



September 5, 2018

The Honorable Robert E. Lighthizer
United States Trade Representative
600 17th Street, N.W.
Washington, DC 20508.

Request for Comments Concerning Proposed Modification of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation (Docket No. USTR-2018-0026)

BSA | The Software Alliance appreciates the opportunity to provide comments to the United States Trade Representative (USTR) on the USTR's extended request for comments through the Federal Register concerning the proposed modification of action under Section 301 relating to China's acts, policies and practices related to technology transfer, intellectual property, and innovation.¹

BSA is the leading trade association representing the global software industry before governments and in the international marketplace. Its members are among the world's most innovative companies, developing cutting-edge solutions in use across the range of information technology (IT) platforms, and are global leaders in advancing cybersecurity.²

The US software industry – and millions of American researchers, engineers and other workers employed in that industry – benefit from American global leadership in the development and provision of software services, including cloud and edge computing services.

In 2016, the software industry was responsible for \$1.14 trillion of total US value added GDP. The industry supported 2.9 million jobs (directly) and 10.5 million jobs (indirectly) – jobs that pay significantly better than the national average for all occupations.³ In 2013 (the most recent year for which data is available), the software industry invested more than \$63 billion in research and development (R&D) in the United States.⁴ Furthermore, US exports

¹ See Office of the US Trade Representative, *Request for Comments Concerning Proposed Modification of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 83 Fed. Reg. 33608 (July 17, 2018); Office of the US Trade Representative, *Extension of Comment Period Concerning Proposed Modification of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 83 Fed. Reg. 38760 (August 7, 2018).

² BSA's members include: Adobe, ANSYS, Apple, Autodesk, Bentley Systems, Box, CA Technologies, Cadence, CNC/Mastercam, DataStax, DocuSign, IBM, Informatica, MathWorks, Microsoft, Okta, Oracle, PTC, Salesforce, SAS Institute, Siemens PLM Software, Splunk, Symantec, Trend Micro, Trimble Solutions Corporation, and Workday.

³ Software.org, *The Growing \$1 Trillion Economic Impact of Software* (Sept. 2017), available at: https://software.org/wp-content/uploads/2017_Software_Economic_Impact_Report.pdf.

⁴ *Id.*

of telecommunications, computer and information services (including software) totaled more than \$42 billion in 2017.

BSA member companies are market leaders in providing enterprise software services around the world, including cloud computing⁵ and edge computing⁶ services, as well as in the R&D of software solutions that involve artificial intelligence (AI), data analytics, blockchain, the Internet-of-Things (IoT). The global cloud service sector alone accounted for \$89.9 billion in revenues in 2016, and 70 percent of global Internet traffic in 2015.⁷ BSA member companies are also market leaders in offering productivity software solutions for enterprises, including in the architecture, construction, engineering, finance, human resources, IT, marketing, manufacturing, and media sectors.

Nevertheless, BSA members companies face intense foreign competition from around the globe, including from China.⁸ The tariff increases proposed in the July 17 and August 7 Federal Register notices would benefit those foreign competitors by subjecting US companies and workers to increased costs of as much as 25% on servers; solid state drives, magnetic disk drives and other memory devices; display and control units; network routers and switches; integrated circuits; printed circuit assemblies; and numerous other computer accessories and products classified under HTSUS chapters 84, 85 and 90.⁹ This IT and network infrastructure is critical to the day-to-day operations of the American software, cloud, and edge computing industries. In this way, the proposed action represents a massive tax on American software innovation, tilting the playing field in favor of foreign software competitors and workers.

BSA and its member companies are gravely concerned that the emerging cycle of escalation will end badly for US enterprises, innovators and workers in the software industry. This will affect not only US enterprises' business in the US but also their businesses in China (on account of retaliatory tariff increases imposed by China on imports of products critical to their businesses in China). The US software industry, like many other industries, stands to lose market share around the world to foreign competitors that: (a) are unburdened by the impact of increasing trade restrictions in the United States and China, and (b) can offer their competing services at lower cost and without the overhang of regulatory uncertainty engendered by the state of US-China bilateral economic relations.

