Big Tech Interests Have Rigged the China Bill with Powerful New Tools to Attack Anti-Monopoly & Pro-Fair-Business-Practices and Pro-Worker & Pro-Consumer Privacy Policies Worldwide

Beware of Big Tech "Special 301" in "Trade Act of 2021 Amendments" to USICA!

The China bill heading to the Senate floor includes a last-minute "Trade Act of 2021" amendment that designates a hands-off approach to Big Tech governance as an "American Value[s]." It requires U.S. trade officials to punish other countries that seek to break up Big Tech monopolies or regulate digital entities, and establishes new tools to do so. Terms in this amendment sought by Big Tech interests are framed as countering Chinese government online censorship, while in reality, the terms apply worldwide and deem any domestic policy upon which Big Tech operations are conditioned to be a form of censorship. **The amendment would require the Office of the U.S. Trade Representative (USTR) to become an agent of Big Tech by creating a new "Special 301" process for USTR to continually monitor other nations' existing and proposed digital governance policies to report on and undermine important pro-consumer, pro-worker, pro-privacy, pro-competitive and pro-fair-business-practices policies and proposals.**

Effectively, this amendment would empower Big Tech to hijack extraordinarily powerful U.S. government trade enforcement tools to undermine digital governance initiatives worldwide. This move attempts to replicate a Big Pharma strategy that has led to decades of attacks and the rollback of access to affordable medicine policies worldwide after Big Pharma interests hijacked trade enforcement tools in the 1980s. Since then, Special 301 for Big Pharma has resulted in an annual hit list of policies worldwide to bring down medicine prices and increase access to medicine, with the U.S. government helping Big Pharma undermine these initiatives by threatening U.S. trade sanctions and other penalties against countries sponsoring the policies.

The proposal to extend extraordinary U.S. Special 301 trade enforcement power to Big Tech contradicts the initiatives now underway by Democrats in the Senate and House to establish U.S. digital governance policies that protect worker rights, consumer privacy, health and safety and fair business practices related to anti-monopoly and competition policy problems. **The amendment captures gig worker protections, competition policy enforcement and digital governance policies under vague language that designates facially neutral regulatory policies that could have a greater impact on larger or market-dominating firms as illegal trade barriers and constraints on market access.**

As a technical matter, the 'strike and replace' language in Sections 7111-7113 of the amendment offered by the Finance Committee chair and ranking members (Sens. Wyden and Crapo) designates various forms of digital regulation as illegal trade barriers that are subject to Section 301 tariffs and other penalties. (Section 301, the statutory basis for the Trump administration's China tariffs, is a part of the Trade Act of 1974 that empowers the USTR to impose sanctions on foreign countries that are deemed to engage in acts that are "unjustifiable" or "unreasonable" and burden U.S. commerce.) The amendment also would newly establish a Special 301 annual review and reporting program for Big Tech. These terms require USTR annually to review all significant trade partner countries' digital governance

policies and prepare a report on policies that limit U.S. firms "market access" or otherwise limit their activities or content. Since Big Pharma was able to get such annual reviews inserted into Section 301 in 1984, the mechanism that this amendment would extend to Big Tech has been used as a powerful unilateral bullying and sanctions tool to undermine medicine price caps and access to medicine policies worldwide.

There are many extremely controversial and problematic aspects to this proposal. Any measure that would enact a major new U.S. policy of extending the powerful trade enforcement tools of Section 301 to target specific policies worldwide, and especially one on a subject on which numerous Members of Congress and committees are currently legislating, should be subject to broad debate and a markup, not slipped into unrelated legislation as a surprise amendment. Other aspects of this amendment, for instance regarding forced labor, are appropriate for a bill focused on China trade and competitiveness. But Section 7111-7113, the technology language, must go.

