

Congressional Trade Leaders Introduce Trade Promotion Authority Legislation

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On January 9, 2014, Sens. Max Baucus (D-MT) and Orrin Hatch (R-UT) introduced the “Bipartisan Congressional Trade Priorities Act of 2014” (the Act), which would renew trade promotion authority (TPA) for the Obama Administration and future administrations. Through TPA legislation, Congress defines U.S. negotiating objectives, oversight and consultation procedures for trade negotiations, and creates a streamlined method for the passage of trade agreements. Under the Act, TPA would apply to any implementing bills submitted for trade agreements entered into before July 1, 2018, or July 1, 2021, provided that neither the House nor the Senate resolves to disapprove an extension prior to the 2018 expiration date. The Act includes a number of “principal negotiating objectives” that potentially advance the interests of U.S. industries in international trade and investment, but certain language should be strengthened to ensure that these objectives are meaningful in practice. Key “principal negotiating objectives” include the following:

- **State-owned enterprises (SOEs):** The Act addresses the uneven competitive playing field created by SOEs and state-controlled entities (SCEs) by requiring negotiators to “seek commitments” that: (1) “eliminate or prevent trade distortions and unfair competition favoring [SOEs and SCEs] to the extent of their engagement in commercial activity,” and (2) ensure that SOEs and SCEs engage in commercial activity only on the basis of commercial considerations. In this regard, the Act requires negotiators to seek provisions that address discrimination, market-distorting subsidies, and the need for SOE and SCE transparency. [1] While this language is aspirational only, it is the first time that U.S. law has recognized the potential harmful

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effects of SOEs and SCEs engaging in commercial competition against private enterprises that must compete on a commercial basis.

- Currency manipulation: The Act addresses currency manipulation by establishing a principal negotiating objective that parties to trade agreements with the United States “avoid manipulating exchange rates in order to prevent effective balance of payments adjustment or to gain an unfair competitive advantage over other parties to the agreement.” The Act recommends “cooperative mechanisms, enforceable rules, reporting, monitoring, transparency, or other means, as appropriate.”^[2] The Act, however, does not create concrete remedies by, for example, including language from legislation previously passed by the House and Senate that addressed currency manipulation.
- Trade remedies: The Act does not strengthen the trade remedies objective from the previous TPA bill, the “Trade Act of 2002,” but requires that negotiators “preserve the ability of the United States to enforce rigorously” the U.S. antidumping, countervailing duty, safeguards, and other trade laws, and “avoid agreements that lessen the effectiveness of domestic and international disciplines on unfair trade.” Like the Trade Act of 2002, the Act’s trade remedies objectives ask negotiators “to address and remedy distortions that lead to dumping and subsidization, including overcapacity, cartelization, and market access barriers.” ^[3]
- Localization barriers: The Act requires negotiators to “eliminate and prevent measures that require U.S. producers and service providers to locate facilities, intellectual property, or other assets in a country as a market access or investment condition.” The Act refers specifically to “indigenous innovation” measures that some governments have used to force foreign producers to transfer valuable technology, intellectual property, or other industrial know-how into the control of domestic firms. ^[4]
- Intellectual Property (IP) Protection: The Act introduces a new principal negotiating objective to address emerging threats to IP protection by “preventing or eliminating government involvement in the violation of intellectual property rights, including cyber theft and piracy.” The remainder of the Act’s IP objectives are the same as those in the Trade Act of 2002, including “providing strong protection for ... new methods of transmitting and distributing products embodying intellectual property,” such as digital trade, and “ensuring that ... rightholders have the legal and technological means to control the use of their works through the Internet.” ^[5]
- Services Trade & Digital Trade in Goods and Services: The Act recognizes that “expansion of trade in services generates benefits for all sectors of the economy and facilitates trade,” and introduces the objective of negotiating a plurilateral Trade in Services Agreement (TISA) with countries that are willing and able to eliminate “regulatory and other barriers that deny national treatment and market access or unreasonably restrict the establishment or operations of service providers.” ^[6] The Act further calls for negotiators to ensure that the provisions of trade agreements currently in force (1) apply to digital goods and services trade and cross-border data flows, and (2) provide electronically delivered goods and services treatment no less favorable than that given to like products in physical form. These objectives include ensuring that governments “refrain from implementing trade related measures that impede digital trade in goods and services, restrict cross-border data flows, or require local storage or processing of data.” ^[7]

- **Dispute Settlement & Enforcement:** The Act seeks to limit the effect of dispute settlement and enforcement on U.S. sovereignty by directing negotiators “to seek adherence by [WTO] panels” to “the mandate of those panels and the Appellate Body to apply the WTO Agreement as written, without adding to or diminishing rights and obligations under the Agreement.” The Act also retains language from the Trade Act of 2002 that asks negotiators to ensure that dispute settlement panels adhere to the standard of review applicable under the Uruguay Round Agreement and give greater deference to national authorities where appropriate. [8]
- **Congressional Authority & Participation:** The Act seeks to increase the authority and participation of Congress in the trade negotiation process. It would require the United States Trade Representative to provide, upon request, *any* Member of Congress with access to negotiation documents, including classified materials. [9] The Act further affirms that no trade agreement may enter into force in the United States unless implementing legislation is enacted into law, and that such legislation may include “only such provisions as are strictly necessary or appropriate to implement” the agreement. [10] Finally, the Act would permit Congress to withdraw TPA with respect to an agreement by a resolution of both houses of Congress, where the President has failed to comply with the Act’s notice and consultation requirements, or if the agreement “fail[s] to make progress in achieving the purposes, policies, priorities, and objectives” of the Act. [11]

While some of these negotiating objectives represent notable progress from previous TPA legislation, much of the language, particularly regarding SOE and SCE provisions and currency manipulation, is broad and generally aspirational. For example, TPA legislation should require negotiators do more than “to seek” provisions to ensure that SOEs operate on a purely commercial basis. In addition, the currency manipulation provisions are unlikely to be meaningful in practice, unless they include clear, concrete enforcement mechanisms that allow interested parties to take action when violations occur.

There continue to be opportunities for domestic companies and industries to work with Congress to shape TPA legislation. In particular, Rep. Sander Levin (D-MI) has expressed an interest in proposing alternative legislation to address certain issues with the Act.

Wiley Rein’s International Trade Practice is closely monitoring TPA legislation proposals and developments and is actively advising clients in this regard.

[1] Section 2(b)(8) of the Act.

[2] Section 2(b)(11) of the Act.

[3] Section 2(b)(16) of the Act (emphasis added).

[4] Section 2(b)(9) of the Act.

[5] Section 2(b)(5) of the Act.

[6] Section 2(b)(2) of the Act.

[7] Section 2(b)(6) of the Act.

[8] Section 2(b)(15) of the Act.

[9] Section 4(a)(1)(b) of the Act.

[10] Sections 3(b)(3)(B)(ii), 6(a)(1) of the Act.

[11] Section 6(b) of the Act.
