

1992

## *U.S. Trade and Policy Series No. 20: The Fast Track Debate: A Prescription for Pragmatism*

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### Recommended Citation

Alan F. Holmer & Judith H. Bello, *U.S. Trade and Policy Series No. 20: The Fast Track Debate: A Prescription for Pragmatism*, 26 INT'L L. 183 (1992)  
<https://scholar.smu.edu/til/vol26/iss1/9>

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## RECENT DEVELOPMENTS

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### *U.S. Trade and Policy Series No. 20* **The Fast Track Debate: A Prescription for Pragmatism**

In June 1990, Presidents George Bush and Carlos Salinas de Gortari endorsed the negotiation of a U.S.-Mexico free-trade agreement. In December 1990, trade ministers from over 100 nations failed to reach agreement in the long-running Uruguay Round multilateral trade negotiations. In February 1991, Presidents Bush and Salinas and Canadian Prime Minister Brian Mulroney announced their intention to negotiate a trilateral North American Free Trade Agreement (NAFTA).

To continue the multilateral talks and to begin the NAFTA negotiations, President Bush on March 1, 1991, formally requested a two-year extension of "fast track" procedures. This request unleashed a torrent of intense lobbying and triggered a spirited debate in the Congress. Although much opposition to the extension focused on certain industries that would likely be "losers" in free trade with Mexico, the fast track procedure itself provoked concern and extensive comment.

This article describes the fast track procedures and their previous applications. It then summarizes the developments in the Uruguay Round multilateral trade negotiations and with respect to Mexico (and Canada) that required extension of

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the fast track. Next, it outlines the concerns expressed by many in the Congress and relates the President's response to those concerns. Finally, this article analyzes the debate in the Congress over the fast track extension and, in light of this debate, offers a prescription for an effective executive-congressional partnership in trade negotiations.

## I. The Fast Track Procedures

Under the U.S. Constitution the President is empowered to conduct the foreign affairs of the United States.<sup>1</sup> Therefore, the President does not need statutory authority to negotiate with foreign countries, including trade negotiations. However, the Congress is empowered to make the laws in general<sup>2</sup> and to regulate trade with foreign nations in particular.<sup>3</sup> A trade agreement whose implementation requires changes in U.S. domestic law therefore falls squarely within the jurisdiction of the Congress.

The fast track is a procedure devised in the Trade Act of 1974<sup>4</sup> to establish a congressional-executive partnership for trade negotiations. It enhances the President's credibility in trade negotiations, in particular by increasing the likelihood that Congress will implement the trade agreements that he negotiates with advice from and in consultation with the Congress. Fast track authority expired in January 1988, but was revived in the Omnibus Trade and Competitiveness Act of 1988 (1988 Act).<sup>5</sup> Sections 1102 and 1103 of the 1988 Act<sup>6</sup> provide the authority and set forth the conditions for the application of the fast track procedures provided in section 151 of the Trade Act of 1974.<sup>7</sup>

Basically, those procedures have been applied to any legislation implementing a trade agreement entered into under section 1102(b) or (c) of the 1988 Act<sup>8</sup> before June 1, 1991, provided:

- in the case of bilateral agreements, the foreign country requested the negotiation and the President provided at least sixty days' notice to the Senate

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1. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936).

2. U.S. CONST. art. I, § 8, cl. 18.

3. *Id.* cl. 3.

4. Trade Act of 1974, §§ 101-102, 151, Pub. L. No. 93-618, 88 Stat. 1978, 1982, 2001 (1975) (codified at 19 U.S.C. §§ 2101, 2111-2112, 2191) (1988) [hereinafter 1974 Act]. For an excellent overview of the fast track, see Harold H. Koh, *Congressional Controls on Presidential Trade Policymaking After I.N.S. v. Chadha*, 18 N.Y.U. J. INT'L L. & POL. 1191 (1986); Koh, *History of the Fast-Track Approval Mechanism*, in JUDITH H. BELLO & ALAN F. HOLMER, GUIDE TO THE U.S.-CANADA FREE-TRADE AGREEMENT 1 (1990).

5. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (codified as amended in scattered sections of 19 U.S.C. (1990)) [hereinafter 1988 Act].

6. *Id.* §§ 1102-1103, 19 U.S.C. §§ 2902-2903.

7. 1974 Act § 151, 19 U.S.C. § 2191.

8. Section 1102(b) concerns agreements (other than bilateral agreements) regarding nontariff barriers. Section 1102(c) deals with bilateral agreements regarding tariff and nontariff barriers. *Id.* § 1102(b)-(c), 19 U.S.C. § 2902(b)-(c). Section 1102(a) gives the President authority to proclaim reductions in U.S. tariffs, subject to specified limits. *Id.* § 1102(a), 19 U.S.C. § 2902(a).

Finance and House Ways and Means Committees of his intention to enter into negotiations;<sup>9</sup>

- the President notified the House of Representatives and Senate of his intention to enter into the agreement at least ninety calendar days before the day on which he entered into the agreement;<sup>10</sup>
- after entering into the agreement, the President submitted to the House and Senate the agreement, a draft implementing bill, a statement of administrative action proposed to implement the agreement, and detailed supporting information,<sup>11</sup> including notably a statement explaining how the agreement makes progress in achieving the negotiating objectives established in section 1101;<sup>12</sup> and
- both the House and the Senate did not separately agree to procedural disapproval resolutions within any sixty-day period, making legislation to implement a trade agreement ineligible for fast track procedures on the basis of the President's failure or refusal to consult with Congress on trade negotiations.<sup>13</sup>

The 1988 Act further provided an opportunity to extend the above-described deadlines to cover any trade agreement entered into after May 31, 1991, and before June 1, 1993, if and only if:

- the President requested such extension by March 1, 1991;
- the President submitted to Congress a report: (1) describing all the trade agreements that have been negotiated under section 1102(b) or (c) and when they will be submitted to Congress for approval,<sup>14</sup> (2) describing the progress made to date in the remaining negotiations, (3) stating that such progress justifies continuation of the negotiations, and (4) stating the reasons why the extension is needed to complete the negotiations;
- by March 1, 1991, the private sector Advisory Committee for Trade Policy and Negotiations submitted a report to Congress on its views regarding the

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9. *Id.* § 1102(c)(3)(B)-(C), 19 U.S.C. § 2902(c)(3)(B)-(C).