As the section-by-section analysis below explains, an initial revision of the amendment prior to its inclusion in the chairman's mark did not remedy its most problematic terms. Rather it shifted the amendment from being a *disastrous* proposal to a *very damaging* one that would freeze – or penalize – many important pro-consumer, pro-privacy, pro-competition, pro-fair-business-practices proposals being advanced worldwide for digital governance. By the time the final Senate vote occurred, only Section 7111, which newly established a Big Tech Special 301 annual review and report, and the pro-Big Tech Generalized System of Preference (GSP) language remained in the Trade Act of 2021 amendment to the Senate China bill. Opposition from other Senate Finance Committee members resulted in Sections 7112 and 7113 being stripped at the last minute. However, Big Tech lobbyists then shifted their focus to the House, seeking to get these terms restored in the House version of the China legislation. Because each aspect of the original amendment reflects a different mechanism that Big Tech interests have sought to insert into domestic legislation as well as into what they have dubbed "digital trade" agreements, this memo reviews all three original provisions.

Limits on Digital Governance and Anti-Trust Enforcement Disguised by Branding Focused on Combatting Chinese Censorship

The Big Tech provisions in the Trade Act of 2021 amendments were framed as necessary to fight online censorship, ostensibly in China. However, the terms require the U.S. government to penalize *any country* that enacts various pro-competition and other policies that could "disrupt digital trade" or create "barriers to digital trade" for U.S. tech firms. Because the amendment focuses on policies' effects, not intent, it labels as "discriminatory" and forbidden facially neutral policies that could have a greater effect on a U.S firm merely because it is a dominant player in a sector. The focus on effect also would capture digital governance policy that conditions a right to operate on meeting privacy, health or safety, worker rights, fair business practices or other standards. Competition policies requiring changes to a structure of an entity or its services are explicitly prohibited. Ironically, it could also ensnare controls on pirated, child pornographic or other content.

Instead, this amendment would target allied countries' digital governance policies that could affect U.S. firms while also having a chilling effect on U.S. digital governance, a subject now engaging many Members of Congress. The amendment effectively uses a "trade" measure to limit Congress' policy space and debate on how the U.S. will approach digital governance.

A special target of this amendment would be the European Union's (EU) Big Tech competition and consumer privacy policies and other nations' efforts to regulate digital firms and services with respect to unfair business practices, labor standards, and health and safety regulations. Section 7113 explicitly

deems policies that require break up of a tech entity or its services to be a Section 301 violation.

One new penalty the amendment would establish is cutting access to U.S. internet content, which is an extremely powerful tool given so many digital services rely on U.S. servers. Beyond undermining a free and fair internet, this would be an unmistakable shot across the bow to foreign allies: 'don't regulate U.S. digital firms, or we'll *entirely* cut off access to U.S. services.' (See Section 7112(b)) This include explicitly forbidding competition policies that require changes to the structure of an entity or its services. (See Section 7113(a)(2)(C))

The politics of this proposal are also extremely troubling. At a time when public concern about Big Tech abuses is rising on a bipartisan basis, Congress would provide formidable new powers for Big Tech to evade governance or accountability. And, after 30 years of failing to add labor and human rights to the powerful Section 301 enforcement mechanism, do congressional Democrats want to prioritize adding new Big Tech protections to Section 301, including those that could undermine labor and consumer protections?

New Big Tech "Special 301" Annual Review and Report Process Would Target Other Nations' Policies by Labeling Common Digital Governance Measures as Illegal Trade Barriers

Section 7111 is entitled "Censorship as a Trade Barrier." However, the actual terms amend Section 301 to instruct the USTR to extend to digital governance policies the annual Special 301 seek-and-destroy mission that a USTR team now undertakes for pharmaceutical interests with respect to generic medicine and other policies Big Pharma oppose. Section 7111 requires USTR to identify all 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.)

