



October 25, 2021

**COMMENTS FOR DOCKET NUMBER USTR-2021-0016  
TO THE OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE**

**REGARDING “FOREIGN TRADE BARRIERS TO U.S. EXPORTS” 2022 REPORTING**

Public Citizen welcomes the opportunity to provide written comment on the Office of the United States Trade Representative’s (USTR) 2022 National Trade Estimate (NTE) report. Public Citizen is a national, nonprofit consumer organization with more than 400,000 members that champions citizen interests before Congress, executive branch agencies and the courts.

For years, USTR’s statutorily-required annual review of U.S. trade partners’ “significant trade barriers” has focused on labelling an array of other countries’ public interest policies related to public health and the environment, food-labelling and privacy laws, and even kosher and halal faith-based dietary standards as illegal trade barriers. Public Citizen urges the Biden administration to reconsider this approach. A trade policy that prioritizes the interests of workers and consumers, must be premised on what is in the public interest, while past NTE reports have only focused on narrow commercial interests.

It is Public Citizen’s view that it is against the public interest both for USTR to spend resources compiling a corporate hit list of such measures and for USTR to effectively arm commercial interests to attack similar policies domestically by labeling such measures categorically as trade barriers. Whatever policies in other countries that U.S. commercial interests may find not to their liking, U.S. government officials should not be in the business of elevating special interest peeves into U.S. policy. Indeed, any broad sense of the U.S. national interest would favor other countries enforcing strong environmental, public health and other public interest standards.

However, even considering a narrow national interest perspective, NTE reports have been loaded with “boomerangs” that could come back against U.S. policy. The most recent NTE reports emphasized “barriers to digital trade,” and included policies in other countries that are similar to those being promoted on a bipartisan basis in the U.S. Congress. In the 2018 report, the European Union’s General Data Protection Regulation (GDPR) was listed as a barrier. According to the report, the policy adds “new requirements for accountability, data governance, and notification of a data breach,” which may “increase administrative costs and burdens” for U.S. companies operating in Europe.<sup>1</sup> The inherent problem in targeting other countries’ non-trade policies simply because they are different than ours and disfavored by corporate interests is spotlighted every time U.S. policy shifts.

Perhaps the best current example of this problem is related to a recently passed law in South Korea that would require app stores to allow consumers to use diverse payment systems, not only those controlled by the app store. The law also would forbid app stores from banning developers

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<sup>1</sup> Public Citizen, “New Trump Administration Trade Report Sticks to the Status Quo”, *Eyes on Trade*, April 11, 2018. Available at: <https://citizen.typepad.com/eyesontrade/2018/04/new-trump-administration-trade-report-sticks-to-the-status-quo.html>

from listing products on competing app store platforms. When South Korean lawmakers proposed the app store bill last year, the Information Technology Industry Council, an industry-backed group that is financed by Apple and Google, urged USTR to list the legislation as a barrier to digital trade.<sup>2</sup> Regrettably, the 2021 NTE report was due just weeks after Ambassador Tai was sworn in and it included a paragraph echoing Big Tech’s talking points.<sup>3</sup>

USTR’s endorsement has fueled Big Tech’s assault against the law, which forbids the anti-competitive practices and monopoly abuses that are leading governments worldwide to focus on digital market disfunctions. Indeed, bipartisan teams of U.S. senators and representatives have introduced legislation in both chambers that would address the same app store anti-competitive issues.<sup>4</sup> Hence, USTR should be particularly cautious and refrain from listing the South Korean law in the 2022 report to avoid stomping on U.S. domestic digital governance policymaking.

While Big Tech platforms may not like the various policies that previous reports labelled as “unclear”, “potentially restrictive” or “burdensome”, it should not be the business of the U.S. government to pressure other countries to not protect their populations’ privacy, personal data, and security, much less to take any actions in the “trade” sphere that foreclose U.S. domestic policymakers’ space to enact robust digital governance measures domestically.

