 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. A government could 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 because the actual language encompasses any government action that has the effect of limiting digital operations. This is the issue that the first ITC report raises in its cautionary language on definitions:

“The definition of censorship used in the report―the prohibition or suppression of speech or other forms of communication―covers a broad spectrum of actions. **These actions to prohibit or suppress speech may range from legitimate regulation of harmful speech to illegitimate suppression of political dissent. International human rights law (IHRL) regarding freedom of expression provides a valuable analytical framework for distinguishing between these incongruent forms of censorship in an objective manner.** The framework is recognized as the global standard for freedom of expression, widely adopted by governments, frequently integrated into private industry standards, and supported by nongovernmental organizations such as Freedom House and other key stakeholders.(10)**However, as application of this framework to the policies and practices described in this report is outside the Commission’s purview**, the description in box 1.1 is provided for background and context only.(11)” [[5]](#footnote-5) (*emphasis added*)

**The Goal Was Ensuring Digital Giants’ Unregulated “Market Access” in Other Nations**

In extending the Special 301 trade mechanism to pursue digital corporations’ interests, USICA Section 71011 did not define key terms such as online “censorship,” “coerced censorship,” and “extra-judicial data access,” or target government suppression of online content or providers based on political perspective or subject matter.

UISCA was packed with definition sections. So, the absence of definition for the key terms in Section 71011 was notable. The threat is that Big Tech firms often claim to be communications platforms, not the retail, hotel, transportation, audiovisual, or other service providers that they are. And if they lose their operating permits or are otherwise shut down by governments – even as a penalty for not meeting legitimate domestic competition policy, worker or industry classification and registration rules, privacy or other rules – they claim that they have been “censored.”

For instance, industry groups, such as the Computer & Communications Industry Association and the U.S. Council for International Business, have argued in National Trade Estimate (NTE) filings that Taiwan’s proposed Digital Communications Act, which “is likely to closely model after EU’s DSA…may reinforce censorship and add friction to cross-border digital trade” [[6]](#footnote-6) and Canada’s proposal to extend certain broadcasting regulations to online entertainment platforms, like Netflix and YouTube, has “profound censorship implications.” [[7]](#footnote-7)

Defining the terms “censorship,” “coerced censorship,” or “extra-judicial data access” would not have fixed the fundamental problem because most of the other Section 71011 terms explicitly described various forms of prohibited conduct, as described in the previous section. Thus, the language would have ensnared legitimate digital governance policies employed worldwide and being contemplated by Congress and administration agencies to limit Big Tech abuses against consumers, smaller businesses, and workers.

**U.S. Law and Practice Already Disciplines Actual Online Trade Barriers**

Finally, the ways in which Section 71011 would undermine legitimate digital governance policies becomes clearer if it is considered in the context of what existing U.S. law and practice already provides with respect to countering actual Chinese government censorship.

As described at the top of this memo, the State Department’s annual country reports include extensive reporting about digital censorship. And, with respect to actual trade violations, 19 U.S.C. 2241, which was read into USICA Section 71011(b) already requires the USTR to prepare the annual NTE report of barriers to U.S. trade, which explicitly covers barriers to “electronic commerce.”[[8]](#footnote-8) Annex 2 of this memo includes the China e-commerce trade violations section of the 2022 NTE. 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 NTE already covers barriers to actual trade online.

Given what the existing annual reports do cover, it becomes clearer that the scope of the new country reports required by Section 71011 would have newly targeted policies worldwide 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 source code and algorithms and more. These issues are both entirely unrelated to trade and are the very issues Congress and agencies seek to address to stop Big Tech abuses.

**ANNEX 1:**

**U.S. STATE DEPARTMENT COUNTRY REPORT ON CHINA THOROUGHLY COVERS CENSORSHIP, INCLUDING ONLINE CENSORSHIP**

**Executive Summary**

**[SNIP]**

* “serious restrictions on free expression and media, including physical attacks on and criminal prosecution of journalists, lawyers, writers, bloggers, dissidents, petitioners, and others as well as their family members; serious restrictions on internet freedom, including site blocking; substantial interference with the freedom of peaceful assembly and freedom of association, including overly restrictive laws that apply to foreign and domestic nongovernmental organizations;

**Section 2. Respect for Civil Liberties**

**A. FREEDOM OF EXPRESSION, INCLUDING FOR MEMBERS OF THE PRESS AND OTHER MEDIA**

The constitution states citizens “enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration.” Authorities limited and did not respect these rights, however, especially when their exercise conflicted with CCP interests. Authorities continued to impose ever-tighter control of all print, broadcast, electronic, and social media and regularly used them to propagate government views and CCP ideology. Authorities censored and manipulated the press, social media, and the internet, particularly around sensitive anniversaries and topics such as public health.

**Freedom of Expression:** Citizens could discuss specific policies but often avoided discussing broader political issues, leaders, or “sensitive” topics for fear of official punishment….

**Freedom of Expression for Members of the Press and Other Media, Including Online Media:** The CCP and government continued to maintain ultimate authority over all published, online, and broadcast material. Officially, only state-run media outlets have government approval to cover CCP leaders or other topics deemed “sensitive.” While it did not dictate all content to be published or broadcast, the CCP and the government had unchecked authority to mandate if, when, and how particular issues were reported or to order they not be reported at all. The government’s propaganda department issued daily guidance on what topics should be promoted in all media outlets and how those topics should be covered. Chinese reporters working for private media companies confirmed increased pressure to conform to government requirements on story selection and content.

The Cyberspace Administration of China (CAC) directly manages internet content, including online news media, and promotes CCP propaganda. A CCP propaganda department deputy minister ran the organization’s day-to-day operations. It enjoyed broad authority in regulating online media practices and played a large role in regulating and shaping information dissemination online.