Neither the term "coerced censorship" nor "censorship" is defined with respect to a special meaning for this amendment, which is extremely problematic. Digital firms regularly use the "censorship" frame to attack any digital governance measure that in any way affects their business model or operations. Consider the plain meaning of this clause, which would encompass any act of a government that has the effect of promoting the suppression of communication. Note that the prohibited effect is not actual censorship, but "promoting censorship." Of course, there are legitimate reasons that a government policy might condition digital communication on certain competition policy, privacy protection or other standards and forbid operating permissions for firms that refuse to meet such standards. Such policies would be captured as forbidden acts, policies and practices that disrupt digital trade.

The requirements for the U.S. government to identify countries and include them in an annual report of bad digital actors is ostensibly limited to only including foreign countries that:

> *"****disrupt digital trade in a discriminatory or trade distorting manner with the*** *goal, or* ***substantial effect, of promoting censorship*** *or extrajudicial data access;" or*
>
> *"****deny fair and equitable market access to digital service providers that are United States persons with the*** *goal, or* ***substantial effect, of promoting censorship*** *or extrajudicial data access;" or*
>
> ***engage in coerced censorship*** *or extrajudicial data access* ***so as to harm the integrity of services or products provided by United States persons in the market of that country,***

the United States market, or other markets. (emphasis added)

The focus on effect is extremely problematic, especially when combined with "discriminatory," "trade distorting" and "fair and equitable market access." In particular, "fair and equitable market access" is a broad, subjective notion, but all three clauses are standard trade pact "trap" language. The terms are designed to capture and forbid policies of general application that may have a bigger impact on some entities because those firms are dominant players in a market.

For example, under this language, a policy that conditions <u>any and all</u> ride sharing firms' operating permission on registering as transportation companies and meeting labor and safety standards would have a discriminatory *effect* on dominant player Uber relative to smaller local firms. Denying operating rights for failing to comply would deny fair and equitable market access to digital service providers that are U.S. persons with the substantial effect of promoting censorship.

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

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

The section also includes language that requires USTR to designate certain countries as "priority foreign countries" based on their acts, policies or practices having the greatest impact. The amendment requires that Section 301 investigations be instigated for countries that are so listed. Such an investigation is the normal pathway to imposing sanctions under Section 301. This language replicates that which currently applies to the annual USTR Special 301 reports attacking affordable medicines policies that pharmaceutical industry interests oppose.

<u>Chilling Progress on Digital Governance by Tracking and Attacking Proposed Policies</u>

Section 7113 was designed to chill countries from enacting *new* digital governance policies. It was pulled before the final vote, but is worth noting because the industry seeks to revive it in the House. It requires that the USTR:

> "*shall initiate a review regarding any* ***discriminatory digital trade act, policy, or practice proposed*** *by a major trading partner of the United States* ***that, if enacted, would accord less favorable treatment to imported or cross-border digital goods and services than to like digital goods and services of national origin****, including by— " among other things "****(C) requiring re-engineering or separation of integrated products without a legitimate policy objective*****;"** (emphasis added)

This provision explicitly lists breaking up digital entities as a prohibited activity, among a list of other actions or policies, some of which are reasonable, and several of which are at best ambiguous and possibly problematic. Consider the EU proposing an Elizabeth Warren-style law that prohibited companies in key

bottleneck product markets from competing in adjacent markets – that would, under this amendment, run afoul (as something "requiring separation of integrated products.")

Or consider a major trading partner proposing a new comprehensive privacy law, the net effect of which, say, would require Google – a company with horrible privacy practices – to re-engineer or separate integrated products. That, too, would constitute a discriminatory digital trade proposal triggering a Section 301 investigation of the EU.

