

*Fast Track:
Options About the Process*¹

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This paper analyzes options for the *fast-track process*. It leaves to others at this conference the important substantive questions, such as what types of agreements should be covered (FTAs, sectoral, etc.), what matters they should include or exclude (labor? environment?), and what domestic programs should be developed for Americans who are hurt by trade liberalization. Instead, it examines alternative fast-track procedures that are consistent with the essence of the process: the assurance that Congress will vote up or down, within a discrete time period, on agreements and implementing legislation as presented by the President. The reason for that assurance, of course, is to give credibility to US negotiators.

I. What Fast-Track Involves

Since the process was invented in 1974, all legislation establishing or renewing fast track has included the following components:

- (1) A specification of trade negotiating objectives, and the type of agreement to which the authority applies;
- (2) Procedural requirements for the executive branch during the negotiating process, such as notifying Congressional committees of intent to initiate negotiations, consulting those committees and private sector advisory groups about issues under negotiation, and advance notice of the President's intention to conclude an agreement;
- (3) A deadline date for conclusion of agreements authorized;
- (4) Rules concerning Presidential submission to Congress of the agreement, the draft implementing bill and supporting documentation; and

¹Paper presented at Institute for International Economics Conference on "Re-Starting Fast Track," February 3, 1998, Washington, D. C. Copyright © 1998, Institute for International Economics.

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- (5) A procedural commitment on the part of Congress to:
 - (a) Introduce the President's draft implementing bill in both houses: and
 - (b) Vote on it up or down within a limited time period (up to 90 legislative days), with amendments prohibited.

Changes in the process could involve any of these and still be true to fast track's purpose, provided that the core of (5)--an expeditious up-or-down Congressional vote--is preserved.

II. *Ill-Founded Objections*

The 1997 debate gave rise to a number of arguments against the process that had a certain polemical utility but do not bear up under analysis. For example, in questioning the necessity of fact-track, Public Citizen's Global Trade Watch points (on its web page) to White House claims of "more than 200 trade agreements which were negotiated and implemented without fast track" during the first Clinton administration, compared to only two (NAFTA and GATT) which required this authority. A look at the nature of those "200 agreements" establishes their irrelevance to the debate. A substantial number were protectionist in character: bilateral textile deals in which exporting nations promised to limit their sales to our market. The others were generally agreements where the action was to be taken by our trading partners (e.g., Japan's commitment to enforce opening of its cellular telephone market), or agreements including US concessions that Congress had already authorized.

Of course fast track is irrelevant to agreements which require no new US legislation. But for those that do require such legislation--free-trade agreements like NAFTA, or new multilateral accords where all players commit to substantial reduction in trade barriers--a procedure like fast track remains essential. Other nations simply will not take the domestic political heat for promising to open important markets to the United States if they don't believe that we can deliver on our market-opening commitments to them. And if Congress can dilute or block concessions by amending the implementing legislation, or by simply refusing to vote on it, the United States won't deliver--as was demonstrated by US failure to implement agreements reached before fast-track was in effect.

A more serious argument is that fast-track is an abdication of Congressional power. To quote Public Citizen again, "Congress loses the authority and the ability to shape [trade] issues." This *could* be true, for the legislation undeniably constrains the legislative process. But fast-track in practice has shown Congress not only retaining but using this "authority and ability" time after time: from the setting of guidelines for specific negotiations to Congressional committee sessions which review and revise drafts of Presidential legislation implementing trade agreements.³ In fact, fast-track originated in Congressional insistence on the power of final action to implement trade agreements involving non-tariff barriers (a power it had relinquished for tariff-reducing

³I. M. Destler, *Renewing Fast-Track Legislation* (IIE, Policy Analysis No. 50, September 1997), pp. 9-16.

agreements). On all the major agreements concluded under fast-track authority, Congress has influenced the substantive priorities and participated actively in writing the laws to carry them out. Congressional fingerprints are everywhere.