The CCP continued to monitor and control the use of non-Mandarin languages in all media within the country. Since January 1, Mongolian-language content, previously broadcast on state media, was replaced with Chinese cultural programs that promote a “strong sense of Chinese nationality common identity.”

All books and magazines continued to require state-issued publication numbers, which were expensive and often difficult to obtain. Nearly all print and broadcast media as well as book publishers were affiliated with the CCP or the government. There were a small number of print publications with some private ownership interest but no privately owned television or radio stations. The CCP directed the domestic media to refrain from reporting on certain subjects, and traditional broadcast programming required government approval.

Journalists operated in an environment tightly controlled by the government. Only journalists with official government accreditation were allowed to publish news in print or online. The CCP constantly monitored all forms of journalist output, including printed news, television reporting, and online news, including livestreaming. Journalists and editors self-censored to stay within the lines dictated by the CCP, and they faced increasingly serious penalties for crossing those lines, which could be opaque. While the country’s increasingly internet-literate population demanded interesting stories told with the latest technologies, government authorities asserted control over technologies such as livestreaming and continued to pressure digital outlets and social media platforms.

Because the CCP did not consider internet news companies “official” media, they were subject to debilitating regulations and barred from reporting on potentially “sensitive” stories.

**Violence and Harassment:** The government frequently impeded the work of the press, including citizen journalists. Journalists reported being subjected to physical attack, harassment, monitoring, and intimidation when reporting on sensitive topics. Government officials used criminal prosecution, civil lawsuits, and other punishment, including violence, detention, and other forms of harassment, to intimidate authors and journalists and to prevent the dissemination of unsanctioned information on a wide range of topics.

Family members of journalists based overseas also faced harassment, and in some cases detention, as retaliation for the reporting of their relatives abroad. Dozens of Uyghur relatives of overseas-based journalists working for Radio Free Asia’s Uyghur Service remained disappeared or detained in Xinjiang. In March, RFA reported that authorities had detained two brothers of Uyghur Service editor Eset Sulaiman since 2018.

Restrictions on domestic and foreign journalists by central and local CCP propaganda departments increased significantly.

Journalists faced the threat of demotion or dismissal for publishing views that challenged the government. In many cases potential sources refused to meet with journalists due to actual or feared government pressure. The scope of censorship was vast, with several Chinese journalists noting “an atmosphere of debilitating paranoia.” For example long-standing journalist contacts continued to decline off-the-record conversations, even concerning nonsensitive topics. So-called taboo topics included not only Tibet, Taiwan, and corruption, but also natural disasters and the #MeToo movement.

During the year authorities imprisoned numerous journalists working in traditional and new media. The government also silenced numerous independent journalists by quarantining them under the guise of pandemic response. Reporters Without Borders, in a report released on December 7, tallied at least 127 journalists (professional and nonprofessional) detained in the country. Of these, 71 – or more than one-half the journalists imprisoned – were Uyghur.

On January 7, investigative journalist Li Xinde, who founded and ran the China Public Watchdog Network anticorruption website, was convicted of “illegal business activity” and received a five-year prison sentence. He was initially detained in 2019 after publishing on his website a report that a court in Tianjin had wrongfully convicted a businessman.

On January 8, former journalist Zhang Jialong was sentenced to 18 months’ imprisonment by the Nanming District Court in Guiyang City on charges of “picking quarrels and provoking trouble.” Zhang, while a journalist with Tencent, met with then secretary of state John Kerry in 2014 and asked him to “tear down this great firewall that blocks the Internet.”

On May 11, citizen journalists Chen Mei and Cai Wei were put on trial at Beijing’s Chaoyang District Court, after more than a year in detention, on the charge of “picking quarrels and provoking trouble.” The two volunteered for a website archive, Terminus 2049, that documented censored COVID-19 outbreak information, among other topics. On August 13, Chen and Cai were convicted on the “picking quarrels and provoking trouble” charge but were then released on August 15 for time served.

A CCP organization in Henan Province issued a call on social media to confront a BBC journalist covering flooding in Zhengzhou, Henan Province. The Foreign Correspondents’ Club of China cited the incident as an example of the “growing hostility against foreign media in China,” thanks to rising Chinese nationalism sometimes “directly encouraged by Chinese officials and official entities.”

The Foreign Correspondents’ Club of China’s annual report on media freedoms, released in March, found that authorities and the CCP used “all arms of state power” – including surveillance systems introduced to curb COVID-19 – to harass and intimidate journalists, their Chinese colleagues, and those whom the foreign press sought to interview. For the third consecutive year, not a single correspondent said that working conditions improved.

The survey reported 88 percent of correspondents had requests for interviews declined because subjects needed prior permission to speak to a foreign journalist or because they were not permitted to speak to foreign journalists at all, an increase from 76 percent in 2019. Nearly 40 percent of correspondents said they were aware of sources being harassed, detained, called in, or questioned for interacting with a foreign journalist, an increase from 25 percent in 2019. Nearly one-half the correspondents said the fear of digital or in-person surveillance regularly affected their ability to adequately interview and communicate with sources or carry out their reporting. Almost 60 percent said their Chinese colleagues were subject to intimidation, compared with 44 percent in 2019.

Authorities used the visa renewal process to challenge journalists and force additional foreign reporters out of the country.  A Reporters Without Borders report released December 7 tallied 18 foreign reporters who were forced to leave the country in 2020 due to surveillance and visa blackmail.

In March, BBC journalist John Sudworth left the country following threats of legal action, obstruction, and intimidation. A state-sponsored propaganda campaign targeted the BBC and Sudworth to discredit them and push back against international criticism regarding issues such as Xinjiang and Hong Kong. According to the Australian Strategic Policy Institute, the government’s targeting of the BBC began after the BBC published a report detailing allegations of systematic rape in internment camps where Muslims were detained in Xinjiang.

