

Calendar No. 76

114TH CONGRESS }
1st Session }

SENATE

{ REPORT
114-45

TRADE FACILITATION AND TRADE ENFORCEMENT ACT OF 2015

MAY 13, 2015.—Ordered to be printed

Mr. HATCH, from the Committee on Finance,
submitted the following

R E P O R T

[To accompany S. 1269]

Including cost estimate of the Congressional Budget Office

The Committee on Finance, having considered an original bill (S. 1269) to reauthorize trade facilitation and trade enforcement functions and activities, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

CONTENTS

	Page
I. REPORT AND OTHER MATERIALS OF THE COMMITTEE	2
A. Report of the Committee on Finance	2
B. Summary of Congressional Consideration of the Bill	2
C. Background	2
1. U.S. Customs and Border Protection (CBP)	2
2. De minimis	4
3. Anti-dumping and countervailing duties (level the playing field legislation)	4
4. Automated Commercial Environment (ACE)	6
5. International Trade Data system (ITDS)	6
6. Advisory Committee on Commercial Operations of U.S. Customs and Border Protection (COAC)	7
7. Centers of Excellence and Expertise (CEEs)	7
8. Commercial Targeting and National Targeting Analysis Groups (NTAGs)	8
9. Import Health and Safety	8
10. Intellectual property rights enforcement at the border	10
11. Bulk residue controversy	10
12. Currency Manipulation	10
13. Drawback simplification	12
14. Enforce Act	12

15. Section 301 of the Trade Act of 1974 (as Amended)	13
16. Interagency Trade Enforcement Center	14
17. Trade Enforcement	14
18. Miscellaneous Tariff bill	14
19. Consumptive Demand	15
II. GENERAL DESCRIPTION OF THE BILL	15
SECTION 1—SHORT TITLE; TABLE OF CONTENTS	15
SECTION 2—DEFINITIONS	15
TITLE I—TRADE FACILITATION AND TRADE ENFORCEMENT	16
TITLE II—IMPORT HEALTH AND SAFETY	28
TITLE III—IMPORT-RELATED PROTECTION OF INTELLECTUAL PROPERTY RIGHTS	29
TITLE IV—EVASION OF ANTIDUMPING AND COUNTERVAILING DUTY ORDERS	34
TITLE V—AMENDMENTS TO ANTIDUMPING AND COUNTERVAILING DUTY LAWS	37
TITLE VI—ADDITIONAL TRADE ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS PROTECTION	38
Subtitle A—Trade Enforcement	38
Subtitle B—Intellectual Property Rights Protection	43
TITLE VII—CURRENCY MANIPULATION	45
Subtitle A—Investigation of Currency Undervaluation	45
Subtitle B—Engagement on Currency Exchange Rate and Economic Policies	46
TITLE VIII—PROCESS FOR CONSIDERATION OF TEMPORARY DUTY SUSPENSIONS AND REDUCTIONS	47
TITLE IX—MISCELLANEOUS PROVISIONS	49
TITLE X—OFFSETS	56
III. BUDGETARY IMPACT OF THE BILL	58
IV. VOTES OF THE COMMITTEE	69
V. REGULATORY IMPACT OF THE BILL	70
VI. ADDITIONAL VIEWS	71
VII. CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED	72

I. REPORT AND OTHER MATERIALS OF THE COMMITTEE

A. REPORT OF THE COMMITTEE ON FINANCE

The Committee on Finance, having considered an original bill (S. 1269) 107 to reauthorize trade facilitation and trade enforcement functions and activities, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

B. SUMMARY OF CONGRESSIONAL CONSIDERATION OF THE BILL

On April 20, 2015 Senator Hatch introduced S. 1015 on behalf of himself and Senator Wyden.

The Senate Committee on Finance met in open executive session on April 22, 2015 to consider the Chairman's Mark to reauthorize trade facilitation and trade enforcement functions and activities, and for other purposes. The proposal the Committee considered was based upon S. 1015. During the Committee's consideration of the proposal, 7 amendments were approved. The Committee approved the amended proposal by voice vote; and ordered the amended proposal reported as an original bill (S. 1269).