But if the critics' main points seem wide of the mark, there are clearly ways that the details of fast track can be crafted to enhance or diminish specific Congressional powers, and to pursue a range of other objectives. Consensus was not achieved by the White House and Congressional committee proposals of 1997. Changes in the fast-track process might help bring consensus in 1998.

III. Process Options: How Clearly Does Congress Specify Which Negotiations Are Covered?

Background. The original fast-track authority was designed for one specific negotiation, the Tokyo Round of multilateral trade negotiations under the GATT, which was launched in 1973 and concluded in 1979. The negotiating objectives and timetable were set with its specific nature in mind--multilateral talks to reduce and regulate non-tariff barriers (NTBs)--though the statutory language allowed for the possibility that the talks might yield more than one agreement. In the end, Robert Strauss and his colleagues opted to implement all of the Tokyo Round agreements through a single piece of legislation.

The Tokyo Round implementing legislation enacted in 1979, however, included a provision extending the deadline for fast-track from January 3, 1980, to agreements concluded by January 3, 1988, even though there were no longer any major negotiations planned. In principle, this would have permitted the administration to bring back for fast-track treatment any follow-on multilateral agreement consistent with the statutory negotiating objectives. No major multilateral agreements were reached during this period. But in the Trade and Tariff Act of 1984 Congress authorized application of fast-track to bilateral free-trade agreements, although with a special procedural requirement for deals with any country except Israel: the administration had to notify the Senate Finance and House Ways and Means Committees of its intent to enter any such negotiation, and either committee could veto the application of fast-track to that negotiation by majority vote within sixty days.⁴ There was no requirement that Congress as a whole authorize a specific FTA in advance.

In the Omnibus Trade and Competitiveness Act of 1988 Congress extended fast-track authority for the Uruguay Round, setting a new timetable and negotiating objectives. There was little expectation of additional FTAs, but the law was written so that the extension also applied to them--with continuation of the committee veto provision. So when (contrary to everyone's expectations) Mexico sought an FTA, fast track applied to what became the NAFTA negotiations

⁴In fact, frustrated by perceived administration weakness and lack of consultation on trade policy, Senate Finance came within one vote of blocking the launch of the US-Canada FTA talks in April 1986. But once the agreement was completed, Congress approved it overwhelmingly in 1988.

once the Finance and Ways and Means Committees acquiesced. The Congressional vote in 1991 to extend the timetable (see below) necessarily applied to NAFTA as well as the Uruguay Round. When the latter was not concluded by the revised deadline, Congress voted a further extension in 1993 explicitly limited to completion of that negotiation, with April 16, 1994 the new deadline.

The 1997 Proposals. The three fast-track bills of September-October 1997⁵ generally followed the formula that had evolved, with broad, permissive language allowing negotiations with any countries (or groups of countries). In fact, these bills took a further step by combining the formerly separate procedural tracks for NTB agreements and FTAs “into a single process” with “common notice, consultation, and implementing procedures.”⁶ The Senate bill included in this process a committee veto like the previous one for FTAs, but required that both Finance *and* Ways and Means disapprove, within 90 days of notification, for fast-track coverage of a negotiation to be blocked. The administration and House versions contained no committee veto. All exempted from the pre-consultation requirement specific negotiations already begun--talks on an FTA with Chile, and certain already-authorized talks within the WTO (e.g., on financial services). Otherwise, the language granting fast-track coverage did not refer to specific negotiations.

An Alternative. The established formula has served trade policy well, giving the executive branch broad leeway on which negotiations to initiate while requiring consultation with Congress and the private sector. However, the fall 1997 debate suggested greater resistance by fast-track critics to certain negotiations (an FTAA) than others (sectoral talks under the WTO). This has generated discussions within the administration about limiting a 1998 fast-track bill to the latter, a proposal which has in turn been criticized by Republican leaders and the business community. A compromise would be a fast-track bill which would:

- a) require that Congress approve in statute the specific negotiations (or category of negotiations) to which fast-track would apply;⁷
- b) include in the 1998 bill specific authorization to launch sectoral (and perhaps other) negotiations under the WTO, and perhaps a Chile FTA; and

⁵These were, of course, the Clinton proposal of September 16th, the “Reciprocal Trade Agreements Act of 1997” voted by the Senate Finance Committee on October 1st, and the “Reciprocal Trade Agreements Authorities Act of 1997” favorably reported by the House Ways and Means Committee on October 8th.