10. *Id.* § 1103(a)(1)(A), 19 U.S.C. § 2903(a)(1)(A).

11. *Id.* § 1103(a)(2), 19 U.S.C. § 2903(a)(2). The required information includes: (1) an explanation how the implementing bill and proposed administrative action will affect existing law; (2) a statement that the agreement makes progress in achieving the applicable purposes, policies, and objectives set forth in § 1101 of the 1988 Act, 19 U.S.C. § 2901; (3) a statement of the President's reasons regarding how the agreement makes such progress (as well as the extent to which the agreement does not do so), how it serves the interests of U.S. commerce, and why the implementing bill and proposed administrative action are required or appropriate to carry out the agreement; (4) a statement describing the efforts of the President to obtain international exchange rate equilibrium and any effect of the agreement on increased international monetary stability; and (5) a statement relating to noncommercial state trading enterprises.

12. *Id.* § 1101, 19 U.S.C. § 2901.

13. *Id.* § 1103(c), 19 U.S.C. § 2903(c).

14. Presumably, the President would indicate that he planned to submit all Uruguay Round agreements as a package, even if some were already concluded. In fact, it seems unlikely that any agreements will be firmly concluded until they all are.

progress made in the negotiations and the reasons for its views regarding whether the requested extension should be approved or disapproved; and

- neither the House nor the Senate adopted an extension disapproval resolution before June 1, 1991.<sup>15</sup>

An extension disapproval resolution could be introduced by any member of Congress.<sup>16</sup> Any such resolution would be referred to the Committee on Finance in the Senate or, in the House, to the Committees on Ways and Means and Rules. Importantly, there is no automatic discharge provision<sup>17</sup>—meaning that a resolution referred to such committees could simply languish there without further action.

## II. The Previous Applications of Fast Track Procedures

As noted above, the United States Congress established the fast track in the Trade Act of 1974,<sup>18</sup> the central purpose of which was to facilitate the seventh or Tokyo Round of multilateral trade negotiations under the auspices of the General Agreement on Tariffs and Trade (GATT).<sup>19</sup> With advice from the Congress and the private sector, those negotiations were finally concluded in April 1979 when the United States and other GATT trading partners signed various codes and framework agreements amending the GATT for their signatories.<sup>20</sup> In accordance with the fast track procedures, implementing legislation was cooperatively drafted by the executive branch (led by the Office of the then Special Trade Representative) and the Congress (led by the Senate Finance and House Ways and Means Committees). The President then submitted the bill already agreed upon, which was passed by the House (395-7)<sup>21</sup> and Senate (90-4)<sup>22</sup> and enacted into law as the Trade Agreements Act of 1979.<sup>23</sup>

15. 1988 Act § 1103(b)(1)(B), 19 U.S.C. § 2903(b)(1)(B). Moreover, any extension disapproval resolution introduced in either house must be reported out of the committee to which it is referred (in the House, the Rules and the Ways and Means Committees; in the Senate, the Committee on Finance) by no later than May 15, 1991.

16. *Id.* § 1103(b)(5)(B)(i), 19 U.S.C. § 2903(b)(5)(B)(i).

17. Section 1103(5)(C) of the 1988 Act (19 U.S.C. § 2903(5)(C)) makes only § 152(d)-(e) (19 U.S.C. § 2192(d)-(e)) relating to floor consideration, applicable to extension disapproval resolutions, and does *not* make applicable § 152(c) (19 U.S.C. § 2192(c)) on discharge of a resolution from a committee.

18. *See supra* note 4 and accompanying text.

19. General Agreement on Tariffs and Trade (GATT), *opened for signature* Oct. 30, 1947, 61 Stat. (pts. 5 & 6) A3, 55 U.N.T.S. 187.

20. *E.g.*, Agreement on Interpretation of Article VI of the General Agreement on Tariffs and Trade, Apr. 12, 1979, 31 U.S.T. 4919, T.I.A.S. No. 9650; International Dairy Agreement, Apr. 12, 1979, 31 U.S.T. 679, T.I.A.S. No. 9623; Agreement on Trade in Civil Aircraft, Apr. 12, 1979, 31 U.S.T. 619, T.I.A.S. No. 9620; Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, Apr. 12, 1979, 31 U.S.T. 513, T.I.A.S. No. 9619; Agreement on Technical Barriers to Trade, Apr. 12, 1979, 31 U.S.T. 405, T.I.A.S. No. 9616.

21. 125 CONG. REC. 18017 (1979).

22. *Id.* at 20194.

23. Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (codified as amended in scattered sections of 5, 19, 26 and 31 U.S.C. (1988)).

The next two uses of the fast track were to implement bilateral rather than multilateral agreements. First, the Trade and Tariff Act of 1984<sup>24</sup> outlined objectives for, and authorized the negotiation of, a free trade agreement with Israel.<sup>25</sup> With advice from the Congress and the private sector, the administration concluded those negotiations the following year and then cooperatively drafted an implementing bill with the Congress. The House passed the bill submitted by the President following this joint collaboration by a vote of 422-0,<sup>26</sup> and the Senate passed the bill by a voice vote.<sup>27</sup> The bill was then enacted as the United States-Israel Free Trade Area Implementation Act of 1985.<sup>28</sup>

Second, in response to Prime Minister Brian Mulroney's request in 1985,<sup>29</sup> and with the advice of the Congress and the private sector, the United States and Canada negotiated a free trade agreement signed by the President and the Prime Minister on January 2, 1988.<sup>30</sup> While the administration felt it had consulted the Congress regularly and in detail,<sup>31</sup> some in the Congress strongly disagreed.<sup>32</sup> Nonetheless, the congressional leadership entered into an agreement with Secretary of the Treasury James A. Baker III and U.S. Trade Representative Clayton Yeutter concerning the legislation to implement the Canada agreement.