The revision of the amendment text has done little to fix its problems. The first draft did not include the "without a legitimate policy objective" clause that is now attached to some terms. Yet, its addition is of little practical meaning. The Section 301 mechanism is a unilateral tool of the U.S. government, which has total discretion to determine what is or is not a legitimate objective of another country. Given the entire thrust of this amendment is to eliminate any obstacles to U.S. firms' access and operations, the new clause has little purpose but to try to calm concerns about this proposal. The first draft also did not include reference to a country's "practice," while the revision expands the scope of covered actions. The "less favorable treatment" clause in this section is technical trade-jargon language for discrimination, which raises the problem of disparate impacts that are caused by the size or prominence of a digital entity not by the policy in question. This problem is described in more detail below in the analysis of the sections of the amendment that define prohibited existing policies.

The revised amendment text excludes a clause defining a violation as anything "(F) being otherwise detrimental to the trade in digital goods or services by United States entities, as determined by the Trade Representative." Obviously, it is better that the catch-all clause is eliminated! However, the specific provisions that remain in this amendment provide ample scope to chill, undermine and attack a broad array of pro-consumer, pro-privacy, and pro-competitive digital governance policies worldwide.

And the amendment alters the normal Section 301 process to speed up enforcement actions against such policies. The final clauses of Section 7113 appear to deem the *mere enactment* of any proposal meeting this section's broad criteria of unacceptable policies to satisfy the standard that triggers mandatory and discretionary penalties under Section 301. If that is not the intent of this provision, it is drafted in a way that certainly supports that reading:

> *"(B) any act, policy, or practice described in subsection (a)(1)(B) or (b)(1) of section 301 of the Trade Act of 1974 (19 U.S.C. 2411) will exist if a proposed digital trade act, policy, or practice described in subsection (a)(1) of this section is finalized;"*

Consider the highlighted language. While (a)(1)(B) refers to Section 2414(a)(1), which is the standard investigation to determine if a foreign government's policy either violates a trade pact or is unjustifiable and burdens or restricts U.S. commerce, the language in the amendment equates the mere enactment of a proposed policy triggering the amendment's scrutiny to qualify as an act, policy, or practice of a foreign country that were it determined via an investigation would be subject to mandatory action.

The reference to the Trade Act of 1974 provisions in this part of the amendment is to this Section 301 language describing what sorts of policies trigger what sorts of response:

(a)(1)(B)

> ***(a)MANDATORY ACTION***
> ***(1)****If the United States Trade Representative determines under section 2414(a)(1) of this title that—*

(A) the rights of the United States under any trade agreement are being denied; or
(B) an act, policy, or practice of a foreign country—
(i) violates, or is inconsistent with, the provisions of, or otherwise denies benefits to the United States under, any trade agreement, or
(ii) is unjustifiable and burdens or restricts United States commerce; the Trade Representative shall take action authorized in subsection (c), subject to the specific direction, if any, of the President regarding any such action, and shall take all other appropriate and feasible action within the power of the President that the President may direct the Trade Representative to take under this subsection, to enforce such rights or to obtain the elimination of such act, policy, or practice. Actions may be taken that are within the power of the President with respect to trade in any goods or services, or with respect to any other area of pertinent relations with the foreign country." (emphasis added)

***(b)DISCRETIONARY ACTION** If the Trade Representative determines under section 2414(a)(1) of this title that—*
***(1)** an act, policy, or practice of a foreign country is unreasonable or discriminatory and burdens or restricts United States commerce, and…*

Strict Enforcement and Strong Penalties, Including Cutting Access to U.S. Data Flows In Retaliation for Policies Such As Breaking Up Digital Entities

Section 7112 of the proposed amendment further amended Section 301 by adding new language on "barriers to digital trade" that defined the Section 301 standard for policies subject to retaliatory action, which is:

> "*an act, policy, or practice that is unreasonable*," to include "*any act, policy, or practice, or any combination of acts, policies, or practices, that* ***denies fair and equitable market opportunities, including through censorship or barriers to the provision of domestic digital services, by the government of a foreign country that— ''(A) precludes competition by*** *conferring special benefits on domestic entities or* ***imposing discriminatory burdens on foreign entities; ''(B) provides inconsistent or unfair market access to United States persons*;"** (emphasis added)

This section, which was abruptly cut shortly before the floor vote, would have created a new, highly threatening Section 301 penalty – cutting off access to U.S. data! This provision is also being pushed on the House side. Even as a threat, this could be used persuade countries to eliminate important digital governance policies, given broad global reliance on U.S. servers and services:

> "*The Trade Representative may direct the blocking of access from that country to data from the United States to address the lack of reciprocal market access or parallel data flows*.''

