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Fast Track Forever?

This has been a Golden Age of new trade agreements. One primary reason: U.S. fast track negotiating authority.

BY GREG MASTEL AND HAL SHAPIRO

Judged by the number of new trade agreements concluded, the past four years has been the most productive period for U.S. trade negotiations in U.S. history. The global negotiations on a new World Trade Organization agreement have moved slowly—as was the case with the last round of global negotiations. But—since Congress extended fast track negotiating authority (now called Trade Promotion Authority) in 2002—the United States has concluded nine Free Trade Agreements. Another seven FTAs are in some stage of the negotiation process.

To put this in perspective, before this grant of fast track negotiating authority the United States had only entered into FTAs with Israel, Canada, Mexico, and Jordan. This list has now extended to almost twenty countries (some FTAs involve more than one trading partner), nearly a five-fold increase.

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These FTAs have not all been with major trading partners, but still they do represent significant forward progress for U.S. trade policy in the face of lingering protectionist sentiments and at a time when global talks have slowed to a crawl. Markets in Latin America, the Middle East, Asia, and Oceania (Australia) have been opened to expanded trade with the United States.

But why has the sudden surge taken place in the past four-plus years? One key reason is certainly the grant of fast track negotiating authority to the President which ensures that trade agreements are voted on by Congress on an expedited basis without amendment. But that authority is set to expire in June of 2007, and the last time fast track expired it was almost eight years before it was revived. Before a similar dead calm swallows U.S. trade negotiations, it would be wise to settle on a formula for fast track that is permanent to avoid another long break between trade agreements to the detriment of both U.S. trade policy and global growth.

A SHORT HISTORY OF THE FAST TRACK

At its core, fast track is an unusual example of power-sharing between the legislative and executive branches of the U.S. government. International trade is an area in which the Constitution divides power between the Congress and the President, with the Congress explicitly given authority to "regulate commerce with foreign nations" and set tariffs, and the President authority to negotiate with foreign countries. Adding to this is an intra-Congress problem in that the House of

Legislation Authorizing or Extending Trade Negotiating Powers

Legislation	Enacted	Brief Description
Trade Act of 1974 (P.L. 93-618)	Jan. 3, 1975	Trade reform, including five-year authorizing provisions in Title I for "negotiating and other authority" for trade agreements.
Trade Agreements Act of 1979 (P.L. 96-39)	July 26, 1979	Implemented trade agreements negotiated by the United States in the Tokyo Round of the General Agreement on Tariffs and Trade (GATT). Extended for an additional 8 years (until Jan. 3, 1988), the President's authority to negotiate trade agreements, under expedited procedures.
Trade and Tariff Act of 1984 (P.L. 98-573)	Oct. 30, 1984	Included Section 401 (for the negotiation of a free trade agreement with Israel) and Section 404 (a provision on fast-track procedures for perishable articles).
Omnibus Trade and Competitiveness Act of 1988 (P.L. 100-418)	Aug. 23, 1988	Comprehensive trade legislation including section 1102, providing authority for the President to enter into reciprocal bilateral and multilateral trade agreements (for five years until June 1, 1993).
Trade Act of 2002 (P.L. 107-210)	Aug. 6, 2002	Title XXI is the Bipartisan Trade Promotion Authority Act of 2002 (for five years until June 1, 2007). Other provisions in this major trade bill include the Andean Trade Preference Act, the Trade Adjustment Assistance program, and the Generalized System of Preferences program.

Representatives is granted a initiating role in tax changes, including tariffs, but only the Senate has a role in ratifying treaties. Given this breakout, an international negotiation focused on trade clearly falls into an area where both the President and the Congress could credibly claim primacy under the Constitution; and a treaty approved by the Senate alone offers an imperfect mechanism for consideration of trade agreements.

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This potential academic problem, however, has some real-world implications, particularly in those cases in which the Congress does not approve of portions of the agreement negotiated by the President and either sends it back for renegotiation or simply refuses to approve a portion of the agreement. The foreign countries involved in such an agreement would be understandably irritated by this forced renegotiation and might demand changes of their own or abandon the draft agreement entirely. This problem is especially acute with respect to multilateral negotiations in which some 150 countries forge delicate compromises that cannot easily be reopened or amended.

The question of how the United States approves and implements international trade agreements came to a head in the late 1960s and early 1970s. President Lyndon Johnson had entered into certain agreements addressing non-tariff issues under his own authority—that is, without submitting them to Congress for approval. Members of Congress reacted to this development with alarm since non-tariff barriers potentially affect a large range of issues ordinarily fall under Congress' purview—health, safety, taxation, and so forth.