The proposed tariff increases could also worsen the US services trade balance by undermining the ability of US software companies and cloud service exporters to compete in the global marketplace. US software and cloud service providers stand to lose, while foreign software and cloud competitors stand to gain. Ultimately, these harms will

⁵ Cloud computing services, which often confer advantages of cost, speed, scalability, reliability and security vis-à-vis on-premises computing services, include infrastructure-as-a-service (IaaS) (e.g., providing access to physical resources including data storage, servers, operating systems or networking equipment), software-as-a-service (SaaS) (e.g., hosting and managing software applications over the Internet), and platform-as-a-service (PaaS) (e.g., providing platforms – including infrastructure, databases and other – over the Internet to allow developers to create and manage web or mobile applications). See US International Trade Commission, *Global Digital Trade 1: Market Opportunities and Key Foreign Trade Restrictions* (August 2017), Inv. No. 332-TA-561, USITC Pub. 4716, p. 19 (*hereinafter* USITC *Global Digital Trade 1 Report*).

⁶ Edge computing includes the development and deployment of a “network of connected objects that are able to collect and exchange data via sensors and other devices” performing data analytics at the data source, outside of centralized data centers. See *id.*, p. 24.

⁷ See *id.*, p. 20.

⁸ See *id.*, pp. 35, 75-77.

⁹ These products, including those that BSA member companies will not readily be able to purchase from sources outside of China, are classified under the following HTSUS subheadings: HTSUS 8471.60.90, HTSUS 8471.70.50, HTSUS 8471.80.10, HTSUS 8473.30.11, HTSUS 8473.30.50, and HTSUS 8517.62.00.

reverberate throughout the economy, as industries that rely on the innovative software produced by US software companies could be forced to bear the added costs brought on by the tariffs or seek out potentially inferior offerings from international competitors who are not subject to them.

Many BSA members have significant and long-standing presences in China and have seen first-hand the challenges and evolution of China's policies in the technology sector. In its comments to the USTR at the outset of the Administration's Section 301 investigation into China's trading practices, BSA highlighted several specific areas of concern: (a) foreign direct investment restrictions, including policies relating to Value-Added Telecommunications Services (VATS); (b) restrictions on cross-border data transfers; (c) requirements for source code and enterprise standard disclosure; and (d) reliance on indigenous technical standards. BSA reiterates its call for both the US and Chinese governments to engage in dialogue toward achieving mutually beneficial solutions to these challenges. Specifically, BSA would prioritize the following issues to be addressed through such dialogue:

- (1) VATS Licensing Requirements. Notwithstanding recent Chinese measures to liberalize restrictions on value-added services, telecommunications and information technology products remain overly and unfairly restricted. BSA urges the USTR to seek a loosening of restrictions to ensure equitable market access and enable foreign businesses to compete in these arenas on a level playing field.
- (2) Cross-Border Data Transfer Restrictions. Cross-border data transfers are increasingly essential for global businesses that depend on cloud computing and other data-centric technologies. BSA urges the USTR to seek a loosening of Chinese restrictions on cross-border data transfers, including by seeking to align China's definitions of critical infrastructure information and personal information, which underpin many of its most problematic regulations, with internationally recognized standards and best practices.
- (3) Clarification of Security Reviews. China continues to develop policies, processes, and standards for conducting security reviews mandated by the Cybersecurity Law and other laws and policies. As these efforts proceed, BSA urges the USTR to seek a clarification by the Government of China that source code and enterprise standards disclosure will not be required under security reviews, and that security reviews can be conducted by internationally accredited international third-party certification authorities.

In addressing these concerns, BSA urges USTR to engage in dialogue with the Government of China and other affected trade partners that can lead to meaningful solutions to the problems identified and a sounder mutual foundation for addressing concerns going forward.

BSA thanks USTR for the opportunity to share these perspectives.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Tommy Ross', with a stylized flourish at the end.

Tommy Ross
Senior Director, Policy