The 2018 NTE report also attacked Quebec’s requirement that 60% of the goods used in its wind energy projects be sourced domestically as this “could pose hurdles for U.S. companies in the renewable energy sector in Canada.”<sup>5</sup> Yet, one of the Biden-Harris administration’s core policy goals has been leveraging federal procurement to strengthen U.S. supply chains of critical products.<sup>6</sup> To that end, it effectively proposed changes to increase price preferences for American-made critical goods, and raise the domestic content threshold for products procured by federal agencies across the board.<sup>7</sup> Moreover, the Biden Build Back Better plan prioritizes

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<sup>2</sup> David McCabe and Jin Yu Young, “*Apple and Google’s Fight in Seoul Tests Biden in Washington*,” The New York Times, August 23, 2021. Available at: <https://www.nytimes.com/2021/08/23/technology/apple-google-south-korea-app-store.html?searchResultPosition=10>.

<sup>3</sup> Office of the United States Trade Representative, “2021 National Trade Estimate Report on Foreign Trade Barriers,” March, 2021. P. 333. Available at: [https://ustr.gov/sites/default/files/2020\\_National\\_Trade\\_Estimate\\_Report.pdf](https://ustr.gov/sites/default/files/2020_National_Trade_Estimate_Report.pdf)

<sup>4</sup> John D. McKinnon, “*App Store Competition Targeted by Bipartisan Senate Bill*,” The Wall Street Journal, August 11, 2021. Available at: [https://www.wsj.com/articles/app-store-competition-targeted-by-bipartisan-senate-bill-11628704834?mod=article\\_inline; Diane Bartz and Stephen Coates, “U.S. House members introduce bill targeting Apple and Google app stores,” Reuters, August 13, 2021. Available at: https://www.reuters.com/technology/us-house-members-introduce-bill-targeting-apple-google-app-stores-2021-08-13/.](https://www.wsj.com/articles/app-store-competition-targeted-by-bipartisan-senate-bill-11628704834?mod=article_inline; Diane Bartz and Stephen Coates, “U.S. House members introduce bill targeting Apple and Google app stores,” Reuters, August 13, 2021. Available at: https://www.reuters.com/technology/us-house-members-introduce-bill-targeting-apple-google-app-stores-2021-08-13/)

<sup>5</sup> Public Citizen, “New Trump Administration Trade Report Sticks to the Status Quo”, *Eyes on Trade*, April 11, 2018. Available at: <https://citizen.typepad.com/eyesontrade/2018/04/new-trump-administration-trade-report-sticks-to-the-status-quo.html>

<sup>6</sup> The White House, “Building Resilient Supply Chains, Revitalizing American Manufacturing, and Fostering Broad-Based Growth: 100-Day Reviews under Executive Order 14017,” June 2021. Available at: <https://www.whitehouse.gov/wp-content/uploads/2021/06/100-day-supply-chain-review-report.pdf>

<sup>7</sup> Department of Defense, General Services Administration and National Aeronautics and Space Administration, “Federal Acquisition Regulation: Amendments to the FAR Buy American Act Requirements,” July 29, 2021. Available at:

[https://www.acquisition.gov/sites/default/files/page\\_file\\_uploads/FAR\\_Buy\\_American\\_Act\\_Proposed\\_Rule\\_Prepublicationv072821.pdf](https://www.acquisition.gov/sites/default/files/page_file_uploads/FAR_Buy_American_Act_Proposed_Rule_Prepublicationv072821.pdf)

creating U.S. jobs in the energy sector, including in renewal energy-related manufacturing, as part of a ‘just transition’ to a more climate-friendly U.S. economy. Indeed, the Quebecois policy, if applied nationally in the United States, would fit squarely within Biden’s Build Back Better plan.