The administration officials agreed to draft the bill cooperatively with the Congress. Moreover, they agreed to accept the provisions worked out in this consultative process, provided: (1) they were consistent with the agreement and its implementation, and (2) were appropriate to carrying out its fundamental purposes. For their part, the congressional officials agreed to vote on the legislation submitted by the President in 1988, and to use their best efforts to expedite the process and vote before the August recess, if possible.<sup>33</sup> Under these pro-

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24. Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2948 (codified as amended in scattered sections of 7, 18, 19, 22, 26, 28, 29, 31, 49 and 50 U.S.C. (1988)).

25. *Id.*, tit. IV (codified as amended in scattered sections of 19 U.S.C. (1988)).

26. 131 CONG. REC. 10631 (1985).

27. *Id.* at 13574.

28. United States-Israel Free Trade Area Implementation Act of 1985, Pub. L. No. 99-47, 99 Stat. 82 (codified at 19 U.S.C. § 2112 note (1988)).

29. Letter from Prime Minister Mulroney to President Reagan (Oct. 1, 1985), *reprinted in* BELLO & HOLMER, *supra* note 4, app. at A-1.

30. *See generally id.*

31. *See, e.g.*, the list of consultations between congressional committees and the executive branch prepared by the Office of the U.S. Trade Representative in 1987, *reprinted in id.* app. at A-6.

32. For example, Senator Max S. Baucus (D-Mont.) wrote that "[t]he Reagan Administration's consultations with Congress concerning the FTA were reminiscent of the academic strategy of the average college student. During the term, important assignments were ignored or halfheartedly carried out. But, with failure close at hand, they were able to study all night to pass the final." *Id.* at 88. Several years later, some members would still recall what, in their view, had been inadequate consultations regarding the FTA. *See, e.g.*, 137 CONG. REC. H3500 (daily ed. May 23, 1991) (statements by Rep. Donald J. Pease (D-Ohio) during the fast track extension debate); *id.* at H3608 (debate statements by Rep. Richard A. Gephardt (D-Mo.)); *id.* at S6552 (debate statements by Sen. Lloyd Bentsen (D-Tex.)).

33. Exchange of letters between Secretary of the Treasury James A. Baker III and Ambassador Clayton Yeutter and the Hons. Jim Wright, Robert Byrd, Dan Rostenkowski, and Lloyd Bentsen (Feb. 17, 1988), *reprinted in* BELLO & HOLMER, *supra* note 4, app. at A-10, 11.

cedures, the administration and Congress again cooperatively drafted legislation that the President then submitted to the Congress. As passed by the House (366-40)<sup>34</sup> and Senate (83-9),<sup>35</sup> that bill was enacted as the United States-Canada Free-Trade Agreement Implementation Act of 1988.<sup>36</sup>

### III. Developments in the Uruguay Round and with Mexico Requiring Extension of the Fast Track

In 1982 the United States sought to capitalize on the Tokyo Round momentum and generate support for a new round of multilateral trade negotiations. At the GATT ministerial meeting the United States tried, but failed in this effort. The resulting disappointment helped fuel U.S. resort to bilateral and plurilateral initiatives, notably the free trade negotiations with Israel (1984-85) and Canada (1985-87). Nonetheless, the U.S. remained committed to the GATT and its further liberalization. Finally in 1986, at another more successful ministerial meeting in Punta del Este, Uruguay, an eighth round of multilateral trade negotiations was finally launched, scheduled to be concluded within four years.<sup>37</sup>

A midterm review in Montreal in December 1988 involved trade ministers in their staffs' negotiations, crystallized issues, and mapped out a timetable and direction for final negotiations.<sup>38</sup> In the spring of 1990, U.S. trade negotiators planned their final assault aimed at a successful conclusion in December 1990. They planned to use interim events—a trade summit at Puerto Vallarta, Mexico, in April, the G-7 Economic Summit in Houston in early July, and a meeting of the GATT Trade Negotiations Committee in late July—to create enough crises to compel reluctant trading partners to make the painful concessions needed to conclude the Round successfully.

However, the Mexican meeting did not jump-start serious negotiations; in Houston the European Communities appeared to agree, but later did not agree, to meaningful agricultural reform; and the Trade Negotiations Committee meeting did not resolve impasses or generate momentum. At the Brussels meeting in December 1990, the talks broke down, principally over the continued impasse regarding, in particular, the use of subsidies. The meeting was adjourned *sine die*, without a certainty of resumption.

Meanwhile, the United States did not put all its trade-liberalizing eggs in one basket. While the GATT remains the cornerstone of U.S. trade policy, Presidents Bush and Salinas announced their intention to pursue a free trade agreement on

34. 134 CONG. REC. 21295 (1988).

35. *Id.* at 24444.

36. United States-Canada Free-Trade Agreement Implementation Act of 1988, Pub. L. No. 100-449, 102 Stat. 1851 (codified at 19 U.S.C. § 2112 note (1990)).

37. GATT, *Ministerial Declaration on the Uruguay Round* (Sept. 20, 1986).

38. GATT Secretariat, *Multilateral Trade Negotiations, Trade Negotiations Committee, Trade Negotiations Committee Meeting at Ministerial Level* (Dec. 9, 1988) (restricted document).

June 10, 1991.<sup>39</sup> At their direction, trade ministers Carla A. Hills and Jaime Serra Puche consulted, and in August 1990 recommended the launch of negotiations.<sup>40</sup> On September 25, 1990, President Bush formally notified the Congress of his intention to negotiate a free trade agreement with Mexico. In February 1991 the U.S. and Mexican presidents and Canadian Prime Minister Brian Mulroney announced that Canada would participate too, making it a trilateral North American Free Trade Agreement negotiation.<sup>41</sup> On February 5, 1991, President Bush formally notified the Congress of his intention of negotiating a free trade agreement with Canada as well as Mexico.<sup>42</sup>

Also in February 1991 all Uruguay Round participants (including the European Communities) agreed to negotiate agricultural subsidy reductions in each of the three major areas.<sup>43</sup> Negotiations in Geneva could then resume. However, under the U.S. fast track, time had run out.

