American Bar Association Section of International Law and Practice Report to the House of Delegates

Fast Track Negotiating Authority*

RECOMMENDATION

BE IT RESOLVED, That the American Bar Association supports the renewal of legislation providing for the President's fast track negotiating authority, as introduced in the Trade Act of 1974 and later extended.

REPORT

1. The United States, as a founder of the liberalized world trading system established by the General Agreement on Tariffs and Trade (GATT), as a signatory to the Agreement Establishing the World Trade Organization (WTO), the North American Free Trade Agreement (the NAFTA) and other important international trade agreements, and as a participant in ongoing discussions toward the development of a Free Trade Area of the Americas (FTAA), has an important national interest in maintaining the integrity of these international agreements and in pursuing the further liberalization of international trade. For these reasons, the American Bar Association continues to support efforts of the Government of the United States to liberalize international trade, consistent with the objectives as stated in the preamble to the WTO agreements of raising standards of living and allowing for optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to preserve the environment and to enhance the means for doing so.[1]

2. Since the Reciprocal Trade Agreements Act of 1934, Congress has periodi-

*This Recommendation and Report was approved by the House of Delegates in February 1997.

Stephen J. Powell and Carlos A. Garcia were the principle authors of this Recommendation and Report for the International Trade Committee, co-chaired by Edward J. Krauland and G. Hamilton Loeb.

1. *See* Preamble to Agreement Establishing the World Trade Organization.

cally delegated authority to the President to negotiate trade agreements with other nations, subject to approval by Congress. However, this system of Presidential negotiation and ordinary Congressional approval did not always function to the satisfaction of the United States or its trading partners. In fact, disagreements between Congress and the President, which both play important roles in U.S. trade policy,[2] have resulted in the United States' failure to implement changes to U.S. laws arising from agreements negotiated by the President. For example, following the Kennedy Round of multilateral trade negotiations, Congress specifically rejected agreements on certain non-tariff barriers, and several trading parties withdrew equivalent concessions made to the United States during the negotiations. The House Committee on Ways and Means later explained that this episode "convinced our major trading partners that previous negotiating procedures were futile if U.S. negotiators could not make commitments they were sure the U.S. would both accept and implement in terms of domestic laws."[3]

3. Tensions between Congress and the President arising from each branch's claim to Constitutional authority to shape international trade agreements have revealed a problem to which the United States' trading partners are sensitive: without a structural vehicle for power-sharing between the two branches, the United States cannot effectively negotiate trade agreements requiring Congressional approval.[4] Fortunately, Congress was able to address the power-sharing problem, while preserving its Constitutional authority, in the Trade Act of 1974, which authorized the President to negotiate and implement tariff reductions subject to approval by Congress through a special "fast-track" procedure. Fast-track means that an agreement will be voted on without amendments and within a fixed period of time: Members simply vote for or against a measure on the fast track, and are not permitted to offer amendments to it. As part of this procedure, the Trade Act of 1974 provided a detailed consultative mechanism to keep Congress informed, to ensure opportunities for Congressional advice to negotiators during

2. As stated by Professor C. O'Neal Taylor:

> Trade negotiating authority, in its current form, provokes a great deal of attention and concern because the negotiation of international trade agreements requires the combined efforts of two branches of the federal government. By its terms, the Constitution gives Congress authority over U.S. international trade issues because it has the power to "lay and collect Taxes, Duties, Imposts, and Excises" and to "regulate Commerce with foreign Nations." On the other hand, the President is empowered to make treaties and has been described as the representative of the United States in foreign affairs matters. Thus, if the United States is going to enter into an international agreement concerning trade matters, the two branches must act together."

C. O'Neal Taylor, *NAFTA and the Fast Track*, 28 GEO. WASH. J. INT'L TRADE 1 (1994) (citing U.S. CONST. art. I, § 8, cls. 1, 3; U.S. CONST. art. II, § 2, cl. 2).

3. Report of the House Committee on Ways and Means, *Trade Agreement Act of 1979*, H.R. REP. No. 317, 96th Cong., 1st Sess.

4. The balance struck between Congress and the President for constitutional authority over trade policy and negotiations must result in a process for trade negotiation that is both accountable to public interests, and efficient and effective to preserve U.S. leadership.

trade negotiations, and to enhance Congressional involvement in the drafting of implementing legislation.