Local employees working for foreign press outlets reported increased harassment and intimidation, in addition to authorities’ continued tight enforcement of restrictions on these employees. Foreign news bureaus are prohibited by law from directly hiring Chinese citizens as employees and must rely on personnel hired by the Personnel Service Corporation, a subordinate unit of the Diplomatic Service Bureau affiliated with the Ministry of Foreign Affairs. The code of conduct threatens dismissal and loss of accreditation for those citizen employees who engage in independent reporting. It instructs them to provide their employers with information that projects “a good image of the country.” Multiple foreign outlets reported a continuing inability to hire the number of local staff members that they wished, saying authorities continued to impose an unofficial cap of one local researcher per foreign correspondent from media outlets out of favor with authorities. Some outlets even reported trouble getting the Diplomatic Service Bureau’s permission to hire a single local researcher per correspondent. New staff were wary of taking on responsibilities that might be considered politically sensitive, limiting their portfolios and contributions.

Government harassment of foreign journalists was particularly aggressive in Xinjiang. According to the 2020 Foreign Correspondents’ Club report, all foreign reporters who traveled to Xinjiang were openly followed, denied access to public places, and were asked or forced to delete photographs and other data from devices. Reporters documented cases of staged traffic accidents, road blockages, hotel closures, and cyberattacks. They reported constant surveillance while they worked in Xinjiang, with government agents stepping in to block access to some areas, intimidating local inhabitants from talking to the journalists, and stopping the journalists – sometimes many times per day – to seize their cameras and force them to erase pictures. Reporters noted local contacts warned them any resident seen talking to foreigners would almost certainly be detained, interrogated, or sent to a “re-education camp.”

Government officials also sought to suppress journalism outside their borders.  While in past years these efforts largely focused on Chinese-language media, during the year additional reports emerged of attempts to suppress media critical of China regardless of language or location.

**Censorship or Content Restrictions:** Regulations grant broad authority to the government at all levels to restrict publications based on content, including mandating if, when, and how particular issues are reported.

According to Freedom House, on February 5, the China Association of Performing Arts (an industry association under the Ministry of Culture and Tourism) released new restrictions that required performances to promote the “party line,” not “undermine national unity,” nor “endanger national security.” Performers who violated the rules would face suspensions or a permanent ban from the industry.

Official guidelines for domestic journalists were often vague, subject to change at the discretion of propaganda officials, and enforced retroactively. Propaganda authorities forced newspapers and online media providers to fire editors and journalists responsible for articles deemed inconsistent with official policy and suspend or close publications. Self-censorship was prevalent among journalists, authors, and editors, particularly with post facto government reviews carrying penalties.

The CCP Central Propaganda Department ordered media outlets to adhere strictly to the information provided by official departments. Directives warned against reporting on issues related to COVID-19 outbreaks, the official response, and international inquiries, as well as party and official reputation, health and safety in general, and foreign affairs.

The government sought to exercise complete control over public and private commentary regarding the COVID-19 outbreak, undermining local and international efforts to report on the virus’s spread. COVID-19 information on Chinese social media was closely guarded from the outbreak’s earliest manifestation. Popular livestreaming and messaging platforms WeChat and YY continued censorship protocols, including on words related to the virus causing COVID-19, SARS, and potential disease vectors.

In the run-up to the 100th anniversary of the CCP’s founding on July 1, the government sought to tighten control over how citizens discuss history on the country’s heavily censored internet, releasing legal amendments stipulating that persons who “insult, slander or infringe upon” the memory of the country’s national heroes and martyrs faced jail time of up to three years.

In April the CAC vowed to crack down on “historical nihilists” and launched a hotline for internet users to report “illegal” comments that “distorted” the CCP’s historical achievements and attacked the country’s leadership. The tip line allowed individuals to report fellow citizens who “distort” the party’s history, attack its leadership and policies, defame national heroes, and “deny the excellence of advanced socialist culture” online.

Also in April authorities in Jiangsu Province detained a 19-year-old man after he made “insulting” comments online regarding Japan’s 1937 occupation of Nanjing.

In early May a regulatory official reported authorities had dealt with a large number of accounts deemed to be propagating “historical nihilism” and that they directed online platforms to clean up more than two million posts the CAC deemed illegal.

Some private companies censored content without explicit orders from authorities. In late March streaming platforms in the country began to censor the logos and symbols of brands such as Adidas that adorn items worn by contestants performing dance, singing, and standup-comedy routines, following a feud between the government and international companies that said they would avoid using cotton produced in Xinjiang. Although government officials may not have ordered the shows to obscure the brands, the video streaming sites apparently felt pressured or obliged to publicly distance themselves from Western brands involved in the feud.

In May, Chinese video platforms censored a *Friends* reunion television special, removing appearances by music stars Lady Gaga, Justin Bieber, and the K-pop group BTS, all of whom had previously engaged in activity that reportedly angered the Chinese government.

The government increased efforts to screen out unsanctioned information and align online content with the state’s agenda. In August the CCP’s Central Propaganda Department, along with the state-backed bodies for state-approved artists and authors, the Ministry of Culture and Tourism, and State Administration of Radio and Television, as well as the China Federation of Literary and Art Circles and Chinese Writers Association, issued policy guidelines urging better “culture and art reviews,” partly by limiting the role of algorithms in content distribution. Under the guidelines, all domestic content creators and distributors are told to “adhere to the correct direction, strengthen Marxist literary theory and criticism, and pay attention to the social effects of literary criticism … and not to contribute to the spread of low, vulgar and pandering content or quasi-entertainment content.”