#### **IV. The President's Extension Request and Response to Congressional Concerns**

The fast track was due to expire on March 1, 1991, the deadline for the President to notify the Congress of his intention to enter into any trade agreement. The President had high hopes for both a NAFTA and a successful conclusion to the Round, but nothing in hand. To preserve the fast track option for these negotiations (as well as any possible agreement resulting from the Enterprise for the Americas Initiative), the President requested an extension of the fast track on March 1, 1991.<sup>44</sup> He submitted to the Congress all necessary supporting documents, including a voluminous report on progress in the Uruguay Round multilateral trade negotiations<sup>45</sup> and a report of the Advisory Committee on

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39. The White House, Office of the Press Secretary, Joint Statement by the Presidents of Mexico and the United States on Negotiation of a Free Trade Agreement (June 11, 1990).

40. OFFICE OF THE U.S. TRADE REPRESENTATIVE, JOINT REPORT BY THE U.S. TRADE REPRESENTATIVE AND THE SECRETARY OF COMMERCE AND INDUSTRIAL DEVELOPMENT OF MEXICO TO THE PRESIDENT OF THE UNITED STATES OF AMERICA AND THE PRESIDENT OF THE UNITED MEXICAN STATES ON BILATERAL U.S.-MEXICAN TRADE (Aug. 8, 1990).

41. The White House, Office of the Press Secretary, Text of a Letter from the President to the Chairman of the Senate Committee on Finance and the Chairman of the House Committee on Ways and Means (Sept. 25, 1990).

42. Letter from President Bush to Dan Rostenkowski, Chairman, Committee on Ways and Means (Feb. 5, 1991).

43. Specifically, participants agreed "to conduct [agricultural] negotiations to achieve specific binding commitments on each of the following areas: domestic support, market access, and export competition . . . ." Proposal by the Chairman at Official Level, Trade Negotiations Committee, Programme of Work (Feb. 26, 1991).

44. Letter from President Bush to the Congress (March 1, 1991) (available from the White House, Office of the Press Secretary).

45. REPORT TO THE CONGRESS ON THE EXTENSION OF FAST TRACK PROCEDURES PURSUANT TO SECTION 1103(B) OF THE OMNIBUS TRADE AND COMPETITIVENESS ACT OF 1988, H.R. DOC. NO. 51, 102d Cong., 1st Sess. (1991).

Trade Policy and Negotiations endorsing the extension of fast track, continuation of the Round, and the NAFTA initiative.<sup>46</sup>

If the President's request had concerned use of the fast track solely to implement any Uruguay Round agreements, the reaction in the Congress might have been muted. His proposal of a free trade agreement with Mexico, however, provoked strong concerns in the Congress and among some interest groups in the private sector. In particular, organized labor strongly opposed the fast track extension for fear of losing American jobs to Mexico because of lower labor rates and less stringent (and less stringently enforced) Mexican standards. Many environmental groups echoed strong concerns as well, fearing protection of the environment would be eroded.

Crystallizing such concerns, Senate Finance and House Ways and Means Committee Chairmen Lloyd Bentsen and Dan Rostenkowski wrote President Bush on March 7.<sup>47</sup> The chairmen's letter asked the President to indicate, by no later than May 1, his plans with respect to labor and environmental issues in connection with the Mexican negotiations. On March 27, House Majority Leader Richard A. Gephardt also wrote the President, asking for the administration's plans regarding wage disparity, rules of origin, environmental protection, health and safety standards, labor mobility, worker and human rights, an escape clause, and worker adjustment programs.<sup>48</sup>

The administration responded to the committee chairmen and majority leader on May 1. In his letter the President first made a personal commitment to "close bipartisan cooperation in the negotiations and beyond."<sup>49</sup> Second, he agreed to work with the Congress to provide adequate worker adjustment assistance. Third, he agreed to develop and implement an expanded program of U.S.-Mexico environmental cooperation parallel to the NAFTA talks. Fourth, he also agreed to work through new initiatives with Mexico to expand bilateral labor cooperation.<sup>50</sup>

Submitted in support of the President's letter, numerous memoranda:

- described Mexico's record on labor and environmental issues, to correct any misunderstandings about Mexico's commitments to worker rights and adequate protection of the environment;

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46. ADVISORY COMM. FOR TRADE POLICY AND NEGOTIATIONS, REPORT TO THE U.S. CONGRESS CONCERNING THE PRESIDENT'S REQUEST FOR THE EXTENSION OF FAST TRACK PROCEDURES IMPLEMENTING LEGISLATION FOR TRADE AGREEMENTS (March 1991).

47. Letter to the President from Senator Lloyd Bentsen, Chairman, Committee on Finance, and Representative Dan Rostenkowski, Chairman, Committee on Ways and Means (March 7, 1991), reprinted in COMMITTEE ON WAYS AND MEANS, EXCHANGE OF LETTERS ON ISSUES CONCERNING THE NEGOTIATION OF A NORTH AMERICAN FREE TRADE AGREEMENT, 102d Cong., 1st Sess. app. at 87 (Comm. Print 1991) [hereinafter EXCHANGE OF LETTERS].

48. *Id.* at 89-98.

49. *Id.* at 2.