⁶“Finance Committee Summary of Fast-Track Bill,” reprinted in *Inside U.S. Trade: Special Report*, October 1, 1997, p. 3.

⁷See the proposal for “a two-tiered fast-track authority” in my *Renewing Fast-Track Legislation*, pp. 41-43.

c) provide an expedited procedure under which Congress would vote on future Presidential requests to launch other negotiations, such as the FTAA or steps in that direction.

(In my September 1997 version of this proposal, it was joined to the idea of making the fast-track procedure itself permanent, without expiration date.)

IV. Time Limits and Extension Procedures

Background. All previous fast-track laws have provided time limits, deadline dates by which agreements must be signed if the procedures are to apply. For the Uruguay Round, it was five years after signing of the Trade Act of 1974. The 1979 law extended this to January 3, 1988. The 1988 law set June 1, 1991, with a provision that the President could get a two-year extension (as George Bush in fact did) if he requested it and neither house disapproved within a limited time period. Note that the fast-track deadline has always applied to the date of the agreement. There has never been one for submission of the President's implementing bill.

The 1997 Proposals. On this point the three bills are essentially the same: both Senate and House committees adopted the President's proposal for an initial deadline of October 1, 2001. This could be extended until 2005 if the President so requested at least three months prior to the deadline and neither house adopted an "extension disapproval resolution" before the initial deadline.

Options. One possibility, alluded to earlier, would be to eliminate such "drop-dead dates" for fast-track authority, as part of a package where Congress controlled fast-track's exercise by approving specific negotiations in advance. As argued in *Renewing Fast-Track Legislation*, this author believes that fast-track authority should be permanent and applicable to specific agreements as Congress authorizes.

Another obvious option would be to alter the specific deadline dates proposed.⁸

A more controversial approach would be for Congress to authorize fast track for a limited time and condition its renewal on progress in meeting a trade-related objective which Congress supports but fears will be neglected once fast track is voted. For example, a number of Democratic Representatives want stronger programs to help Americans adjust to globalization--programs for the "trade losers," or for those otherwise left out of the current American prosperity. Others want serious efforts to address labor and environmental issues at the international level, but might recognize that trade negotiations are not a particularly promising

⁸If one goes with the established practice of deadline dates, the ones proposed are reasonable: substantially after the Presidential election and inauguration, allowing enough time to complete some negotiations but requiring a new President to seek extension of the authority within his first year.

venue. Promises to address such problems after fast track was enacted have lacked credibility (since some earlier, NAFTA-related promises were imperfectly kept). One possible means by which advocates could keep the heat on the administration--and on trade supporters within Congress--would be amending the fast-track legislation to:

- a) authorize fast-track for a limited time (2 or 3 years), with provisions for extension, much like current proposals; but
- b) require the President, when he requests fast-track extension, to certify progress on worker opportunity programs⁹ in a comprehensive report to Congress submitted at the time of his request; and
- c) require an affirmative resolution passed by both houses to extend fast-track, and provide that its wording include language like: "The Congress endorses the President's report of progress on worker opportunity programs for Americans and through this resolution, under section ____ of the _____, authorizes the application of the provisions of Section 151 of the Trade Act of 1974, as amended, to implement bills for trade agreements completed before October 1, 2005."

V. Requirements During Negotiations

Background. In 1974 through 1993, all fast-track legislation required administration negotiators to consult regularly with Congress and with a network of advisory committees representing business and other Americans affected by trade agreements. It mandated the appointment of Congressional advisers to the negotiation, and full sharing of information with them and key staff. The laws have also required that the President notify Congress at least 90 (or 120) days in advance of his intention to enter into a specific agreement, and provide substantive information about its proposed content so that Congress and the advisory committees can express their views. In 1988 a "reverse fast-track" provision was added under which Congress would withdraw fast track in the midst of a negotiation if an administration failed to consult or notify as required.