C. BACKGROUND

1. U.S. Customs and Border Protection (CBP)

International trade is a critical component of the U.S. economy, with U.S. goods trade amounting to about \$4 trillion in 2014, with

merchandise imports of \$2.4 trillion and exports of \$1.6 trillion. U.S. Customs and Border Protection (CBP), the agency charged with managing the import process at the border, admitted about 30.4 million import entries per year through over 300 U.S. ports of entry (POEs) in fiscal year (FY) 2013. The largest volume of imports comes through land (truck and rail) and maritime flows, which together account for over 25 million shipping containers per year.

The efficient flow of legally traded goods in and out of the United States is thus a vital element of the country's economic security. While U.S. trade in imports depends on the smooth flow of legal cargo through POEs, the goal of trade facilitation often competes with two additional goals: (1) the enforcement of U.S. trade laws designed to protect U.S. consumers and business against illegal imports and to collect customs revenue; and (2) import security, or preventing the entry of chemical, biological, radiological, and nuclear (CBRN) weapons and related material; illegal drugs; and other contraband.

SELECTED LEGISLATIVE HISTORY

The United States Customs Service (USCS) was established by an act of Congress on July 1, 1789. In September 2, 1789, the USCS was placed under the Secretary of the Treasury. Other key laws establishing and authorizing the trade functions of the USCS included provisions in the Tariff Act of 1930, the Customs Simplification Act of 1953, and the Reorganization Plan of 1965.

The last time that USCS's trade functions were fundamentally reorganized was in 1993, in Title VI of the North American Free Trade Agreement Implementation Act (P.L. 103-182), also known as the Customs Modernization and Informed Compliance Act, or "Mod Act." The Mod Act placed a greater administrative burden on the importer, and shifted USCS's focus to the collection of data and post-entry enforcement (i.e., audits) to ensure that all legal requirements have been met. By reducing USCS's role in duty determination, the act freed up agency assets to modernize the import process and improve post-entry enforcement. Although private industry stakeholders faced increased responsibilities, the law also provided for a quicker and more transparent import process through streamlined and automated customs operations.

Following the 9/11 terrorist attacks, the Homeland Security Act (P.L. 107-296) placed all or some part of 22 different federal departments and agencies, including the USCS, into the newly created Department of Homeland Security (DHS). The USCS became DHS' bureau of Customs and Border Protection (CBP) and has been the lead agency on import policy since 2003.

The customs reauthorization legislation in the Trade Act of 2002 (Title III of P.L. 107-210, the Customs Border Security Act of 2002) authorized appropriations for a number of noncommercial and commercial CBP programs. Sec. 338 of the Act amended the Tariff Act of 1930 to authorize the Secretary of the Treasury to require, by regulation, the electronic submission of this information to CBP. Sec. 343(a) required the Secretary, in consultation with a broad range of stakeholders, to promulgate regulations for advanced cargo information based on the Secretary's determination of what is "reasonably necessary to ensure aviation, maritime, and surface

transportation safety and security.” Sec. 343(b) required shippers of cargo loading in a U.S. port (including an ocean transportation intermediary that is a non-vessel-operating common carrier) to submit a complete set of shipping documents within 24 hours after the cargo is delivered to the marine terminal operator, and under no circumstances later than 24 hours prior to departure of the vessel.

The Maritime Transportation Security Act of 2002 (MTSA, P.L. 107-295) amended DHS authority under the Trade Act of 2002 to collect advanced cargo data from importers and exporters and permitted CBP to share the information with other federal agencies.

2. De minimis

The de minimis level, currently \$200, refers to the value threshold below which unaccompanied shipments can enter U.S. commerce without the need for formal entry procedures or payment of customs duties. The de minimis level was provided for in P.L. 103-182, and in section 321(a)(2)(c) of the Tariff Act of 1930 (19 U.S.C. 1321(a)(2)(C), as amended).