4. Fast track's procedures encourage interaction and cooperation between Congress and the President as the two branches develop an agenda for the President to pursue during negotiations which may result in the need for Congress to pass related domestic legislation. Referring to the cooperation required between Congress and the President under the Trade Act of 1974 and subsequent legislative improvements of fast track, Professors Ackerman and Glove posit that

> [a]lthough the Constitution requires the senators to give their "advice" as well as their "consent" to treaties, this text lapsed into desuetude over the centuries. Today's Senate often confronts completed agreements that it can reject or revise only on pain of international embarrassment. In contrast, the Trade Act provides a dynamic framework through which Congress can give effective advice before the President signs on the dotted line. . . .
>
> [T]he Trade Act insists that the President consult with all relevant committees, include members of Congress in American negotiating delegations, and provide ninety day notice of an intention to sign any agreement. In discharging these functions, the executive must generate reams of paper explaining how its evolving proposals satisfy the Act's detailed statement of objectives. More important than the paper trail is the genuine discussion and serious horse-trading that go[es] on during the advisory period. Thus, this modern statute has redeemed the promise of "*advice* and consent" in a way that eluded the constitution-writers of 1787.[5]

5. The no-amendment process is a vital component that demands Congressional-Executive cooperation in order to remain effective. It provides both branches with incentives to complete most of the intra-governmental negotiating prior to the commencement of, and certainly prior to the conclusion of, the negotiations themselves. The predictability of the government's process is essential to foreign trading partners negotiating agreements with a president operating under fast track authority.[6] The importance of the fast track's time-frame and of congressional-executive cooperation in the pre-negotiation development of international trade policy was highlighted by the Senate Committee on Finance during consideration of the initial fast track provision in 1974:

> Our negotiators cannot be expected to accomplish the negotiating goals of Title I [tariff and non-tariff authority] if there are no reasonable assurances that the negotiated agreements would be voted up or down on their merits. Our trading partners have expressed an unwillingness to negotiate without some assurances that the Congress will consider the agreements within a definite time-frame.[7]

---

5. Bruce Ackerman and David Glove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 801, 904-905 (1995) (citations omitted).

6. The expedited, no-amendment legislative process under fast track also avoids the effective renegotiation of agreements after they are presented to Congress through the president through the addition of "reservations," amounting to unilateral conditions, which trading partners must accept if the agreement ever is to become effective. *See* Ackerman & Glove, *supra* at 905.

7. Report of the Senate Committee on Finance, *Trade Reform Act of 1974*, S. REP. No. 1298, 93rd Cong., 2d Sess. 107 (1974).

6. Since its introduction, fast track has been a useful tool that has been renewed and refined over time.[8] In this process, fast track has played a significant role in expanding U.S. exports, reducing prices of imported goods, and improving the quality of life in the United States. As observed by the House committee during the 1979 extension of fast-track authority for an additional eight years (until January 3, 1988):

> [E]xtension of this authority provides the President with an essential tool to reduce barriers to U.S. exports, a necessary element of export expansion, vital to U.S. economic well-being in the future.[9]

Prior to the most recent expiration of fast track authority in April 1994, the procedure had enabled the United States to negotiate and implement the Agreement Establishing the World Trade Organization (the Uruguay Round GATT negotiation), the NAFTA, the U.S-Canada Free Trade Agreement, and the U.S.-Israel Free Trade Agreement.

7. Other countries will not enter into a bargain with the United States that Congress could try to "reopen" through selective amendments. Thus, an up or down vote on the entire bargain is critical. This is why the European Union and Canada emphasized the importance of fast track to the successful conclusion of the Uruguay Round and the NAFTA, respectively. Similarly, discussions with Mexico, Canada and Chile concerning Chile's accession to the NAFTA were suspended by Chile in 1995 when it was evident that fast track would not be renewed that year. Mexico and Canada now await renewal of fast track prior to engagement in further NAFTA negotiations.

8. Without fast-track authority, it appears there will be no meaningful negotiations to provide for the inclusion of additional countries within the NAFTA pursuant to its provisions for accession. In addition, without fast-track authority, it will be impossible for the United States to engage its trading partners in more advanced FTAA negotiations or to remain effective in advancing current talks toward a binding FTAA agreement. Similarly, without fast-track authority the other member nations of the WTO will be unwilling to negotiate new or revised multilateral trade agreements with the United States. If the United States is not equipped with its most useful tool for advancing its trade agenda, it jeopardizes its leadership role within the shifting global economic community.

---

8. For example, Congress's ability to monitor and contribute to the process of developing negotiating policy was expanded in the late 1980s through the Omnibus Trade and Competitiveness Act of 1988 (Pub. L. No. 100-418). This Act provided additional provisions on consultations with Congress, requiring the USTR to submit an annual statement to the House Committee on Ways and Means and the Senate Finance Committee setting forth trade policy objectives and priorities, actions and legislation to achieve them, and progress toward their accomplishment. It also required the USTR to seek advice from congressional advisors and provided for Members of Congress to be accredited as official advisers to U.S. delegations to trade conferences, meetings and delegations.

9. Report of the House Committee on Ways and Means, *Trade Agreement Act of 1979*, H.R. REP. No. 317, 96th Cong., 1st Sess. 184 (1979).

9. In summary, the American Bar Association views fast track legislation as essential to the liberalization of trade because it provides a necessary structure for power-sharing between Congress and the President in the process of negotiating and implementing international trade agreements. Because fast track has been successful and other nations are unwilling to negotiate important trade agreements without it, the American Bar Association continues to view fast track as a necessary component of the United States' regime for international trade negotiation and policy development. Approval of this resolution is consistent with a similar resolution approved by the Board of Governors on May 9, 1991, supporting an earlier extension of fast track authority.