In the wake of Watergate, Congress sought increased transparency and oversight over trade negotiations. At the same time, the President and trading partners sought a mandate by Congress to pursue trade negotiations. The result was the Trade Act of 1974, which offered the President a timely vote on his agreement without amendment in return for increased congressional input on and oversight of trade negotiations. Thus, from the beginning, fast track balanced the practical needs of trade negotiations with the legitimate demands of Congress for a role in the negotiation process.

Since 1974, it has become clear that fast track authority is not required for every trade agreement. The U.S.-Jordan FTA, for example, was negotiated and approved by Congress without the benefit of fast track. Other FTAs, particularly those with small, eager trading partners, might be similarly handled. It has become equally clear, however, that fast track or something like it greatly simplifies the process of negotiating a complex, hard-fought trade agreement—particularly one involving a number of countries. Certainly, the record of recent years would indicate that far more agreements are negotiated with fast track in place than without it. At the very least, the presence of fast track seems to be read overseas as evidence that the United States is serious about concluding new agreements.

Largely for this reason, Presidents and Congresses since 1974 have repeatedly returned—with some refinements—to similar fast track models. Under the current version in the 2002 Trade Act, the up-or-down vote without amendments is maintained. For its part, however, the Congress lays out a series of negotiating objectives to be followed by the President and requires three months to review a draft agreement before it is signed. The legislation contemplates a process for drafting the legislation to implement the agreement that calls for cooperative

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drafting by the President and the relevant committees of Congress before the legislation is formally submitted to Congress for approval. In cases involving an FTA (as opposed to a global trade agreement), the President must also submit the name of the country or countries he wishes to negotiate with and additional information before formally initiating negotiations.

Several of these provisions provide Congress the opportunity for some input into the trade negotiation process. That said, the formula also gives the Congress a different role "in regulating commerce with foreign nations," setting tariffs, and providing "consent" to international agreements than was likely envisioned by the framers of the Constitution. The fast track retains for Congress the final say on implementing trade agreements, but the power of individual Members of Congress to press their concerns is reduced compared to other pieces of legislation because amendments and delays are not allowed.

Although the process was intended by some of its authors to enhance Congress's role in trade negotiations, over time fast track has evolved to put the President clearly in the lead on international trade negotiations and restrict the power of the Congress to block presidential trade initiatives. All agreements do ultimately require the assent of Congress, but the President has considerable power both to select the trade negotiating partners and to set the details of the agreement. Whether a practical necessity or not, the transfer of power is real.

IT'S ABOUT POWER

This formula is a generally practical approach for allowing trade negotiations to proceed within our system of checks and balances and divided power, but in the last decade and a half international trade has been a controversial topic. As epitomized by the

Recent Congressional Votes on Free Trade Agreements and on "Fast Track" Negotiating Authority

Partner Country/Region	Year Approved	House Vote	Senate Vote
NAFTA	1993	234–200	61–38
Jordan	2001	Voice Vote	Voice Vote
Chile	2003	270–156	65–32
Singapore	2003	272–155	66–32
Australia	2004	314-109, 1 Present	80–16
Morocco	2004	323–99	Unanimous Consent
CAFTA-DR	2005	217–215	55–45
Bahrain	2005	327–95	Unanimous Consent
Trade Act of 2002	2002	215–212	64–34

debate on the North American Trade Agreement (NAFTA) in the early 1990s, the consensus behind liberal international trade has certainly eroded since its high water mark in the 1960s.

The conventional wisdom is that free trade has taken a particular beating in Congress. As so often happens, however, the conventional wisdom overstates the case. Congress has never turned down a trade agreement in the modern era. There are clearly protectionist sentiments expressed in the Congress, but such has been the case throughout the history of the United States. The congressional votes on NAFTA and the ill-named CAFTA—the Central American Free Trade Agreement—were close, but most recent FTAs passed comfortably in both the House and the Senate. In recent years, free trade has been more popular among Republican Members of Congress than among Democrats, but on recent FTAs—aside from CAFTA and NAFTA—fully a third of Democrats in both Houses of Congress joined strong Republican majorities in support of the agreement.

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The votes on fast track itself, however, have been considerably closer. The 2002 Trade Act, for example, ultimately passed the U.S. House of Representatives by three votes—after surviving earlier votes by margins as small as a single vote.

Each of these congressional votes has its own unique history. In some cases, feelings about the President, the congressional leadership, and the overall political environment likely swayed a number of votes. Each individual congressman likely voted the way he or she chose to vote driven by a complex set of considerations. Still, reviewing the statements of the Congressmen who voted no on fast track suggests that as many were opposed to "giving the President a blank check" as were concerned about imports flooding the U.S. market.