50. *Id.*

- described various economic studies demonstrating that a free-trade agreement with Mexico would provide economic benefits to the United States;
- outlined the administration's plan to conduct separate, but parallel negotiations with Mexico on environmental issues; and
- indicated how the United States and Mexico proposed to consult on labor-related issues.<sup>51</sup>

In addition to this eighty-six-page response, administration witnesses testified before numerous committees in support of the President's request for extension of the fast track. They argued that:

- An extension was essential to continued U.S. economic leadership.
- Without fast track authority, the Office of the U.S. Trade Representative (USTR) would be out of business; USTR could not engage in trade liberalizing negotiations without the fast track. Congress had to decide whether or not it wanted USTR to negotiate trade liberalizing agreements. If it did, it was essential it give USTR the fast track.
- The vote on the fast track extension was not a vote on any result and did not lock any member in; it was only a procedural vote.
- The fast track was neither a fast, nor a narrow, track; the administration was not trying to rush anything through. Congress had ample time for input in the negotiations and review of the final agreement.
- The administration would honor its end of the bargain: Congress would receive detailed consultations, and the administration would write the implementing legislation with Congress. Members could vote against the implementing legislation the President submitted if they believed the agreement he negotiated was unacceptable.<sup>52</sup>

Meanwhile, fast track extension disapproval resolutions were introduced and reported out of committees in both the House of Representatives and the Senate. The House resolution, H. Res. 101, was sponsored by Representative Byron L. Dorgan (D-S.D.); the identical Senate measure, S. Res. 78, was sponsored by Senator Ernest L. Hollings (D-S.C.). The Dorgan resolution was reported out of the Ways and Means Committee unfavorably on a vote of 27-9 on May 14.<sup>53</sup> The Hollings resolution likewise was reported unfavorably out of the Finance Committee on a vote of 15-3 on May 14.<sup>54</sup> With the receipt of the administra-

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51. *Id.* at 4-86.

52. *See, e.g.*, statements of Ambassador Carla A. Hills before the Senate Comm. on Finance (Feb. 6, 1991); Subcomm. on Trade, House Comm. on Ways and Means (Feb. 20, 1991); House Comm. on Ways and Means (March 12, 1991); House Comm. on Agriculture (April 24, 1991).

53. H.R. REP. NO. 63, pt. 2, 102d Cong., 1st Sess., at 9 (1991).

54. S. REP. NO. 56, 102d Cong., 1st Sess. 6 (1991). Both Chairmen Rostenkowski and Bentsen elected to report the resolutions out for floor action, rather than keep them bottled up in committee, even though the fast track procedures do not provide for the automatic discharge of a resolution from committee. *See supra* notes 4, 18 and accompanying text; *see also* 137 CONG. REC. S6550-54 (daily ed. May 23, 1991) (comments of Chairman Bentsen).

tion's response, a torrent of lobbying by various interest groups,<sup>55</sup> and the reports of the Finance and Ways and Means Committees, the congressional debate began.

## V. The Congressional Debate over Extension of the Fast Track

Much of the debate in the Congress over the President's fast track extension request centered on the substance of the negotiations concerned, in particular the NAFTA talks with Mexico.<sup>56</sup> However, a considerable portion of the debate addressed the fast track procedure itself. A few members suggested that the fast track procedure was unconstitutional.<sup>57</sup> Most opponents of its extension, however, accepted its lawful basis, but decried the "abrogation,"<sup>58</sup> "abdication,"<sup>59</sup> "surrender,"<sup>60</sup> or "relinquish[ment]"<sup>61</sup> of congressional power, prerogatives, and responsibilities. They opposed giving the executive a "carte blanche," "blank check,"<sup>62</sup> or "keys to the store,"<sup>63</sup> thus reducing the role of Congress to that of a mere "rubber stamp."<sup>64</sup>

Some opponents argued that fast track required that Congress trust the administration—a trust that some felt unwarranted by the administration's track record.<sup>65</sup> Indeed, such distrust was not limited to the Bush administration, or even to Republican administrations, by a Democratic Congress. The distrust

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55. See, e.g., Jill Abramson, *U.S.-Mexico Trade Pact Is Pitting Vast Armies of Capitol Lobbyists against Each Other*, WALL ST. J., Apr. 25, 1991, at A16; see also 137 CONG. REC. S6634-36 (daily ed. May 23, 1991), S6797-98, S6810-11, S6816-17 (daily ed. May 24, 1991) (letters and press releases incorporated in the fast track extension congressional debate).

56. See, e.g., *id.* at S6614-15 (daily ed. May 23, 1991) (comments of Sen. Slade Gorton (R-Wash.)).

57. See, e.g., *id.* at H3505 (comments of Rep. John J. LaFalce (D-N.Y.)) ("The whole concept of fast-track authority is ultra vires and unenforceable."); *id.* at H3565 (comments of Rep. Gerald D. Kleczka (D-Wis.)) ("Our founding fathers would shudder at the thought of an agreement with so great an impact on American lives not subject to the consideration of elected representatives.").

58. *Id.* at H3503 (comments of Rep. LaFalce).

59. *Id.* at H3514 (comments of Rep. Cardiss Collins (D-Ill.)), H3529 (comments of Rep. David R. Obey (D-Wis.)), H3544 (comments of Rep. Richard J. Durbin (D-Ill.)), S6574 (comments of Sen. Jesse A. Helms (R-N.C.)).

60. *Id.* at H3524 (comments of Rep. Tim Johnson (D-S.D.)), H3574 (comments of Rep. Louis Stokes (D-Ohio)).

61. *Id.* at H3531 (comments of Rep. Ed Jenkins (D-Ga.)).

62. *Id.* at H3578 (comments of Rep. Craig Thomas (R-Wyo.)), H3590 (comments of Rep. Thomas McMillen (D-Md.)). Both of those representatives supported fast track extension and argued that such extension was not a blank check. *Contra id.* at H3582 (comments of Delegate Eleanor Holmes Norton (D-D.C.)), H3587 (comments of Rep. Nick J. Rahall, II (D-W.Va.)).

63. *Id.* at H3584 (comments of fast track supporter Rep. Robert F. Smith (R-Or.)).

64. *Id.* at H3579 (comments of Rep. Ted Weiss (D-N.Y.)); see also *id.* at S6595 (comments of Sen. Tom Harkin (D-Iowa)).