Citizen journalists faced an increasingly difficult climate, with the CAC and other authorities seeking to strengthen control over content published through social media, including “self-media” accounts. Also known as “we-media,” these accounts are typically blogs operated independently on social media without official backing from established outlets. Self-media had become one of the biggest emerging trends, with a report by the State Information Center noting that in 2020 online media accounted for 80 percent of the country’s media market. The tightened restrictions online had the effect of further clamping down on self-employed reporters, who also could not be accredited by the National Press and Publication Administration, which administers tests and grants the licenses required for citizens to work in the profession. Unaccredited reporters can face legal fallout or even criminal charges. The campaign to clean up self-media accounts also targeted social media trending charts, push notifications, and short-video platforms. The CAC was also exploring measures to control the distribution of information across all internet platforms to end “disruption to the order of internet broadcasts.”

In January the National Press and Publication Administration announced that it had made it a priority to stop reporters from running their own self­media accounts, as part of its annual review of journalists’ accreditation.

In February the CAC implemented new rules on managing public internet accounts, the first change since 2017. The rules specified the type of content platforms should ban, including those deemed to be engaged in fabricating information, inciting extreme emotions, plagiarism, cyberbullying, blackmailing, and artificially inflating the number of clicks. This represented a fresh crackdown on “fake news” and other online activities perceived to be harmful. The new rules to “protect the security of content and maintain a healthy cyberspace” aimed to curb independent reporting and reposting of information considered illegal while promoting government-sanctioned stories.

The new rules also broadened the definition of harmful online information. In addition to information that authorities considered to endanger national security, leak state secrets, or subvert state power, the new rules banned online information that “disrupts financial market order.” False information regarding disasters, epidemics, emergencies, and food and drug safety was also banned. On top of possible criminal charges and other punishments, websites spreading such information could be shut down, and individuals working for such sites could be held liable and subject to heavy fines.

In July the government launched a campaign to crack down on “fake news” and clean up online content. The CCP’s Central Propaganda Department announced the campaign would target “illegal news activities” by news organizations and staff, internet platforms and public accounts, as well as unaccredited social organizations and individuals.

Control over public depictions of President Xi was severe, with censors aggressively shutting down any depiction that varied from official media storylines. Censors continued to block images of the Winnie the Pooh cartoon character on social media because internet users used it to represent Xi. Social media posts did not allow comments related to Xi Jinping and other prominent Chinese leaders.

Domestic films were subject to government censorship. The CCP continued to call for films to highlight Chinese culture and values and promote the country’s successful growth. On October 9, former news editor and journalist Luo Chang Ping was detained in Hainan for a post on Weibo critical of a film’s depiction of the country’s role in the Korean War on suspicion of “impeaching the reputation of heroes and martyrs.”

Foreign movies shown in the country were also subject to censorship. The scheduled PRC release of *Nomadland*, a foreign movie directed by China-born filmmaker Chloe Zhao, was postponed following a controversy concerning comments Zhao made in 2013 regarding censorship in China; many online mentions of *Nomadland* were censored by authorities.

In October, Chinese broadcaster Tencent blocked Boston Celtics (National Basketball Association) games from its platform after a member of the team, Enes Kanter, posted social media posts critical of the PRC’s policies in Tibet.

Newscasts from overseas news outlets, largely restricted to hotels and foreign residence compounds, were subject to censorship. Individual issues of foreign newspapers and magazines were occasionally banned when they contained articles deemed too sensitive. Articles on sensitive topics were removed from international magazines. Television newscasts were often blacked out during segments on sensitive subjects. For example in February, authorities banned the BBC World News television channel in apparent retaliation after the United Kingdom revoked the license of the state-owned Chinese broadcaster CGTN.

Government regulations restrict and limit public access to foreign television shows, which are banned during primetime, and local streamers had to limit the foreign portion of their program libraries to less than 30 percent.

Authorities continued to ban books with content they deemed inconsistent with officially sanctioned views. The law permits only government-approved publishing houses to print books. Newspapers, periodicals, books, audio and video recordings, or electronic publications may not be printed or distributed without the approval of central authorities and relevant provincial publishing authorities. Individuals who attempted to publish without government approval faced imprisonment, fines, confiscation of their books, and other punishment. The CCP also exerted control over the publishing industry by preemptively classifying certain topics as state secrets.

Government rules ban the sale of foreign publications without an import permit. This includes sales on online shopping platforms, which are banned from offering “overseas publications,” including books, movies, and games that do not already have government approval.  The ban also applies to services related to publications.

New rules from the Ministry of Education went into effect April 1, banning from libraries books that favored the “West” at the expense of China. *Nikkei Asia* reported that the order would impact 240 million primary and secondary school students and also require students to begin studying “Xi Jinping Thought.” According to *Nikkei Asia*, books that conveyed political, economic, and cultural ideas from democratic nations could be banned.

**Libel/Slander Laws:** By law defamation can be punished by up to three years’ imprisonment; truth is not a defense.

In February police in the Shapingba District of Chongqing issued a criminal detention warrant for a 19-year-old Chinese citizen living overseas in connection for his posts on the Sina Weibo microblogging platform. Police claimed the blogger posted a comment defaming People’s Liberation Army (PLA) martyrs that had a “severe negative social impact.” Official state media reported that at least six other Chinese domestic internet users had been under criminal or administrative detention for “stirring up trouble” by publishing defamatory comments concerning PLA martyrs on social media platforms.

In May at least seven citizens were detained for “defaming” Yuan Longping, revered as the “Father of Hybrid Rice” in China, who died on May 22. Media reports noted that local police had responded to complaints of insulting remarks regarding Yuan on social media and determined the posts had caused a “seriously bad” impact on the society. Five of the detained faced criminal investigations; two were detained under administrative procedures. Sina Weibo announced on May 24 that it would permanently close the accounts of 64 users who were found to have spread insults and attacks on Yuan.