Obvious targets for this would be policies that the EU has used and other countries have considered against data flows to countries that do not provide sufficient consumer privacy protections, which is a standard that quite a few Members of Congress would agree includes the United States.

A broad array of policies could get hit with this harsh penalty under the relevant language. First, the standard includes both the highly subjective "denies fair and equitable market opportunities" and "provides inconsistent or unfair market access" clauses. (Note that in this use, it is not even

"market access" per se, but "market access **opportunities,**" a broader and vaguer pre-establishment standard.) Second, the language pairs "barriers to the provision of domestic digital services" with their having the effect of "imposing discriminatory burdens on foreign entities." This means that, as per above, conditioning permissions to operate on meeting labor, health or safety, privacy or competition policies of general application could trigger this standard even if the discriminatory burden relates to the dominance of the U.S. firms in the market, not intentional discrimination against a foreign entity. This makes the use of the term "precludes competition" in this provision especially cynical. This amendment is anti-antitrust.

Limits on Digital Governance Added as New Conditions for Developing Countries to Qualify for the Generalized System of Preferences Special U.S. Market Access

The provisions above were paired with new terms limiting digital regulation that Sens. Wyden and Crapo added as eligibility criteria for developing countries to qualify for the Generalized System of Preferences lower-tariff U.S. market access in a GSP reauthorization bill that he introduced on the same day:

> **SEC. 10001. MODIFICATION OF ELIGIBILITY CRITERIA FOR BENEFICIARY DEVELOPING COUNTRIES.**
> *''(11) the extent to which such country—*
> *''(A) has refrained from imposing, or has eliminated, digital trade barriers, including unnecessary or discriminatory data localization or data transfer restrictions; and*
> *''(B) has taken steps in the digital environment to support consumer protections, the privacy of personal information, and open digital ecosystems.''*

The GSP language and Section 7111 establishing the new Big Tech Special 301 system were included in the package passed by the U.S. Senate in June 2021. The combination of these two proposals operates like a pincer move against countries' adoption or maintenance of robust digital governance policies that promote the interest of working people, consumers and non-monopolist businesses. While all Democrats supported the bill, dozens of Republican Senators opposed. Ironically, some of the GOP Senators voting not identified provisions in the Trade Act of 2021 amendment as the basis for their opposition, including terms that provided new tariff cuts for imports from China.

For more information, contact: Lori Wallach, lwallach@rethinktrade.org

See next page for side-by-side of Big Pharma Special 301 and proposed Special 301 for Big Tech

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, and
(2) those foreign countries identified under paragraph (1) that are determined by the Trade Representative to be priority foreign countries.

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

SEC. 71011 - ''Sec. 183. Identification of countries that disrupt digital trade.

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

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

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

Representative by interested persons, including information contained in reports submitted under section 2241(b) of this title and petitions submitted under section 2412 of this title.
(3) The Trade Representative may identify a foreign country under subsection (a)(1)(B) only if the Trade Representative finds that there is a factual basis for the denial of fair and equitable market access as a result of the violation of international law or agreement, or the existence of barriers, referred to in subsection (d)(3).
(4) In identifying foreign countries under paragraphs (1) and (2) of subsection (a), the Trade Representative shall take into account—
(A) the history of intellectual property laws and practices of the foreign country, including any previous identification under subsection (a)(2), and
(B) the history of efforts of the United States, and the response of the foreign country, to achieve adequate and effective protection and enforcement of intellectual property rights.