65. See *id.* at H3519 (comments of Rep. Dorgan) ("Do I trust this administration? Of course not."); see also *id.* at H3547 (comments of Rep. Andrews), H3549 (comments of Rep. Kildee), H3551 (comments of Rep. Conyers), H3562 (comments of Rep. Wolpe). Representative Douglas Applegate (D-Ohio) also claimed that "[t]he Administration's track record on trade stinks." *Id.* at H3605.

expressed was institutional—of the executive branch by the Congress. For example, one congressman said: “Trade negotiators ask you to just trust them. The Tokyo Round experience [led by the Democratic Carter administration] shows they were willing to lie massively to get a deal. And they want us to respect them in the morning and trust them again.”<sup>66</sup> In addition to the Tokyo Round, the use of fast track with respect to the more recent free-trade agreement with Canada was criticized. Congressman John Dingell (D-Mich.) spoke of what he characterized as the administration’s broken promises regarding the FTA;<sup>67</sup> Majority Leader Richard Gephardt said that the public debate of that agreement prior to its conclusion was “almost nonexistent.”<sup>68</sup>

In particular, some members—including some fast track supporters—complained of the inadequacy of past administrations’ consultations with the Congress. Finance Committee Chairman Lloyd Bentsen, for example, said that the Reagan administration’s initial consultations with the Congress regarding the U.S.-Canada Free-Trade Agreement were inadequate.<sup>69</sup> While he maintained that the Bush administration had “learned that lesson” and “[has] been consulting with us every step of the way,”<sup>70</sup> other members disagreed. Senator Thomas A. Daschle (D-S.D.), for example, maintained: “In my experience, the consultations have not been meaningful. . . . Muggers meet directly with their victims, too, but we don’t call it consultations.”<sup>71</sup> Senator Ernest B. Hollings (D-S.C.) echoed this concern: “[T]hey claim that the distinguished Ambassador for Trade, Carla Hills, she consults. She consults. That is what I am complaining about. These consultations are killing us.”<sup>72</sup>

Some members disagreed that the fast track was necessary to conduct any trade negotiations. Congressmen Jenkins and Helms, for example, both said they just did not accept the argument that fast track authority “is essential to a successful negotiation of new trade agreements.”<sup>73</sup> As Representative William L. Clay (D-Mo.) argued: “Fast track may be convenient to the President of the United States, but it is by no means essential to his ability to negotiate international agreements.”<sup>74</sup>

On the other hand, many who supported the extension of fast track for the multilateral Uruguay Round negotiations opposed, or expressed serious reserva-

66. *Id.* at H3516 (comments of Rep. Stark).

67. *Id.* at H3547-48 *passim*.

68. *Id.* at H3608.

69. *Id.* at S6552 (daily ed. May 24, 1991). He then added that the administration later “got the message and then they came and consulted.” *Id.*; see also *supra* note 32 for similar comments of Sen. Baucus concerning consultations concerning the U.S.-Canada FTA.

70. 137 CONG. REC. S6552 (daily ed. May 24, 1991).

71. *Id.* at S6640.

72. *Id.* at S6778.

73. *Id.* at S6575 (daily ed. May 23, 1991) (comments of Sen. Helms); see also *id.* at H3530-31 (comments of Rep. Jenkins).

74. *Id.* at H3585.

tions about, its use for the NAFTA talks. Representative Pease, for example, maintained that the use of the fast track "is warranted when negotiating trade agreements with as many as 107 partners."<sup>75</sup> The administration, however, did not persuade Representative Pease and others that fast track was necessary in negotiations with far fewer trading partners. As Senator Paul S. Sarbanes (D-Md.) argued:

I have voted for this [fast track] procedure on GATT in the past. I was moved by the argument that if you go to a negotiation with 107 negotiators, it is very difficult to go back and renegotiate it. . . . But now, the administration is extending this to negotiations with individual countries.

. . . .  
 . . . I do not support the administration's path of moving to make fast track standard operating procedure in each trade negotiation that comes along.<sup>76</sup>

In addition to this concern about the use of fast track for bilateral or trilateral negotiations generally, opposition was expressed to its use for talks with Mexico in particular. Senator Metzenbaum (D-Ohio) argued: "The Mexicans initiated these trade talks. The Mexicans want this agreement. And the Mexicans will continue to negotiate with or without the fast track. That is the reality."<sup>77</sup> Further, some members noted reports of a statement by the Mexican chief negotiator that Mexico would negotiate with the United States, with or without the fast track.<sup>78</sup>

In response to these concerns, fast track supporters made the following arguments. First, they maintained that trade negotiations are an essential component of any strategy to enhance American competitiveness. House Majority Leader Gephardt began the argument: "[I]f we [can] open closed markets today we can open closed factories tomorrow."<sup>79</sup> Senator Lloyd Bentsen and Chairman of the Finance Subcommittee on International Trade, Max Baucus, continued it:

If you are serious about cracking down on foreign barriers, trade negotiations must be a part of your strategy. In the absence of negotiations, a multitude of unfair foreign barriers will remain. And the United States cannot settle for that—not if we want to be effective competitors for world markets.<sup>80</sup>

. . . .

75. *Id.* at H3500.

76. *Id.* at S6598-99; *see also id.* at S6787 (daily ed. May 24, 1991) (comments of Sen. Edward M. Kennedy (D-Mass.)) ("[I]t is difficult to envision a multilateral trade negotiation that would allow each nation to amend the treaty. And that is why the fast track procedure should be approved. But I want to express my deep concern over the Administration's use of fast track authority to enter into trade negotiations with Mexico."); *id.* at S6825 (comments of Sen. Joseph R. Biden (D-Del.)) ("[F]ast track was designed with multilateral negotiations in mind.").

77. *Id.* at S6603 (daily ed. May 23, 1991).

78. *See, e.g., id.* at S6598 (comments of Sen. Sarbanes), S6602 (comments of Sen. Metzenbaum). Metzenbaum referenced excerpts from *El Financiero*, "a respected Mexican newspaper," which reported the following observation made by Mexican Chief Negotiator Herminio Blanco in March 1991: "With the fast track or without it, in any case the negotiations will be carried out." *Id.* at S6602-03.

79. *Id.* at H3607.

80. *Id.* at S6552 (comments of Sen. Bentsen).