The 1997 Proposals. All three bills retained these well-established consultation requirements, and carried over the "reverse fast-track" provision of the 1988 law. The House bill adds new consultation requirements regarding agriculture, focusing on comparison of the level of bound US tariffs on agricultural products with those of US trading partners.

Options. The legislation specifically mandates consultation at the beginning of a trade negotiation, and at its conclusion. In between, it provides generally for keeping Congress and

⁹This approach could be used for any substantive purpose (like parallel labor/environment negotiations), but it seems particularly appropriate for worker opportunity programs, which in the past have tended to rise in priority at the time of trade legislation and recede thereafter.

advisory committees informed. How effectively this is done, and how much legislative branch representatives can influence agreements *as their substance takes shape* depends on the attitude and skill of executive branch negotiators (and the interest and skill of those on Capitol Hill). If Congress wished to enhance the consultation provisions, the logical time would when their substance was getting serious and decisions were beginning to get made. Alternative means might include:

- a) a periodic reporting requirement on progress in specific negotiations, with reports made to committees or Congress as a whole;
- b) a special reporting requirement on the state of negotiations on any topic which Congress wishes to single out for special attention; or
- c) creation of a new mechanism (a Congressional review panel, a joint executive-congressional consultation body) which would assess progress regularly.

Any such reforms would only be effective if key members of Congress gave them priority and sustained attention. Especially important would be the ongoing attention of the trade committees. In the past, the “best intentions” of many on consultations have been thwarted by the difficulty of getting serious attention and substantive input from legislators when Congressional action on a matter is not imminent.

VI. Requirements Between Signing of an Agreement and Submission of Implementing Legislation

Background. This has been the stage about which trade laws have had the least to say. The President has always been required to notify Congress once an agreement is reached. He has also been required to send to Congress, along with the implementing legislation, a statement of administrative actions to be taken, and documents explaining the legislation, justifying it in terms of the original negotiating objectives, etc. Congress has never limited the time period between the signing of an agreement and the submission of implementing legislation. Nor has it addressed, in law, the procedure by which that legislation is developed--though it has become standard practice for it to be shaped by “non-markup” sessions involving Congressional committees and executive branch officials.

The 1997 Proposals. The White House, Senate and House bills each included all of the above requirements. In addition, they all included a new provision, patterned on an earlier Ways and Means Committee proposal, that the President submit to Congress within 60 days of the agreement “a description of those changes to existing laws. . .required in order to bring the United States into compliance with the agreement.” [Sec. 105 (a)(I)(B)]¹⁰

¹⁰A principal purpose of this provision is to constrain the inclusion, in implementing legislation, of provisions not “required” to comply with the agreement. (The section reference is the same in all three bills.)

Options. One possibility would be to limit the time between signing an agreement and submission of implementing legislation, but this seems unnecessary. The administration will, in almost all cases, want to move as rapidly as possible, and Congress will frequently slow the action down while specific issues and interests are addressed.

More promising, from the Congressional vantagepoint, would be statutory language to reinforce the “nonmarkup” process. There is no way, of course, that legislators can assure that their wishes will be followed in the language of the implementing bill--the fast-track process requires that the administration be the ultimate arbiter of what changes in law are required to carry out an agreement. But Congress could guarantee an opportunity to participate by requiring that:

- (a) the administration present implementing legislation for comment by the Congressional committees with jurisdiction; and perhaps also
- (b) that it begin this process no less than 45 days before submission of the President’s implementing bill.

VII. Rules Governing the Implementing Bill

Background. From the 1974 Act onward, fast-track laws have allowed inclusion in the implementing legislation of matters “necessary or appropriate” to carrying out the agreements signed. This has come to include provisions to conform to Senate and House rules by offsetting any revenues lost to the government from tariff reductions.

The laws have also required that Congress act on the bill, without amendment, within 90 days of its submission (60 days if a non-revenue bill). There are sublimits for committee and floor consideration to ensure that the bill moves expeditiously through each chamber.