The exemption is intended to “avoid expense and inconvenience to the Government disproportionate to the amount of revenue that would otherwise be collected.” Thus, a goal of the de minimis threshold is to balance the collection of tariff revenue with the administrative costs (to the government) of customs duty collection. The statute also gives the Secretary of the Treasury the ability to raise the de minimis level by regulation.

3. Anti-dumping and countervailing duties (level the playing field legislation)

ANTIDUMPING AND COUNTERVAILING DUTIES

Two major U.S. trade remedies are the antidumping (AD) law, which combats the sale of imported products at less than fair market value, and the countervailing duty (CVD) law, which aims to offset foreign government subsidization of imported goods.

The AD law (19 U.S.C. 1673 et seq.) provides relief to U.S. industries and workers that are “materially injured, or . . . threatened with material injury, or the establishment of an industry in the United States is materially retarded” due to imports sold in the U.S. market at prices that are less than fair market value. The CVD law (19 U.S.C. 1671 et seq.) provides relief to domestic industries that are “materially injured, or . . . threatened with material injury, or the establishment of an industry in the United States is materially retarded” due to imported goods that have been subsidized by a foreign government or public entity, and can therefore be sold at lower prices than similar goods produced in the U.S.

SUBSIDIES AND COUNTERVAILING DUTIES

The first CVD statute was passed as part of the Tariff Act of 1890, but was limited to the protection of American sugar producers. The first general CVD provision appeared in the Tariff Act of 1897 (also known as the Dingley Tariff; Section 7, 55th Congress, Session I, Ch. 11. 1897). This provision authorized the Secretary of the Treasury to investigate and impose duties “whenever any country, dependency, or colony shall pay or bestow, directly or

indirectly, a bounty or grant upon the exportation of any article or merchandise from such country, dependency, or colony . . .”.

Prior to 1995, there were two countervailing duty law in force. Section 303 of the Tariff Act of 1930, the earlier of the two laws, applied to countries that were not “under the agreement,” or members of the General Agreement on Tariffs and Trade (GATT). This statute was subsequently repealed in section 261(a) of the Uruguay Round Agreements Act (URAA, P.L. 103-465) with the advent of the WTO.

Title VII of the Tariff Act of 1930 (19 U.S.C. 1671ff) describes the CVD law, which applies to all U.S. trading partners. In the statute, a countervailable subsidy is defined as a case in which a government of a country or any public entity within the territory of the country: (1) provides a financial contribution; (2) provides any form of income or price support within the meaning of Article XVI of the GATT 1994; or (3) makes a payment or funding mechanism to provide a financial contribution, or entrusts or directs a private entity to make a financial contribution, if providing the contribution would normally be vested in the government and the practice does not differ in substance from practices normally followed by governments; to a manufacturer, producer, or exporter of merchandise. When a commodity exported into the U.S. is subsidized in this manner and a U.S. industry is “materially injured,” “threatened with material injury,” or “the establishment . . . is materially retarded,” a countervailing duty is imposed “equal to the amount of the net countervailable subsidy” (19 U.S.C. 1671(a)). The relief provided in each case is an additional import duty equal to the subsidy (countervailing duty).

ANTIDUMPING

In the case of dumping, the unfair trade practice consists of “the sale or likely sale of goods at less than fair value” (19 U.S.C. 1677(34)). The relief provided is an additional duty based on the amount of dumping (as calculated, a weighted average dumping margin) placed on the subject imports.

The U.S. AD statute originated in the Emergency Tariff Act of 1921, which allowed for a special “antidumping duty” to be assessed when a foreign producer sold “a class or kind of foreign merchandise” for importation into the U.S. at “less than its fair value.” Another AD provision, the Antidumping Act of 1916, imposed criminal penalties for dumping and although there were cases brought under the Act, its provisions were never carried out. The 1916 Act was repealed in December 2004 in response to a WTO dispute settlement determination that the law was in violation of U.S. WTO obligations. The current AD statute, as substantially amended, currently appears in Title VII of the Tariff Act of 1930 (19 U.S.C. 1673ff).