The relatively strong support enjoyed by most free trade agreements—especially compared to that in favor of the original grant of fast track—suggests that it is the transfer of power to the President which is built into fast track as much as the merits of free trade that motivate congressional opposition.

PERMANENT FAST TRACK

Given the value of fast track in forging new trade agreements, the question naturally arises: Is another balance possible, a balance that allows trade negotiations to proceed without interruption, but enjoys greater consensus within Congress? In short, is there a way to consistently win the strong majorities that supported the U.S.-Australian FTA instead of the razor-close votes on CAFTA and on fast track itself?

The fact is, there is nothing magical about the current formula for fast track. It is just one practical solution to a complex problem of balancing power between the political branches of the U.S. government. If the President were granted lasting negotiating authority in return for Congress having more authority over the substance of individual negotiations, it is perhaps possible to get out of the cycle of limited grants of fast track followed by interruptions. In short, it is possible to create a permanent fast track.

One approach would be to create a permanent grant of fast track enshrined in legislation and in the rules of both the House and the Senate. Rather than simply allowing the President to pursue any agreement he chooses, however, the specific authority to negotiate could be more focused.

The President could be required to obtain congressional approval in the form of a resolution before initiating any trade negotiation. The joint resolution could include specific negotiating objectives tailored to the countries and issues involved in the contemplated agreement. As is the case in the current grant of fast track, these objectives would not be specifically binding but would provide guidance to U.S. trade negotiators. Since they would be specific to the negotiation at hand, however, they would have the advantage of being more targeted and relevant; they would very likely provide political limitations on the potential outcome of negotiations.

A pre-approval resolution would also send a strong signal to U.S. trading partners that agreements along the lines of that described in the resolution would win congressional support.

This resolution to grant fast track could be drafted with the relevant committees of Congress—as the current implementing legislation for trade agreements is prepared—to ensure that Congress has greater say in the shape of the eventual agreement. To avoid filibuster and related problems, the resolution itself would likely need to enjoy the protection of a kind of fast track to avoid unnecessary delays. Once the final agreement was concluded, the legislation to implement it—like all legislation—would have to be submitted to Congress for final approval under some sort of fast-track like process. But given that Congress has outlined the agreement it desires, one that comes close to meeting its objectives would likely be easily approved by Congress.

THE CASE FOR PERMANENT FAST TRACK

This approach would create far more continuity in trade negotiations because the United States would always be in a position where it could begin trade negotiations subject to the agreed process. After some consultation with Congress, a President could launch an agreement at any time. A guaranteed vote on his resolution to initiate negotiations would ensure Congress was afforded the upfront opportunity to consider the prospective agreement while ensuring that the issue could not be indefinitely delayed.

It is possible that this approach would encourage Presidents to pursue agreements that enjoy greater congressional support instead of pursuing marginal cases. But this may be a good outcome. The relatively popular and easily approved FTAs with Australia and Singapore, for example, not only enjoyed greater congressional support than the CAFTA, but also offered greater economic benefits according to most estimates. In general, an agreement that promised compelling economic benefits would likely enjoy strong support; focusing on those agreements would actually be a step forward for U.S. trade policy and the U.S. economy.

If the President wanted to negotiate an agreement that offered fewer benefits or was for some other reason controversial, the President would have the opportunity to make his case to Congress and receive a vote. Such a vote may be difficult to win, but that is part of the central challenge (and virtue) of democratic government.

A pre-approval resolution would also send a strong signal to U.S. trading partners that agreements along the lines of that described in the resolution would win congressional support. This is likely to strengthen the hand of U.S. negotiators and speed negotiations.

There is likely no perfect process for allowing trade negotiations to proceed and to protect the constitutionally prescribed role of the Congress. The current model for fast track, however, was arrived at more by trial and error than clear design. It has allowed trade negotiations to proceed, but only with fits and starts. It is also an approach that likely rebalances power in a way the founding fathers would not have intended and with which many in Congress are uncomfortable. Although no perfect alternatives are apparent, it is possible to address the clear weaknesses of the current process and allow trade negotiations to proceed.

The increasing importance of trade—both politically and economically—suggests that the fast track process may warrant another look. Despite some grumbling, there is a strong economic case that trade liberalization is an engine of growth for both the U.S. and the global economy and that trade agreements have driven that liberalization. That being the case, the United States can balance executive and congressional power in a way that allows trade agreements to be concluded without needless delay. With the end of the current grant of fast track due to expire in June 2007 and another disruption of trade negotiations possible, now would be a particularly good time to consider a permanent fast track. ◆