Insight

Key Trade Issues in USICA and COMPETES: The Good, Bad, and Ugly

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Executive Summary

- Congress recently held the first meeting of the conference committee tasked with reconciling the differences between the Senate-passed United States Innovation and Competition Act (USICA) and the House-passed America Creating Opportunities for Manufacturing, Pre-Eminence in Technology, and Economic Strength (COMPETES) Act.
- Among these bills' vast array of provisions, generally characterized as intended to help the United States compete with China, are many related to trade.
- This paper considers the eight most important trade provisions and provides guidance on which are pro-growth and should be pursued regardless of the conference outcome (categorized as "good"), which either introduce new costs for U.S. businesses or unnecessarily increase government spending and should be carefully debated (categorized as "bad"), and which were introduced after limited debate, would advance untested programs that impose new trade barriers, and should be closely scrutinized or simply discarded (categorized as "ugly").

ISSUE	GOOD/BAD/UGLY	USICA/COMPETES/BOTH
Section 301 Tariff Exclusions	GOOD	USICA
Generalized System of Preferences	GOOD	BOTH
Miscellaneous Tariff Bill	GOOD	BOTH
Online Country of Origin Labeling	BAD	BOTH
Trade Adjustment Assistance	BAD	COMPETES
Antidumping and Countervailing Duty Changes	UGLY	COMPETES
De Minimis Changes	UGLY	COMPETES
Outbound Investment Review or "Reverse CFIUS"	UGLY	COMPETES

Introduction

On May 12, 2022, Congress held the first meeting of the conference committee tasked with reconciling the differences between the Senate-passed United States Innovation and Competition Act (USICA) and the House-passed America Creating Opportunities for

Manufacturing, Pre-Eminence in Technology, and Economic Strength (COMPETES) Act. These bills, which grew out of a $16-billion effort to help curb the semiconductor shortage in 2020, have morphed into catch-all legislation – with USICA ringing in at $250 billion, and COMPETES at $400 billion – ostensibly aimed at countering competition from China but covering everything from seafood imports to climate funding.

Among the bills' vast array of provisions are several related to trade. This paper reviews the top eight trade provisions in USICA and COMPETES and identifies those that are "good" – those that would increase U.S. competitiveness by reducing or eliminating barriers to trade and should be pursued even if the conference committee fails to reconcile. It also identifies provisions that are "bad" – those that would increase costs on U.S. businesses or spending for unnecessary or duplicative government programs and should be carefully debated. And finally, it tags those provisions that are "ugly" – as they were introduced after limited debate, would advance untested programs that impose new trade barriers, and should be closely scrutinized or simply discarded.

The Good

Policies ranked as "good" increase U.S. competitiveness by reducing or eliminating tariff and non-tariff barriers to trade.

Section 301 Tariff Exclusions

USICA would reinstate all previously granted exclusions to Section 301 tariffs on imports from China. These tariffs were initially imposed in 2018 by the Trump Administration on Chinese imports, and are referred to as the "China tariffs." Based on 2021 import figures, the Section 301 "China tariffs" cover $267 billion worth of imports from China and cost the United States $48 billion a year. The purpose of the exclusion process is to provide economic relief to U.S. importers that face a difficult time accessing imports – especially critical inputs – due to the tariffs. The Office of the United States Trade Representative (USTR) examines factors such as whether the product is available from countries other than China or whether there is domestic production capacity in the United States, among other things. USTR under the Trump Administration initially granted over 2,200 product exclusions, all of which expired by the end of 2021. In March 2022, USTR under the Biden Administration finally reinstated the tariff exclusions, but for only 549 products.

USICA would also presumably require USTR to consider more factors when examining exclusion requests with the intended goal of increasing transparency and the number of exclusions granted. These include "whether the imposition of the duty with respect to the article would unreasonably increase consumer prices for day-to-day items consumed by low-or middle-income families in the United States," and "whether the imposition of the duty would have an unreasonable impact on the ability of an entity to fulfill contracts or to build critical infrastructure," among other considerations.[1] These additional criteria could aid U.S. companies seeking exclusions from the tariffs.

When the Senate voted last year to include this provision in USICA, it passed with a 91-4 vote. Support seems to have waned for reinstating the exclusion process, however; when the Senate voted in May on a motion to instruct regarding a Section 301 exclusions process, it was approved by a much narrower margin of 53-43.[2] Ostensibly, some members voted against this motion because they view perpetuating the exclusion process as an acceptance of the existence of Section 301 tariffs. Instead, those members may instead prefer to eliminate the Section 301 tariffs.