INVESTIGATIONS

Although AD and CVD investigations involve fundamentally different types of unfair trade behavior, the remedies provided (an additional duty offsetting the “dumping margin” in AD cases, or the amount of subsidy in CVD cases) and investigative procedures are similar.

AD and CVD investigations involve a complex, quasi-judicial process conducted by two U.S. agencies:

- The U.S. International Trade Commission (USITC) determines whether or not a U.S. industry has suffered material injury, or the threat thereof; and
- The Office of Enforcement and Compliance at the International Trade Administration of the U.S. Department of Commerce (called the “administering authority” in the statute) determines the existence and amount of dumping or subsidy.

Both agencies conduct investigations on the basis of U.S. statutory authority, agency regulations, precedence established in prior investigations, and case law established in the Court of International Trade (CIT) and other judicial bodies.

4. Automated Commercial Environment (ACE)

General authority for the Automated Commercial Environment (ACE) and the International Trade Data System (below) were provided for in Title VI of the North American Free Trade Agreement Implementation Act (P.L. 103-182), which established the National Customs Automation Program, an automated electronic system for the processing of commercial imports. Expenditures for ACE were first provided in the then-U.S. Customs Service FY2001 appropriations (the Consolidated Appropriations Act, 2001, Public Law 106-554). Subsequently, Section 13031(f) of the Consolidated Omnibus Budget Reconciliation Act of 1985 (19 U.S.C. 58c(f)(4)) created a separate account within the general fund of the Treasury known as the “Customs Commercial and Homeland Security Automation Account,” which also provided that \$350 million would be deposited into the account (from custom merchandise processing fees) in fiscal years 2003-2005.

ACE is designed to replace the obsolete, mainframe-based Automated Commercial System (ACS) that began operations in 1984, and is still in use for some trade functions. CBP has designated ACE as the automated system that will become the platform for a future “single window” through which importers and exporters will be able to transmit data and coordinate with other Federal trade-participating government agencies regarding shipments of merchandise in an efficient and cost-effective manner.

5. International Trade Data system (ITDS)

Section 411(d) of the Tariff Act of 1930 (19 U.S.C. 1411(d)) provides that the Secretary of Treasury shall oversee the establishment of an electronic system to be known as the “International Trade Data System” (ITDS). The ITDS, along with ACE, is a tool for improving CBP’s interagency coordination with its 47 partner government agencies (PGAs). ITDS is an intergovernmental project to coordinate and standardize the collection of trade enforcement data by all federal government agencies that play a role in trade enforcement. The goal is to build a “single window” for the electronic collection and distribution of standard government-wide import and export data for the use of government agencies with a role in trade enforcement, in order to eliminate redundant information requirements. Under section 405 of the Security and Accountability for Every (SAFE) Port Act of 2005 (P.L. 109-347), federal agencies

Section 403(d) includes additional definitions.

This title creates procedures that require CBP to investigate allegations of evasion of antidumping and countervailing duty orders and provides tools to counteract the detrimental effect of those practices. This title addresses the concerns of the Committee that CBP does not currently adequately protect the United States from evasion of AD/CVD orders.

TITLE V—AMENDMENTS TO ANTIDUMPING AND COUNTERVAILING DUTY LAWS

Section 501—Consequences of failure to cooperate with a request for information in a proceeding

Section 501 amends Section 776(b) and 776(c) of the of the Tariff Act of 1930 to provide the U.S. Department of Commerce flexibility to select appropriate facts available or adverse facts available when a foreign party fails to cooperate with the agency's request for information in a proceeding.