(c)REVOCATIONS AND ADDITIONAL IDENTIFICATIONS
(1) The Trade Representative may at any time—
(A) revoke the identification of any foreign country as a priority foreign country under this section, or
(B) Identify any foreign country as a priority foreign country under this section,
if information available to the Trade Representative indicates that such action is appropriate.
(2) The Trade Representative shall include in the semiannual report submitted to the Congress under section 2419(3) of this title a detailed explanation of the reasons for the revocation under paragraph (1) of the identification of any foreign country as a priority foreign country under this section.

(d) DEFINITIONS For purposes of this section—
(1) The term "persons that rely upon intellectual property protection" means persons involved in—
(A) the creation, production or licensing of works of authorship (within the meaning of sections 102 and 103 of title 17) that are copyrighted, or
(B) the manufacture of products that are patented or for which there are process patents.
(2) A foreign country denies adequate and effective protection of intellectual property rights if the foreign country denies adequate and effective means under the laws of the foreign country for persons who are not citizens or nationals of such

''(2) REVOCATIONS AND ADDITIONAL 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.

(e)PUBLICATION

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

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

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

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

(A) affects cultural industries,

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

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

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

practice that is the basis for identification of a country under subsection (a)(2), unless the United States has already taken action pursuant to article 32.6 of the USMCA in response to such act, policy, or practice. In deciding whether to identify an act, policy, or practice under paragraph (1), the Trade Representative shall—

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

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

(3) CULTURAL INDUSTRIES For purposes of this subsection, the term "cultural industries" means persons engaged in any of the following activities:

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

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

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

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

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

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

(1) ACTION PLANS

(A) In general

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

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

(i) the Trade Representative has identified for placement on the priority watch list; and
(ii) has remained on such list for at least one year.
(C)Action plan described An action plan developed under subparagraph (A) shall contain the benchmarks described in subparagraph (D) and be designed to assist the foreign country—
(i)to achieve—
(I) adequate and effective protection of intellectual property rights; and
(II) fair and equitable market access for United States persons that rely upon intellectual property protection; or
(ii) to make significant progress toward achieving the goals described in clause (i).
(D)Benchmarks described
The benchmarks contained in an action plan developed pursuant to subparagraph (A) are such legislative, institutional, enforcement, or other actions as the Trade Representative determines to be necessary for the foreign country to achieve the goals described in clause (i)or(ii) of subpara (C).
(2)FAILURE TO MEET ACTION PLAN BENCHMARKS
If, as of one year after the date on which an action plan is developed under paragraph (1)(A), the President, in consultation with the Trade Representative, determines that the foreign country to which the action plan applies has not substantially complied with the benchmarks described in paragraph (1)(D), the President may take appropriate action with respect to the foreign country.
(3)PRIORITY WATCH LIST DEFINED
In this subsection, the term "priority watch list" means the priority watch list established by the Trade Representative pursuant to subsection (a).

(h)ANNUAL REPORT Not later than 30 days after the date on which the Trade Representative submits the National Trade Estimate under section 2241(b) of this title, the Trade Representative shall submit to the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate a report on actions taken under this section during the 12 months preceding such report, and the reasons for such actions, including—
(1) a list of any foreign countries identified under subsection (a);
(2) a description of progress made in achieving improved intellectual property protection and market access for persons relying on intellectual property rights; and
(3) a description of the action plans developed under subsection (g) and any actions taken by foreign countries under such plans.

''(e) ANNUAL REPORT.—Not later than 30 days after the date on which the Trade Representative submits the National Trade Estimate under section 181(b), the Trade Representative shall submit to the Committee on Finance of the Senate and the Committee on Ways and Means of the House of Representatives a report on actions taken under this section during the one-year period preceding that report, and the reasons for those actions, including—
''(1) a list of any foreign countries identified under subsection (a); and
''(2) a description of progress made in decreasing disruptions to digital trade.''.

(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.