In October a woman identified in court only by her last name, Xu, was sentenced to seven months in prison for violating a newly amended criminal code that makes “impeaching the reputation of heroes and martyrs” a crime. Xu had mocked online some internet users who had imagined themselves as Dong Cunrui, a war hero who died during China’s civil war in 1949.

**National Security:** Authorities often justified restrictions on expression on national security protection grounds. Government leaders cited the threat of terrorism to justify restricting freedom of expression by Muslims and other religious minorities. These justifications were a baseline rationale for restrictions on press movements, publications, and other forms of repression of expression.

**Internet Freedom**

The government tightly controlled and highly censored domestic internet usage, monitoring private online communications without appropriate legal authority. The CAC operated a website called the Reporting Center for Illegal and Undesirable Information, where internet users can report information, including political information.

According to Reporters Without Borders, the CAC stated that in 2020 nearly 130,000 social media accounts and more than 12,000 websites were shut down by the government, and more than 2,000 keywords related to COVID-19 triggered censorship. In December 2020 ProPublica and the *New York Times* published a report that found the PRC had issued more than 3,200 directives and 1,800 memos and other files aimed at controlling the narrative of the COVID-19 outbreak.

Domestic internet authorities led by the Cybersecurity Defense Bureau targeted individuals accused of defaming the government online, whether in public or private messages. Media reports detailed individual cases of police detaining citizens for defamation, identified via search engines. Victims were frequently questioned for hours until they agreed to sign letters admitting their guilt and promising to refrain from “antisocial” behavior. In several cases citizens told reporters that police warned suspects their children could be targeted for their parents’ crimes.

The government continued to employ tens of thousands of individuals at the national, provincial, and local levels to monitor electronic communications and online content. The government reportedly paid personnel to promote official views on various websites and social media and to combat alternative views posted online. Internet companies also independently employed thousands of censors to carry out CCP and government directives on censorship. When government officials criticized or temporarily blocked online platforms due to content, the parent corporations were required to hire additional in-house censors, creating substantial staffing demands well into the thousands and even tens of thousands of persons per company.

On January 12, the Jamestown Foundation published a report based on official documents that estimated the PRC spent $6.6 billion on internet censorship in 2020. The report explained that according to official documents from the CCP’s United Front Work Department, censorship activities included silencing democracy activists, rights lawyers, and dissidents both domestically and abroad. The CAC monitored domestic social media, like WeChat and Weibo, and foreign social media to track online public opinion, and employed internet trolls collectively referred to as the “50 cent party” to manipulate online public opinion. The Ministry of Public Security employed officers to monitor the internet and keep internet users in check.

The law requires internet platform companies operating in the country to control content on their platforms or face penalties. According to Citizen Lab, China-based users of the WeChat platform were subject to automatic filtering of chat messages and images, limiting their ability to communicate freely.

The law allows the government to “monitor, defend, and handle cybersecurity risks and threats originating from within the country or overseas sources,” and it criminalizes using the internet to “create or disseminate false information to disrupt the economic or social order.” The law also codifies the authority of security agencies to cut communication networks across an entire geographic region during “major security incidents,” although the government had previously implemented such measures before the law’s passage.

CAC regulations require websites, mobile apps, forums, blogs, instant communications services, and search engines to ensure news coverage of a political, economic, diplomatic, or commentary nature reflects government positions and priorities. These regulations extend long-standing traditional media controls to new media, including online and social media, to ensure these sources also adhere to CCP directives.

The government continued efforts to limit unauthorized virtual private network (VPN) service use. While the government permitted some users, including major international companies, to utilize authorized VPNs, many smaller businesses, academics, and citizens were prohibited from using these tools. The government regularly penalized those caught using unauthorized VPNs. At the same time the government tacitly allowed individuals to use VPNs to access Twitter, Facebook, Instagram, and other websites normally inaccessible in the country for the purpose of attacking views that criticized the government. PRC embassies and state-run media outlets, for example, regularly posted in Chinese and English on Twitter, Facebook, and YouTube.

The government blocked thousands of foreign websites, including many major international news and information websites such as those of the *New York Times*, *Washington Post*, *Wall Street Journal*, the BBC, and the *Economist*, as well as websites of human rights organizations such as Amnesty International and Human Rights Watch. Authorities blocked many other websites and applications, including but not limited to Google, Facebook, YouTube, WhatsApp, Twitter, Clubhouse, Signal, and Wikipedia. Despite being blocked, Twitter and other foreign social media were estimated to have millions of users in the country, including government and party officials and prominent journalists and media figures. Authorities also blocked access to scores of foreign university websites.

Government censors continued to block content from any source that discussed topics deemed sensitive, such as the 2019-20 Hong Kong prodemocracy protests, Taiwan, the Dalai Lama, Tibet, Xinjiang, and the 1989 Tiananmen Square massacre.

Following professional tennis player Peng Shuai’s accusation that former vice premier Zhang Gaoli had sexually assaulted her (see section 6, Women), her name and even the word “tennis” were censored on social media in China, and her social media accounts were blocked.

The government also significantly increased censorship of business and economic information.

Authorities continued to jail numerous internet writers for their peaceful expression of political views. On May 29, human rights activist Wang Aizhong was taken by police from his home in Guangzhou on the charge of “picking quarrels and provoking trouble” and was formally arrested on July 6. Known as a supporter of the “Southern Street Movement” when activists took to the streets to protest the suppression of press freedom and to make political demands, Wang’s posts on social media focused on vulnerable populations.

Activist Li Yanjun was summoned by police after posting a video of the iconic tank man in Tiananmen Square on June 4, 1989. On Weibo, the popular Twitter-like social media platform, the candle emoji many associated with Tiananmen was removed.