Section 502—Definition of material injury

Section 502(a) adds a new section 771(7)(J) of the Act which clarifies that, when considering whether a domestic industry suffered material injury, the International Trade Commission shall not make a negative determination merely because the domestic industry is profitable or because its performance has improved.

Section 502(b) modifies section 771(7)(C)(iii) of the Act to direct the Commission to consider certain additional injury factors such as the ability of domestic producers to service debt, as well as the return such producers receive on their assets. The amendment also makes clear that the term "profits" includes gross profits, operating profits, and net profits.

Section 502(c) modifies section 771(7)(C)(iv) of the Act to simplify the "captive production" test. In particular, this amendment eliminates the third part of the captive production test—that the production of the domestic like product sold in the merchant market is not generally used in the production of that downstream article.

Section 503—Particular market situation

Section 503 amends section 771(15), section 773(a)(1)(B)(ii)(III), and section 773(e) the definitions of "ordinary course of trade," "normal value" and "constructed value." These modifications provide that where a particular market situation exists that distorts pricing or cost in a foreign producer's home market, the Department of Commerce has flexibility in calculating a duty that is not based on distorted pricing or costs.

Section 504—Distortion of prices or costs

Section 504(a) amends section 773(b)(2) of the Act by removing the requirement that a party allege that a foreign producer has made sales below its costs before Commerce initiates an investigation.

Section 504(b) modifies section 773(c) of the Act to clarify that Commerce can disregard prices or costs of inputs that foreign producers purchase if Commerce has reason to believe or suspect that the inputs in question have been subsidized or dumped.

Section 505—Reduction in burden on Department of Commerce by reducing the number of voluntary respondents

Section 505 amends Section 782(a) of the Act to clarify Commerce's authority to select and limit voluntary respondents.

Section 506—Application to Canada and Mexico

Section 506 clarifies that the legislation applies to goods from Canada and Mexico pursuant to the North American Free Trade Agreement (NAFTA).

This title amends U.S. antidumping and countervailing duty laws relating to the investigations by the Department of Commerce and International Trade Commission. The changes in Section 501 clarify statutory requirements for the use of facts available. The changes in Section 502 respond to concerns that the Commission may in some cases not examine all data relevant to analyzing the effects of dumped and subsidized imports on the domestic industry, and concerns regarding the Commission's ability to accurately assess captive production issues. The changes in Sections 503 and 504 provide clarifications regarding home market distortion and cost and price distortion. Section 505 clarifies the treatment of voluntary respondents in light of certain recent court decisions.

TITLE VI—ADDITIONAL TRADE ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS PROTECTION

SUBTITLE A—TRADE ENFORCEMENT

Section 601—Trade Enforcement Priorities

Section 601 amends section 310 of the Trade Act of 1974 to set out in section 310(a) a process for USTR to identify trade enforcement priorities, consult with Congress on the establishment of those priorities, and report on the actions taken to address those priorities. Section 310(a)(1) provides that USTR must consult with the Committee on Finance and the Committee on Ways and Means no later than May 31 each year regarding the prioritization of acts, policies, or practices of foreign governments that raise concerns under a U.S. trade agreement, or otherwise pose a barrier to U.S. exports. The section also provides that USTR shall focus on eliminating acts, policies, and practices that are likely to have the most impact on economic growth, and take into account relevant factors, including the trade barrier's economic significance and effect on U.S. jobs, and whether it was identified in the National Trade Estimate Report or by a Federal agency or congressional committee. Section 601(a) further requires the USTR to report on the identified trade enforcement priorities no later than July 31 of each year. The report must also include a description of actions taken to address trade enforcement priorities identified in prior years.

Section 310(b), as amended by section 601, requires USTR to undertake semi-annual enforcement consultations with the Senate Finance Committee and House Ways and Means Committee, which occurs at the same time as the reporting established under 310(a), and not later than January 31 of each year. The semi-annual consultations shall address the identification, prioritization, investigation, and resolution of acts, policies, or practices of foreign government of concern under U.S. trade agreements; active enforcement