Instead of bemoaning the problems, we should be looking for solutions. And one of the best available solutions is to open foreign markets with trade agreements.<sup>81</sup>

Second, fast track supporters argued that other nations simply would not participate in trade negotiations with the United States except under fast track procedures. As Senator John C. Danforth (R-Mo.) summarized:

[I]t is the overwhelming opinion of people who know anything about international trade that without fast track there is no possibility of a trade agreement. It is just not going to happen. . . . Carla Hills says she has been told by her negotiating partners, forget it, we are not even going to talk to you.<sup>82</sup>

Sam M. Gibbons (D-Fla.), chairman of the Subcommittee on International Trade, House Committee on Ways and Means, explained that during the sixth round of multilateral trade negotiations, the Kennedy Round, the administration had negotiated two agreements that the Congress subsequently had refused to implement legislatively. This experience, he noted, was the reason Congress created the fast track. Failure to implement the Kennedy Round agreements convinced the trading partners of the United States that negotiations with the U.S. executive branch lacked an adequate foundation in the absence of some substantial indication that the Congress supported the executive in the negotiations.<sup>83</sup> As Chairman Gibbons summarized, the reaction of trading partners was: “‘Listen, unless you reform your congressional procedures, we aren’t dealing with you anymore. You are not a reliable bargainer.’”<sup>84</sup>

Thus, argued fast track supporters, trade negotiations were essential to stimulate American competitiveness, and the fast track was essential to trade negotiations. Moreover, they added, the fast track did not reduce, but rather enhanced, the role of the Congress in trade negotiations. The fast track ensured that the Congress was a partner in the executive’s deliberations with foreign nations on trade matters. “‘Fast track enables us to be a trade negotiating partner with the ultimate power to say yes or no,’” said House Minority Leader Robert H. Michel (R-Ill.).<sup>85</sup> Indeed, Chairman Dan Rostenkowski of the Ways and Means Committee argued that as a result of the fast track extension debate, Congress “‘has already strongly influenced the scope, agenda and course of the North American free trade negotiations before they even begin.’”<sup>86</sup>

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81. *Id.* at S6798 (daily ed. May 24, 1991) (comments of Sen. Baucus).

82. *Id.* at S6623 (daily ed. May 23, 1991); *see also id.* at H3498-99 (comments of Rep. David Dreier (R-Cal.)), H3503 (comments of Sam M. Gibbons (D-Fla.)).

83. *Id.* at H3503, H3517.

84. *Id.* at H3503.

85. *Id.* at H3559; *see also, e.g., id.* at H3518 (comments of Rep. Bill Archer (R-Tex.)), H3546 (comments of Rep. David E. Price (D-N.C.)), H3607 (comments of Rep. Rostenkowski (D-Ill.)).

86. *Id.* at H3521; *see also id.* at S6596 (comments of Sen. John D. Rockefeller IV (D-W.Va.)) (“Congress’s role is not cosmetic”); *id.* at S6806 (daily ed. May 24, 1991) (comments of Sen. Connie Mack (R-Fla.)) (asserting that the fast track does not eliminate the Congress’s influence on the outcome of trade negotiations).

Moreover, supporters generally credited at least the current administration with doing a good job in consulting with the Congress on trade negotiations. As ranking member of the Senate Finance Committee Bob Packwood (R-Or.) concluded: "If there is anything that can be said now about our U.S. Trade Representative, Ambassador Carla Hills, it is that she has given us opportunity after opportunity . . . for input."<sup>87</sup> Further, many supporters stressed that Bush administration trade negotiators had earned the Congress's trust by allowing the Brussels Ministerial to fail rather than to accept bad agreements. Speaker after speaker in the fast track extension debate gave the administration substantial credit for the courage of its conviction that no agreement was better than a bad agreement. For example, Representative Philip M. Crane (R-Ill.) "remind[ed] . . . those of little faith, that it was our distinguished U.S. Trade Representative who refused to conclude what in her eyes was an unsatisfactory agreement in the Uruguay round."<sup>88</sup> Senator Phil Gramm (R-Tex.) added:

The fact that Carla Hills was willing to walk away from the last best offer of the Europeans at the end of the GATT round in late 1990s tells me that this is a lady of real toughness. And it convinces me that she will be prepared to walk away from another GATT round if the final offer is not acceptable and will be willing to walk away from a United States-Mexico agreement if not successful.<sup>89</sup>

Next, fast track supporters maintained that extension of fast track procedures did not require a wholesale delegation of trust to the administration. As several members indicated, "Trust but verify" may be applied to trade as well as strategic arms negotiations.<sup>90</sup> Indeed, many fast track supporters who voted against the extension disapproval resolutions joined fast track opponents in stressing their intention to seek to maximize congressional influence in the negotiations and scrutinize the outcome closely:

- **Congressman David E. Skaggs (D-Colo.):** "Negotiate, Mr. President, but negotiate well. . . . I'll be reading the fine print of any agreement."<sup>91</sup>
- **Senator Sam Nunn (D-Ga.):** "I will be looking carefully at the final agreement reached in the Uruguay round and the trade agreement with Mexico, and my vote for the fast track in no way commits me to vote for final approval."<sup>92</sup>

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87. *Id.* at S6555 (daily ed. May 23, 1991).

88. *Id.* at H3527.

89. *Id.* at S6607; *see also, e.g., id.* at H3595 (comments of Rep. Bill Emerson (R-Mo.)), S6600 (comments of Sen. Dave Durenburger (R-Minn.)), S6617 (comments of Sen. Dennis DeConcini (D-Ariz.)), S6798 (comments of Sen. Max Baucus). *But cf., e.g., id.* at S6595 (comments of Sen. Tom Harkin (D-Iowa)), S6640 (comments of Sen. Thomas Daschle (D-S.D.)).

90. *Id.* at H3572 (comments of Rep. William Hughes (D-N.J.)).

91. *Id.* at H3592-93. He also added: "We promise you careful scrutiny of the results." *Id.* at H3594.

92. *Id.* at S6814 (daily ed. May 24, 1991).