The 1997 Proposals. None of the three bills alters the legislative timetable or the no-amendment rule. The main change regarding the bill’s substance has been the effort, spearheaded by Ways and Means, to curtail inclusion in the implementing bill of provisions not “necessary” to carry out the agreement. The Clinton bill made a modest concession by requiring that provisions be “necessary or appropriate” *and* be “related to trade.” The Senate Finance bill narrowed matters somewhat, limiting the bill to provisions “necessary” for implementation or “otherwise related to the implementation, enforcement, and adjustment to the effects of such trade agreement and are directly related to trade.” House Ways and Means was most restrictive, with the primary criterion that provisions must be not only “necessary” for implementation but also “directly related to the principal trade negotiating objectives.” The House also allowed “provisions to provide adjustment assistance to workers and firms adversely affected by trade.” And all three bills allowed inclusion of provisions necessary for compliance with budget legislation.

Options. The purpose of language restricting the scope of implementing bills was (1) to curb what were perceived as past abuses of the process, using fast-track bills to rewrite sections of trade (and other) law, going well beyond what the agreements required, and (2) for Republicans, to limit the inclusion of labor and environmental provisions not directly related to trade.¹¹ The second of these is beyond the scope of this paper, albeit central to the larger fast-track struggle of 1997. On the first, the Ways and Means requirement that any provision implement a specific negotiating objective seems overly restrictive. Negotiators may wish to pursue new trade liberalization opportunities, in consultation with Congress, which were not evident when legislation was crafted. However, there are a number of additional ways that the legislation could curb the inclusion of unnecessary (but, to some, desirable) provisions in laws partaking of fast track's procedural privileges. Specifically, Congress could:

- a) provide that revenue offset provisions of fast-track bills are subject to amendment;¹²
- b) more radically, provide that any provisions not "necessary" to implement the agreement are subject to amendment; and/or
- c) require that the President highlight and justify all provisions not strictly "necessary" when he submits his implementing legislation.

It would also be desirable for Congress to shorten the timetable for consideration of fast-track bills once submitted. The current "90 legislative days" seems excessive, since their substance is set, and much of the debate takes place, before the bill is submitted. A shorter period would prevent a committee chairman from delaying Congressional action (as Senator Hollings did with the Uruguay Round bill) or perhaps even preventing such action before a Congress adjourned *sine die*.

VIII. *Why A New Look at the Process Makes Sense*

Central to the fate of fast track are a range of substantive issues, particularly the fate of workers and the environment in a globalizing US economy. Other essays at this conference

¹¹To underscore what was *excluded*, the Senate Finance bill added a subsection on "international economic policy objectives," replicated by Ways and Means, which set forth "the policy of the United States to reinforce the trade agreements process by (A) fostering stability in international currency markets. . .; (B) supplementing and strengthening standards for protection of intellectual property under. . .organizations other than the WTO. . .; C) "promoting respect for workers' rights". . .; and (D) . . ."seeking to protect and preserve the environment." Its concluding sentence specified: "Nothing in this subsection shall be construed to authorize the use [fast-track] procedures. . .to modify United States law."

¹²On this and the following proposal, there would need to be some rule to prevent death or indefinite delay in conference. One would be a limit of the conference to, say, 15 days, with provisions to revert back to the President's proposed language if the two houses could not agree.

address these issues. The purpose of this essay has been to highlight *procedural* options, some of which--of course--could be employed for substantive purposes.

The fast-track process has gotten a bad rap from its critics. It stands, in the view of this author, as one of the great innovations of the past quarter-century in executive-legislative policy coordination. But every detail therein is not sacred. There are many ways its specifics could be altered without violence to the core principle of assuring expeditious, up-or-down Congressional action on the substance of trade agreements reducing non-tariff barriers or establishing new free trade areas. This paper has suggested a few such ways, in the hope it may be of some aid in achieving the (thus far elusive) consensus needed to move forward on America's trade liberalization agenda.