On January 29, the *Wall Street Journal* published a report that found 58 Chinese internet users had been sentenced to prison for up to four years for posts on Twitter, Facebook, or YouTube.

Online references to same-sex acts, same-sex relations, and scientifically accurate words for genitalia were banned based on a government pronouncement listing same-sex acts or relations as an “abnormal sexual relation” and forbidding its depiction.

While censorship was effective in keeping casual users away from websites hosting content deemed sensitive, many users circumvented online censorship by using various technologies. Information on proxy servers outside the country and software for defeating official censorship were available, although frequently limited by the Great Firewall. Encrypted communication apps such as Telegram and WhatsApp and VPN services were regularly disrupted, especially during “sensitive” times of the year.

In March the CAC rebuked executives from LinkedIn, the sole major American social network still allowed to operate in the country, for failing to sufficiently control political content. The company was required to perform a self-evaluation, prepare a report, and temporarily suspend new sign-ups of users inside the country. Media reports indicated the company used a combination of software algorithms and human reviewers to flag posts that could offend the government, and users who ran afoul of the speech rules received emails informing them that their post was not viewable by LinkedIn members in China. In October, LinkedIn announced it would shut down operations in China. In November, Yahoo China announced that it would also end operations in China.

The law obliges internet companies to cooperate fully with investigations of suspected leaks of state secrets, stop the transmission of such information once discovered, and report the crime to authorities. This was defined broadly and without clear limits. Furthermore, the companies must comply with authorities’ orders to delete such information from their websites; failure to do so is punishable by relevant departments, such as the Ministry of Public Security and law enforcement authorities.

**Annex 2:**

**NATIONAL TRADE ESTIMATES REPORT COVERS E-COMMERCE “TRADE BARRIERS” IN CHINA**

**SERVICES – Excerpt from page 107**

Internet Regulatory Regime China’s Internet regulatory regime is restrictive and non-transparent, affecting a broad range of commercial services activities conducted via the Internet, and is overseen by multiple agencies without clear lines of jurisdiction. China’s Internet economy has boomed over the past decade and is second in size only to that of the United States. Growth in China has been marked in service sectors similar to those found in the United States, including retail websites, search engines, vocational and adult online education, travel, advertising, audio-visual and computer gaming services, electronic mail and text, online job searches, Internet consulting, mapping services, applications, web domain registration, and electronic trading. However, in the China market, Chinese companies dominate due in large part to restrictions imposed on foreign companies by the Chinese government. At the same time, foreign companies continue to encounter major difficulties in attempting to offer these and other Internet-based services on a cross-border basis. China continues to engage in extensive blocking of legitimate websites, imposing significant costs on both suppliers and users of web-based services and products. According to the latest data, China currently blocks most of the largest global sites, and U.S. industry research has calculated that more than 10,000 sites are blocked, affecting billions of dollars in business, including communications, networking, app stores, news, and other sites. Even when sites are not permanently blocked, the often arbitrary implementation of blocking, and the performance-degrading effect of filtering all traffic into and outside of China, significantly impair the supply of many cross-border services, often to the point of making them unviable.

**BARRIERS TO DIGITAL TRADE AND ELECTRONIC COMMERCE Page 106-109**

**Data Restrictions**

In 2021, China continued to build out its expansive regulation of data. A new Data Security Law entered

into force in September 2021, and a new Personal Information Protection Law entered into force in

November 2021. These new laws operate together with the Cybersecurity Law, which took effect in June

2017, the National Security Law, which has been in effect since 2015, and various implementing measures

to prohibit or severely restrict cross-border transfers of information that are routine in the ordinary course

of business and are fundamental to any business activity. These laws and measures also impose local data

storage and processing requirements on companies that collect “important data,” which is a broad and

vaguely defined term. They also suggest that China intends to apply these restrictions and requirements

not only to companies that are considered to operate in “critical information infrastructure sectors,” another

broad and vaguely defined term, but also to companies operating in other sectors. Given the wide range of

business activities that are dependent on cross-border transfers of information and flexible access to global

computing facilities, these developments have generated serious concerns among foreign governments as

well as among stakeholders in the United States and other countries, including among services suppliers.

**Secure and Controllable Information and Communications Technology Policies**

In 2021, implementing measures for China’s Cybersecurity Law remained a continued source of serious

concern for U.S. companies since the law’s enactment in 2016. Of particular concern are the Measures for

Cybersecurity Review, first issued in 2016 and later updated in 2020 and 2021. This measure implements

one element of the cybersecurity regime created by the Cybersecurity Law. Specifically, the measure puts

in place a review process to regulate the purchase of information and communications technology (ICT)

products and services by critical information infrastructure operators and online platform operators in

China. The review process is to consider, among other things, potential national security risks related to

interruption of service, data leakage, and reliability of supply chains.

As demonstrated in implementing measures for the Cybersecurity Law, China’s approach is to impose

severe restrictions on a wide range of U.S. and other foreign ICT products and services with an apparent

goal of supporting China’s technology localization policies by encouraging the replacement of foreign ICT

products and services with domestic ones. U.S. and other stakeholders and governments around the world

expressed serious concerns about requirements that ICT equipment and other ICT products and services in

critical sectors be “secure and controllable,” as these requirements are used by the Chinese government to

disadvantage non-Chinese firms in multiple ways.

In addition to the Cybersecurity Law, China has referenced its “secure and controllable” requirements in a

variety of measures dating back to 2013. Through these measures, China has mandated that Chinese

information technology users purchase Chinese products and favor Chinese service suppliers, imposed local

content requirements, imposed domestic R&D requirements, considered the location of R&D as a

cybersecurity risk factor, and required the transfer or disclosure of source code or other intellectual property.