Generalized System of Preferences

The Generalized System of Preferences, or GSP, is the United States' longest running and most extensive trade preference program. GSP eliminates tariffs on roughly 5,000 products, many of which are intermediate goods used to make finished products in the United States, from more than 120 developing countries. In 2020, $16.7 billion worth of goods was imported under GSP, saving Americans nearly $880 million. Unfortunately, the program expired on December 31, 2020, leaving U.S. companies on the hook for costly tariffs on imports that were covered under GSP. According to the Coalition for GSP, "companies [have] paid at least $1.35 billion in extra taxes" since the program expired.

Both USICA and COMPETES would renew GSP and refund tariffs that were paid by importers while the program was expired. USICA would renew GSP until January 2027 (nearly five years), while COMPETES would set an expiration date for the program in December 2024. The two bills also include new eligibility rules regarding labor and environmental policies, as well as requiring participating countries to implement American-style gender equity standards. New stipulations for GSP make it more difficult for developing countries – many of which do not have existing laws in line with these new requirements – to qualify for the program and could result in decreased utilization. Historically, GSP has received overwhelming bipartisan support. Should conference negotiations stall, GSP should be renewed through other means.

Miscellaneous Tariff Bill

Congress regularly considers legislation to remove miscellaneous tariffs on products that are not available domestically. These are referred to as Miscellaneous Tariff Bills, or MTBs, and in recent years they have been passed in conjunction with GSP. The American Manufacturing Competitiveness Act (AMCA) of 2016 established a new process for determining which products can be included under an MTB after the existing process was

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[1] https://www.congress.gov/bill/117th-congress/senate-bill/1260/text

[2] A motion to instruct is a proposal to instruct conferees appointed to a conference committee to take a certain position in the conference. A motion to instruct is not binding.

criticized for resembling the earmarking process.[3] Prior to the AMCA, companies had to petition their representatives directly to get imports included in the MTB. Under the AMCA, petitions go to the U.S. International Trade Commission, which evaluates each request, and then provides Congress with a list of products to include in the MTB. Congress can remove products, but it cannot add any new ones.

The last round of MTBs, which is estimated to have saved Americans roughly $1 billion in tariffs, expired on December 31, 2020. Expiration is estimated to cost importers $1.3 million per day in tariffs for products that were previously covered under MTB. The latest round of MTBs – which are included in both USICA and COMPETES – would eliminate or reduce tariffs on more than 1,300 products, many of which are inputs for U.S. manufacturers. Both USICA and COMPETES would renew the process for MTB petitions established under the AMCA. Similar to GSP, bills that cut miscellaneous tariffs receive strong bipartisan support. The 2018 MTB was passed unanimously in the House; providing this widely supported tariff relief should not be delayed by debate over more controversial issues.

The Bad

A provision categorized as "bad" either introduces new costs for U.S. businesses or increases government spending for unnecessary or duplicative programs.

Online Country of Origin Labeling

Both the USICA and COMPETES contain the Country of Origin Labeling (COOL) Online Act. Traditionally, a manufacturer is required to provide a country of origin label on its products or its packaging. If this product is sold in a brick-and-mortar store, the consumer can usually locate and view the physical country of origin label. Yet this might not always be the case for products sold on the internet, as consumers cannot as easily view the country of origin label and the website might not provide a description. The COOL Act would require online retailers to list in a "conspicuous place" the country of origin of a product sold on a website. Supporters of this provision argue it will increase transparency by allowing U.S. consumers to know the origin of the products they buy online. Proponents also suggest it would help consumers more easily identify American-made goods.

The COOL Act would expose online retailers and sellers to new liabilities, however. The manufacturer of a product knows its inputs and production processes and has the data on-hand to provide such information through a physical country of origin label for its own products. But the COOL Act would require retailers to post *and* verify this information on products provided by their suppliers. Retailers would face new costs by having to backtrack and collect and decipher large amounts of data for the millions of products sold online by millions of suppliers. In addition, country of origin labels indicate the final assembly location of a product but leave out the fact that most items are made from

[3] Earmarks are discretionary spending provisions that set aside money for a specific purpose. In the past they have been used by members of Congress to get money for their district at the behest of local interest groups.

components sourced from around the world. For example, [Apple's iPhone] is assembled in China by Foxconn (a Taiwanese company), but that stage of the process only represents $10–$20 of the value of the phone.