Conclusion

Through this Resolution, the American Bar Association supports the renewal of fast-track negotiating authority, without judging the merits of any agreement that might be submitted to Congress under such authority. In so doing, the American Bar Association expresses its support for continued negotiation in pursuit of a system of rules that has the potential to provide the basis for increased trade, sustainable development, and prosperity.

Respectfully submitted,
Lucinda A. Low
Chair

January 1997

Statement of Ownership, Management, and Circulation

(Required by 39 U.S.C. 3685)

1. PUBLICATION TITLE: *The International Lawyer* (ISSN:0020-7810)
2. PUBLICATION NUMBER: 581-860
3. FILING DATE: October 1, 1997
4. ISSUE FREQUENCY: Quarterly
5. NUMBER OF ISSUES PUBLISHED ANNUALLY: Four
6. ANNUAL SUBSCRIPTION PRICE: $12.00
7. COMPLETE MAILING ADDRESS OF KNOWN OFFICE OF PUBLICATION *(Not printer)*: 750 N. Lake Shore Dr., Chicago, IL 60611-4497
8. COMPLETE MAILING ADDRESS OF HEADQUARTERS OR GENERAL BUSINESS OFFICE OF PUBLISHER: *(Not printer)* 750 N. Lake Shore Dr., Chicago, IL 60611-4497
9. FULL NAMES AND COMPLETE MAILING ADDRESSES OF PUBLISHER, EDITOR, AND MANAGING EDITOR *(Do not leave blank) (Name and Complete mailing address)*:
   PUBLISHER: American Bar Association, 750 N. Lake Shore Dr., Chicago, IL 60611-4497
   EDITOR: Peter Winship, Southern Methodist University, School of Law, Dallas, TX 75275
   MANAGING EDITOR: DeIdra Hall-Holmes, 750 N. Lake Shore Dr., Chicago, IL 60611-4497
10. OWNER: American Bar Association, 750 N. Lake Shore Dr., Chicago, IL 60611-4497
11. KNOWN BONDHOLDERS, MORTGAGEES AND OTHER SECURITY HOLDERS OWNING OR HOLDING 1 PERCENT OR MORE OF TOTAL AMOUNT OF BONDS, MORTGAGES OR OTHER SECURITIES: None
12. TAX STATUS *(For completion by nonprofit organizations authorized to mail at special rates)*
    The purpose, function, and nonprofit status of this organization and the exempt status for federal income tax purposes: Has Not Changed During the Preceding 12 Months
13. PUBLICATION TITLE: *The International Lawyer*
14. ISSUE DATE FOR CIRCULATION DATA BELOW: Sum. 97, 31/2
15. EXTENT AND NATURE OF CIRCULATION:

	Average No. Copies Each Issue During Preceding 12 Months	Actual No. Copies of Single Issue Published Nearest to Filing Date
a. Total Number of Copies *(Net press run)*	15,764	15,880
b. Paid and/or Requested Circulation		
(1) Sales Through Dealers and Carriers, Street Vendors and Counter Sales *(Not mailed)*	-0-	-0-
(2) Paid or Requested Mail Subscriptions *(Include advertiser's proof copies and exchange copies)*	13,448	13,385
c. Total Paid and/or Requested Circulation *(Sum of 15b(1) and 15b(2))*	►13,448	13,385
d. Free Distribution by Mail *(Samples, complimentary, and other free)*	1,388	1,266
e. Free Distribution Outside the Mail *(Carriers or other means)*	-0-	-0-
f. Total Free Distribution *(Sum of 15d and 15e)*	►1,388	1,557
g. Total Distribution *(Sum of 15c and 15f)*	►14,836	14,651
h. Copies Not Distributed:		
(1) Office Use, Leftovers, Spoiled	928	1,229
(2) Returns from News Agents	-0-	-0-
i. Total *(Sum of 15g, 15h(1), and 15h(2))*	►15,764	15,880
Percent Paid and/or Requested Circulation *(15c/15g * 100)*	91%	92%

16. PUBLICATION OF STATEMENT OF OWNERSHIP: PUBLICATION REQUIRED. WILL BE PRINTED IN Volume 31, No. 3, Fall 1997, ISSUE OF THIS PUBLICATION.
17. SIGNATURE AND TITLE OF EDITOR, PUBLISHER, BUSINESS MANAGER, OR OWNER: (SIGNED) *Ronald Kadlec*, Manager, ABA Mail Services; (DATE) October 1, 1997.

I certify that all information on this form is true and complete. I understand that anyone who furnishes false or misleading information on this form or who omits material or information requested on the form may be subject to criminal sanctions (including fines and imprisonment) and/or civil sanctions (including multiple damages and civil penalties).