In the 2019 update of the Measures for Cybersecurity Review, China added political, diplomatic, and other

“non-market” developments as potential risk factors to be considered.

In addition, in 2015, China enacted a National Security Law and a Counterterrorism Law, which include

provisions citing not only national security and counterterrorism objectives but also economic and industrial

policies. The State Council also published a plan in 2015 that sets a timetable for adopting “secure and

controllable” products and services in critical government ministries by 2020.

Meanwhile, sector-specific policies under this broad framework continue to be proposed and deployed

across China’s economy. A high-profile example from December 2014 was a proposed measure drafted

by the China Banking Regulatory Commission that called for 75 percent of ICT products used in the

banking system to be “secure and controllable” by 2019 and that would have imposed a series of criteria

that would shut out foreign ICT providers from China’s banking sector. Not long afterwards, a similar

measure was proposed for the insurance sector.

In 2015, the United States, in concert with other governments and stakeholders around the world, raised

serious concerns about China’s “secure and controllable” regime at the highest levels of government within

China. During the state visit of China’s President in September 2015, the U.S. and Chinese Presidents

committed to a set of principles for trade in information technologies. The issue also was raised in

connection with the June 2015 S&ED meeting and the November 2015 JCCT meeting, with China making

a series of additional important commitments with regard to technology policy. China reiterated many of

these commitments at the November 2016 JCCT meeting, where it affirmed that its “secure and

controllable” policies are not to unnecessarily limit or prevent commercial sales opportunities for foreign

ICT suppliers or unnecessarily impose nationality-based conditions and restrictions on commercial ICT

purchases, sales, or uses. China also agreed that it would notify relevant technical regulations to the WTO

Committee on Technical Barriers to Trade (TBT Committee).

Again, however, China has not honored its promises. The numerous draft and final cybersecurity

implementation measures issued by China from 2017 through March 2022 raise serious questions about

China’s approach to cybersecurity regulation. China’s measures do not appear to be in line with the nondiscriminatory, non-trade restrictive approach to which China has committed, and global stakeholders have

grown even more concerned about the implications of China’s ICT security measures across the many

economic sectors that employ digital technologies. Accordingly, throughout 2021, the United States

conveyed its serious concerns about China’s approach to cybersecurity regulation through written

comments on draft measures, bilateral engagement and multilateral engagement, including at WTO

committee and council meetings, in an effort to persuade China to revise its policies in this area in light of

its WTO obligations and bilateral commitments. These efforts are ongoing as of March 2022.

**Encryption**

Use of ICT products and services is increasingly dependent on robust encryption, an essential functionality

for protecting privacy and safeguarding sensitive commercial information. Onerous requirements on the

use of encryption, including intrusive approval processes and, in many cases, mandatory use of indigenous

encryption algorithms (e.g., for WiFi and 4G cellular products), continue to be cited by stakeholders as a

significant trade barrier.

In October 2019, China adopted a Cryptography Law that includes restrictive requirements for commercial

encryption products that “involve national security, the national economy and people’s lives, and public

interest,” which must undergo a security assessment. This broad definition of commercial encryption

products that must undergo a security assessment raises concerns that the new Cryptography Law will lead

to unnecessary restrictions on foreign ICT products and services. In August 2020, the State Cryptography

Administration issued the draft Commercial Cryptography Administrative Regulations to implement the

Cryptography Law. This draft measure did not address the concerns that the United States and numerous

other stakeholders had raised regarding the Cryptography Law.

Going forward, the United States will continue to monitor implementation of the Cryptography Law and

related measures. The United States will remain vigilant toward the introduction of any new requirements

hindering technologically neutral use of robust, internationally standardized encryption.

**ANNEX 3**

**BIG PHARMA’S SPECIAL 301 VS. BIG TECH SPECIAL 301 in USICA Sec. 71011**

**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 e, 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](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=19-USC-699711487-75103023&term_occur=999&term_src=title:19:chapter:12:subchapter:I:part:8:section:2242), 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](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=19-USC-699711487-75103023&term_occur=999&term_src=title:19:chapter:12:subchapter:I:part:8:section:2242),

**(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](https://www.law.cornell.edu/uscode/text/19/2241#b) and petitions submitted under [section 2412 of this title](https://www.law.cornell.edu/uscode/text/19/2412).

**(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](https://www.law.cornell.edu/uscode/text/19/2419#3) 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](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=19-USC-699711487-75103023&term_occur=999&term_src=title:19:chapter:12:subchapter:I:part:8:section:2242)” 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 IDENTFICATIONS.—

‘‘(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](https://www.law.cornell.edu/uscode/text/19/3511#d_15).

**(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).

**(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](https://www.law.cornell.edu/uscode/text/19/2241#b), the Trade Representative shall identify any act, policy, or practice of Canada which—

**(A)** affects [cultural industries](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=19-USC-233417254-75104947&term_occur=999&term_src=title:19:chapter:12:subchapter:I:part:8:section:2242),

**(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](https://www.law.cornell.edu/uscode/text/19/4502)).

**(2) Special rules for identifications** For purposes of [section 2412(b)(2)(A) of this title](https://www.law.cornell.edu/uscode/text/19/2412#b_2_A), an act, policy, or practice identified under this subsection shall be treated as an act, policy, or

‘‘(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).

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](https://www.law.cornell.edu/uscode/text/19/2155), 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](https://www.law.cornell.edu/uscode/text/19/2241#b).