The past NTE approach has also been tone-deaf with respect to broader U.S. diplomatic goals, for instance criticizing Malaysia—a predominantly Muslim country—for having certain restrictions on the importation of alcohol, and Brunei—another predominantly Muslim country—for requiring that non-halal foods be sold in specially designated rooms.<sup>8</sup>

Shamefully, both the 2018 and the 2017 national trade estimate reports even condemned other governments’ policies to promote breastfeeding. Despite the fact that studies show that breastfeeding has the potential to save 800,000 children under the age of five every single year,<sup>9</sup> these reports challenged existing regulations or proposed legislation that restrict corporate marketing practices aimed at toddlers and young children in Hong Kong, Indonesia, Malaysia, and Thailand.<sup>10</sup>

This anti-public-interest focus has not been a partisan matter. Prior to the Trump years, the 2014 NTE report during the Obama administration listed as trade barriers to be removed New Zealand’s popular health programs to control medicine costs, an Australian law to prevent the offshoring of consumers’ private health data, Japan’s pricing system that reduces the cost of medical devices, Peru’s policies favoring generic versions of expensive biologic medicines, and Canada’s patent standards requiring that a medicine’s utility should be demonstrated to obtain monopoly patent rights.<sup>11</sup> All of these issues and similar policies are now the focus of the U.S. Congress and state legislatures. As well, many states and cities have adopted a policy also attacked in the 2014 NTE report, which named Mexico’s “sugary beverage tax” and “junk food tax” to be illegal trade barriers.

The practice of targeting and condemning public interest policies undertaken by other nations through these reports has been pervasive in both Republican and Democratic administrations as has the failure to consider the conflicts with U.S. domestic policy initiatives that can be created by a U.S. government agency taking up a list of policies U.S. commercial interests want to attack in other countries and socializing those private attacks in a U.S. government report. Attacks on

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[https://www.acquisition.gov/sites/default/files/page\\_file\\_uploads/FAR\\_Buy\\_American\\_Act\\_Proposed\\_Rule\\_Prepublicationv072821.pdf](https://www.acquisition.gov/sites/default/files/page_file_uploads/FAR_Buy_American_Act_Proposed_Rule_Prepublicationv072821.pdf)

<sup>8</sup> *Id.*

<sup>9</sup> Unicef, “Breastfeeding”, last accessed: October 28, 2020. Available at:

[https://www.unicef.org/nutrition/index\\_24824.html](https://www.unicef.org/nutrition/index_24824.html)

<sup>10</sup> Public Citizen, “New Trump Administration Trade Report Sticks to the Status Quo”, *Eyes on Trade*, April 11, 2018. Available at: <https://citizen.typepad.com/eyesontrade/2018/04/new-trump-administration-trade-report-sticks-to-the-status-quo.html>; Public Citizen, “Trump’s Trade Agency Attacks Other Countries’ Efforts to Promote and Protect Breastfeeding in New Report”, *Eyes on Trade*, April 19, 2017. Available at:

<https://citizen.typepad.com/eyesontrade/2017/04/trumps-trade-agency-attacks-other-countries-efforts-to-promote-and-protect-breastfeeding-in-new-repo.html>

<sup>11</sup> Public Citizen, “As Obama Visits TPP Countries, New Obama Administration Report Targets Their Public Interest Policies as “Trade Barriers” to be Eliminated”, *Eyes on Trade*, April 22, 2014. Available at:

<https://citizen.typepad.com/eyesontrade/2014/04/new-obama-administration-report-targets-tpp-countries-public-interest-policies-as-trade-barriers-to-.html>

legitimate policies adopted by other countries by labeling them as “trade” violations also fuels the growing global backlash against the current globalization and trade regime.

During the Biden administration, the Office of the USTR has ended past problematic practices: it is promoting a worker-centered trade policy and supporting an emergency waiver of the World Trade Organization’s (WTO) intellectual property rules that hinder widespread production of COVID-19 vaccines. This new focus is aligned with the administration’s domestic priorities and with public opinion. The 2022 NTE report is the time to end the shameful past NTE model. We urge USTR to limit the report’s scope to actual trade policies, such as tariffs, quotas, or import licensing schemes, and refrain from demonizing environmental, public health, and other legitimate public interest policies as “significant trade barriers,” especially those that treat domestic and foreign goods, firms and services alike.