- **Congressman Doug Bereuter (R-Neb.):** “This Member would . . . serve notice to the administration that he will go over the eventual NAFTA with a fine-toothed comb.”<sup>93</sup>

Perhaps the House Majority Leader characterized this attitude most colorfully:

I am serving notice today that Congress will [keep the pressure on] Chairman Rostenkowski, Senator Bentsen, and I will sound like the song by the [P]olice that goes, “Every breath you take, every step you take, every move you make, we’ll be watching you.” Trust but verify: that will be our policy.<sup>94</sup>

Finally, various members—fast track supporters and opponents—indicated that if the Congress was dissatisfied with the agreements the administration negotiated, then it had, and might exercise, the right to change the fast track rules.<sup>95</sup>

Ultimately the fast track supporters prevailed. On May 23, 1991, the House of Representatives rejected the fast track disapproval resolution sponsored by Representative Byron L. Dorgan (D-N.D.), voting 192-231.<sup>96</sup> Immediately after defeating the disapproval resolution, the House passed overwhelmingly a “sense of the House”<sup>97</sup> resolution affirming the Congress’s commitment to hold the administration to promises it had made concerning the treatment of environmental safeguards, worker safety, and worker adjustment assistance.<sup>98</sup> On May 24, 1991, the Senate disapproval resolution sponsored by Senator Ernest F. Hollings also failed, by a vote of 36-59.<sup>99</sup> Consequently, the President has authority until June 1, 1993, to enter into trade agreements pursuant to fast track procedures.<sup>100</sup>

## VI. A Prescription for a Pragmatic Partnership

As Senator Gramm characterized it, the rejection of the House and Senate resolutions that would have disapproved the extension of fast track was a “triumph of reason over passion” and “a victory of public interest over the special interests.”<sup>101</sup> Clearly, it was a strong, bipartisan endorsement for using trade

93. *Id.* at H3544 (daily ed. May 23, 1991).

94. *Id.* at H3608 (comments of Rep. Richard Gephardt (D-Mo.)).

95. *See, e.g., id.* at H3498 (comments of Rep. Anthony C. Beilenson (D-Cal.)), H3572 (comments of Rep. William Hughes (D-N.J.)), H3590 (comments of Rep. Thomas McMillen (D-Md.)), H3609 (comments of Rep. Bill Barrett (R-Neb.)), S6639 (comments of Sen. Thomas Daschle (D-S.D.)).

96. *Id.* at H3588.

97. *Id.* at H3589, H3610.

98. EXCHANGE OF LETTERS, *supra* note 47.

99. 137 CONG. REC. S6829 (daily ed. May 24, 1991).

100. Even though the administration prevailed in the vote on an extension disapproval resolution, the fast track remains decidedly fragile. Despite its inclusion in a statute, it remains expressly subject to the constitutional rulemaking authority of each house. At any time, either the House of Representatives or the Senate can change its fast track rule, or eliminate the fast track altogether. Therefore, the administration and supporters of the Round and North American free trade talks must remain vigilant to preserve the fast track.

101. 137 CONG. REC. S6586 (daily ed. May 23, 1991).

negotiations to open foreign markets and thus enhance American competitiveness. A comfortable majority in both houses basically decided to "give trade a chance."<sup>102</sup>

The debate, however, exposed the fragility of the fast track and the peril for any trade agreement negotiated by an administration without sufficient involvement of the Congress. For the President to enjoy both credibility with America's trading partners and substantial prospects for congressional passage of implementing legislation, these two branches must truly work together as partners: in the establishment of negotiating objectives, throughout the actual negotiations, and in the implementation of agreements in U.S. domestic law.

Pragmatically, this means that the administration must consult the Congress not only regularly, but meaningfully. While naturally loathe to disclose publicly its strategy, tactics, and goals, administration officials must be able and willing to consult with and confide in members and their staffs on these decisions. Some disagreements about substance are unavoidable, but Congress should have no just ground for complaint against the administration regarding procedures.

While regular and meaningful consultation with the Congress may sound easy to those not directly involved with the federal government, it requires an enormous expenditure of energy and time by many administration officials. The U.S. Trade Representative is not able to address the combined houses, as the President does when he delivers his State of the Union message. Even if she had this opportunity, it is far too public a forum in which to consult meaningfully without betraying negotiating positions to other nations. Instead, teams of administration officials, at varying levels and from varying agencies, haunt House and Senate hearing rooms, chambers, and corridors in an effort faithfully and diligently to meet their responsibility to consult with the Congress. However inefficient and diverting this requirement, it must be fulfilled.

For its part, on the other hand, Congress must be prepared to shoulder the burden of making trade-offs if it wishes to be a responsible partner in trade negotiations. The classic public injunction of the Congress to any administration in trade negotiations is to achieve 100 percent of all U.S. objectives and to make no concessions. While this is an understandable starting point, it is impossible to realize. Negotiations are based upon compromise. Trade agreements are likely to endure only if they embody compromise, since sovereign governments adhere over time only to arrangements that, on balance, serve their interests.

Of course, members of Congress who wish to be reelected cannot reasonably take positions in public that would provoke opposition by constituents. In public many in the Congress feel compelled to enjoin the administration to make no sacrifice and to attain all goals. In private, however, members must be prepared

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102. *Id.* at H3607 (comments of Rep. Richard Gephardt (D-Mo.)).

to prioritize their objectives and to share with the administration their advice about negotiating positions. Unless they are prepared to do so, they are ethically estopped from complaining about the trade-offs that the administration ultimately must make.

Of course, even if both branches are responsible and faithful partners, disagreements on the substance will occur. Even when the administration consults diligently and the Congress, in private, offers frank advice about negotiating positions and trade-offs, the administration must sift conflicting advice—from different members and committees, the private sector, and executive agencies—and make hard choices that will not be universally popular.

Ultimately, the fast track requires the executive to exercise leadership, but reserves power for the Congress to accept or reject the agreements concluded with its advice. This formula does not guarantee that trade negotiations will succeed, but it provides the best opportunity for such success. If the Congress is realistic in its private advice to the administration, and the administration in turn is forthcoming in regular consultations with the Congress, there is no reason why this fast track partnership, while always fragile, cannot prosper through not only the Uruguay Round and NAFTA negotiations, but for the trade negotiations of the twenty-first century as well.