**(3) Cultural industries** For purposes of this subsection, the term “[cultural industries](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=19-USC-233417254-75104947&term_occur=999&term_src=title:19:chapter:12:subchapter:I:part:8:section:2242)” 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](https://www.law.cornell.edu/uscode/text/19/2241#b), 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](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=19-USC-1486271819-75105908&term_occur=999&term_src=title:19:chapter:12:subchapter:I:part:8:section:2242); 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](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=19-USC-699711487-75103023&term_occur=999&term_src=title:19:chapter:12:subchapter:I:part:8:section:2242); 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](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=19-USC-1486271819-75105908&term_occur=999&term_src=title:19:chapter:12:subchapter:I:part:8:section:2242)” means the [priority watch list](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=19-USC-1486271819-75105908&term_occur=999&term_src=title:19:chapter:12:subchapter:I:part:8:section:2242) 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](https://www.law.cornell.edu/uscode/text/19/2241#b), 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.’’.

(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 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.

1. United States International Trade Commission, Foreign Censorship, Part 1: Policies and Practices Affecting U.S. Businesses, Corrected February 2022 Publication Number: 5244 Investigation Number: 332-585 at page 100. Available at <https://www.usitc.gov/publications/332/pub5244.pdf> [↑](#footnote-ref-1)
2. United States International Trade Commission, Foreign Censorship, Part 1: Policies and Practices Affecting U.S. Businesses, Corrected February 2022 Publication Number: 5244 Investigation Number: 332-585 at page 24. Available at <https://www.usitc.gov/publications/332/pub5244.pdf> [↑](#footnote-ref-2)
3. a The United Nations, General Assembly, The Universal Declaration of Human Rights (UDHR), adopted December 10, 1948; Hannum, “The Status of the Universal Declaration,” 1996, 112; International Covenant on Civil and Political Rights (ICCPR), opened for signature December 16, 1966; academic professional, interview by USITC staff, July 7, 2021.

b The United Nations, General Assembly, UDHR, adopted December 10, 1948, arts. 19, 29(2).

c Nunziato, “How (Not) to Censor,” 2011; Hannum, “The UDHR in National and International Law,” 1998, 145.

d Academic professional, interview by USITC staff, July 7, 2021 (General Comment No. 34 plays a key role in aligning State practice in this regard); USITC, hearing transcript, July 1, 2021, 109–110 (testimony of Maria Repnikova, Georgia State University) (discussing the fluctuation of norms).

e Nunziato, “How (Not) to Censor,” 2011, 5–6. Note that more countries have ratified since the publication of the previously cited article. UN Treaty Collection, Status of the International Covenant on Civil and Political Rights, accessed October 5, 2021.

f ICCPR, opened for signature December 16, 1966, art. 19(2).

g Experts disagree as to whether or not activity that suppresses speech in a manner compatible with the ICCPR is not censorship or simply justified censorship. USITC, hearing transcript, July 1, 2021, 108 (testimony of Suzanne Nossel, PEN America); USITC, hearing transcript, July 1, 2021, 161 (testimony of Nigel Cory, Information Technology and Innovation Foundation). See also Center for Democracy and Technology, written submission to the USITC, July 22, 2021, 1–2 (does not constitute censorship); USITC, hearing transcript, July 1, 2021, 181, 191 (testimony of Daphne Keller, Stanford Univ.y) (constitutes censorship) and academic professional, interview by USITC staff, July 7, 2021 (constitutes censorship).

h USITC, hearing transcript, July 1, 2021, 107–108 (testimony of Suzanne Nossel, PEN America); academic professional, interview by USITC staff, July 7, 2021. Note that slight linguistic variations of these criteria are used on occasion, though the legal requirements are substantially the same.

i The United Nations, General Assembly, Human Rights Council, *Report of the Special Rapporteur*, 2018; Strossen, “United Nations Free Speech Standards” 2021; Human Rights Committee, “General Comment No. 34, Article 19,” September 12, 2011; USITC, hearing transcript, July 1, 2021, 106 (testimony of Suzanne Nossel, PEN America); USITC, hearing transcript, July 1, 2021, 261 (testimony of Nigel Cory, Information Technology and Innovation Foundation).

j ICCPR, opened for signature December 16, 1966, art. 19(3).

k Center for Democracy & Technology, submission to the USITC, July 22, 2021, 1–2; academic professional, interview by USITC staff, July 7, 2021; USITC, hearing transcript, July 1, 2021, 106–108 (testimony of Suzanne Nossel, PEN America).

l *Faurisson v. France*, United Nations Human Rights Committee, (November 8, 1996), ¶¶ 9.4–9.7, 10.

m *Decision n ° 2020-801 DC*, French Constitutional Council, (June 18, 2020), ¶¶ 8–9, 19–20, 26, 32. [↑](#footnote-ref-3)
4. United States International Trade Commission, Foreign Censorship, Part 1: Policies and Practices Affecting U.S. Businesses, Corrected February 2022 Publication Number: 5244 Investigation Number: 332-585 at page 32. Available at <https://www.usitc.gov/publications/332/pub5244.pdf> [↑](#footnote-ref-4)
5. United States International Trade Commission, Foreign Censorship, Part 1: Policies and Practices Affecting U.S. Businesses, Corrected February 2022 Publication Number: 5244 Investigation Number: 332-585 at page 29. Available at <https://www.usitc.gov/publications/332/pub5244.pdf> [↑](#footnote-ref-5)
6. United States Council for International Business, USCIB Comments Regarding Foreign Trade Barriers to U.S. Exports for 2021 Reporting, October 26, 2021, at page 141. Available at <https://www.regulations.gov/comment/USTR-2021-0016-0042> [↑](#footnote-ref-6)
7. Computer & Communications Industry Association, Comments of the Computer & Communications Industry Association regarding Foreign Trade Barriers to U.S. Exports for 2022 Reporting, October 26, 2021, at page 36. Available at <https://www.regulations.gov/comment/USTR-2021-0016-0049> [↑](#footnote-ref-7)
8. 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 commercefn, [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.] [↑](#footnote-ref-8)