Trade Adjustment Assistance

COMPETES would renew a government program called Trade Adjustment Assistance (TAA), which aims to help individuals who have presumably lost their jobs because of trade[4] – such as from imports or offshoring – find new employment or access job retraining programs. Over the last five years, the annual budget for TAA was $700 million.[5] Over the same period, an average of 29,000 individuals have received benefits annually through TAA,[6] meaning the average program cost per individual is more than $24,000. TAA was last renewed for six years in 2015, along with Trade Promotion Authority, which creates expedited procedures for the approval of trade agreements. Both laws expired in 2021, but TAA was permitted to continue on a smaller scale for an additional year. It is set to fully terminate on July 1, 2022.

The House Ways and Means Trade Subcommittee held a hearing on TAA in March 2021, during which only proponents of the program were brought as witnesses. William Spriggs, chief economist for the AFL-CIO, testified that "[TAA] must be designed to meet a bigger challenge than originally envisioned: assumptions that the total number of jobs would remain the same and workers would just need training to move into new opportunities. Instead, trade impacts diminish job opportunities for whole commute zones." The Trade Adjustment Assistance Modernization Act included in COMPETES would dramatically increase the size and scope of the current TAA program. It would expand the budget for TAA to nearly $3.4 billion per year, renew it through 2028, and expand the programming from just workers to include firms, farmers, communities, and community colleges. While USICA includes a renewal of Trade Adjustment Assistance, COMPETES does not.

Contrary to claims from proponents of trade restrictions, there has been no net private sector job loss in the United States due to trade. In fact, private sector employment is at its highest level in recorded history. Trade encourages greater competition, similar to new technology, which can lead to job growth in productive sectors and decline in those that are no longer competitive. The United States is not currently hurting for private sector job openings. According to the latest Department of Labor reports, there are 5.6 million more jobs available than individuals seeking employment.[7] At the same time, many local communities have programs to help workers displaced for any reason, making a trade-

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[4] More specifically, "an individual must be experiencing a separation, threat of separation or reduction in wages as a result of imports or shifts of production to foreign countries and must be part of a worker group for whom a petition for Trade Adjustment Assistance has been certified by the Office of Trade Adjustment Assistance." https://www.benefits.gov/benefit/90#:~:text=An%20individual%20must%20be%20experiencing,Office%20of%20Trade%20Adjustment%20Assistance.

[5] Author calculations based on: https://www.dol.gov/agencies/eta/budget

[6] Author calculations based on: https://www.dol.gov/sites/dolgov/files/ETA/tradeact/pdfs/AnnualReport21.pdf

[7] Author calculations based on: https://www.bls.gov/news.release/empsit.nr0.htm and https://www.bls.gov/news.release/jolts.nr0.htm

specific program duplicative and unnecessary. In an environment of such abundant employment opportunities, it is difficult to justify not only a renewal of TAA, but the dramatic expansion proposed in COMPETES.

The Ugly

Policies that are considered “ugly” were included in USICA or COMPETES after limited debate and would advance untested programs that impose new barriers to individuals and companies engaging in trade.

Antidumping and Countervailing Duty Changes

COMPETES contains the Leveling the Playing Field Act 2.0, which would make major changes to existing antidumping (AD) and countervailing (CV) duty laws. Under the Tariff Act of 1930, private domestic industries can petition the Department of Commerce (DOC) and the U.S. International Trade Commission (USITC) to investigate if a specific imported product is being dumped and/or receiving unfair subsidies.[8] To determine if dumping and/or unfair subsidization is occurring for a specific import, DOC will compare the prices of the imports with those of similar products produced in the United States.[9] To determine if a domestic industry has suffered a material injury, USITC will examine “income-and-loss data” submitted by the petitioners. If the findings are affirmative, DOC will impose AD/CV tariffs.[10]

The Leveling the Playing Field Act 2.0 would specifically expand AD/CV investigations to include “cross-border subsidies” and also create “concurrent/successive” investigations. “Cross-border subsidies,” which DOC does not currently investigate, are subsidies provided by a foreign government to one of its companies operating in another country (e.g., a practice of China’s Belt and Road Initiative). “Concurrent” investigations would allow DOC to automatically extend affirmative findings for separate but coexisting investigations that cover the same products but from different countries. The “successive” investigations would allow DOC to automatically extend an affirmative finding from an already concluded investigation to a new investigation if it covers the same products, even if the imports come from different countries.

Supporters of this legislation are particularly supportive of the concurrent and successive investigations. They argue these investigations would address the “whack-a-mole" problem that occurs when domestic producers win an AD/CV case, only for those imports to shift to another country so that foreign producers can avoid the newly enacted tariffs. As it stands, AD/CV laws heavily favor domestic producers seeking tariffs. DOC almost always issues a preliminary decision in AD/CV cases to impose tariffs while the rest of the case is

[8] https://www.usitc.gov/trade_remedy/adcvd_handbook.htm
[9] The DOC investigates whether a producer or exporter is dumping and/or receiving unfair subsidies. The USITC investigates if a domestic industry has suffered a material injury from dumping and/or unfair subsidization.
[10] https://www.usitc.gov/trade_remedy/documents/handbook.pdf

conducted.[11] The concurrent/successive investigations would give even more power to domestic producers seeking tariffs because they would not have to present the specific facts unique to a given case. These domestic producers could simply refer to past cases with affirmative findings, point out the similarities, and get the tariffs they want. Petitioners on the other side of the case would have less room and time to demonstrate that dumping and/or unfair subsidies have not occurred. This could potentially lead to large increases in AD/CV tariffs, not necessarily because dumping and/or unfair subsidies occur, but because a U.S. firm was able to manipulate the quasi-judicial process to produce affirmative findings to impose tariffs.

De Minimis Changes

COMPETES contains the Import Security and Fairness Act, which would prohibit imports from countries identified as both a non-market economy and a violator of intellectual property standards from receiving de minimis treatment.[12] Current de minimis rules allow imports valued under $800 to enter the United States duty-free (tariff-free), as the paperwork needed to process duties for these imports often costs more than the duties themselves. (Of note, while imports that benefit from de minimis do not require the same processing burdens, they are still subject to the same security protocols as any other imports). By exempting lower-value imports from duties, de minimis allows U.S. Customs and Border Protection (CBP) to focus on higher-value imports that provide more tariff revenue. Removing the de minimis rules for countries identified as non-market economies and intellectual property violators, such as China, would greatly increase the number of imports CBP would need to review, and greatly increase its paperwork, processing times, and costs.

Outbound Investment Review or "Reverse CFIUS"

The Committee on Foreign Investment in the United States (CFIUS) reviews capital inflows by businesses from foreign countries that could present a threat to U.S. national security. There is growing support for a new mechanism to review outbound capital, or a "reverse CFIUS." The National Critical Capabilities Defense Act was introduced in both chambers, but the bill was only included in COMPETES. This legislation would establish an interagency committee to review outbound investment—that is, U.S. capital meant for investment in other countries. The bill would give the committee very broad authority to review investment meant for a "country of concern" and specifically gives the example of a "foreign adversary" or "non-market economy." There is far from a consensus on what exactly these terms mean, however, and they could be so widely construed as to make the reverse CFIUS overly broad in scope.

[11] https://www.heritage.org/trade/report/legislative-trade-agenda-2020

[12] Established by Section 321, 19 USC 1321, de-minimis allows the single shipment of goods duty free on one day given the total worth of the shipment of those goods on that day does not exceed $800. Congress passed the Trade Facilitation and Trade Enforcement Act of 2015 which increased the de minimis threshold from $200 to $800.

During debate over USICA, reverse CFIUS was left out of the final bill. Business groups have been critical of the National Critical Capabilities Defense Act. The U.S. Chamber of Commerce argues that "The measure is overly broad in scope and would capture a wide range of transactions without an obvious nexus with national security." It is possible that this type of mechanism could help to de-politicize outbound investment: CFIUS created a process to objectively evaluate inbound investment that might threaten national security, often keeping these investments from becoming front-page, political news. Despite these potential benefits, the National Critical Capabilities Defense Act is controversial because it would infringe upon the ability of Americans to freely move their capital, whereas CFIUS is a review mechanism for only foreign capital. Additionally, such a mechanism would be largely duplicative of existing Treasury Department authorities to prevent investment by U.S. firms into companies supplying China's People's Liberation Army or other foreign businesses deemed a threat to national security.

The Department of Treasury released a counterproposal to the National Critical Capabilities Defense Act to create a pilot program that would collect data "to understand national security concerns that could arise from such transactions and the extent to which existing authorities are capable of addressing those risks, and to identify any new authorities that should be established to address those risks." Senator Cornyn also released a counterproposal to narrow the National Critical Capabilities Defense Act. Congress has yet to reach a consensus on an outbound investment review mechanism, but – at the very least – such a significant proposal requires more debate.