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Fast Track for Trade Agreements: Procedural Controls for Congress and Proposed Alternatives

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Summary

The fast track trade procedures in the Trade Act of 1974 operate as procedural rules of the House and Senate, and the statute itself declares them to be enacted as an exercise of the constitutional authority of each house to determine its own rules. The procedures prohibit amendment in both houses and assure the covered bills an opportunity to move forward at each essential step in the legislative process.

The intent of these procedures is to ensure that a bill implementing a nontariff trade agreement will be able to reach an "up-or-down" vote in the form submitted and in a timely manner. These procedures prevent Congress from altering an implementing bill or declining to act, but permit it to enact or reject the bill. By these means Congress retains authority to legislate in the areas covered, yet affords the President conditions for effective negotiation.

The Constitution generally empowers the President to conduct foreign policy, and in practice, only the executive can effectively speak for the United States in negotiations.

Implementing the agreement, on the other hand, normally requires changes in existing law, which only Congress might enact. Laws providing fast track negotiation authority for nontariff trade agreements have compensated for the restrictions placed on the legislative powers of Congress by providing, instead, mechanisms for Congress to influence the terms of the agreements, and of their implementing legislation, through other phases of the process, including:

- defining what implementing bills qualify for fast track consideration;
- placing conditions on the form of the negotiations and the content of both agreements and implementing legislation; and
- establishing notice and consultation requirements.

These mechanisms permit Congress to deny fast track consideration to implementing bills if it concludes that the executive is not conducting negotiations in accordance with statutory requirements. Most of these mechanisms appear as provisions of laws that have given the President authority, for a limited period, to negotiate trade agreements that may be implemented through legislation considered under fast track procedures.

The President's 1997 fast track proposal, as well as two bills (S. 1269 and H.R. 2621) reported by the Senate Committee on Finance and the House Committee on Ways and Means, are generally similar in the negotiating authority they grant, the notifications and consultations they require, and the processes of implementation and enforcement they provide. There are, however, some differences that could become significant factors in the debate.

Contents

The author appreciates numerous highly useful comments on previous drafts of this paper from Vladimir Pregelj, Specialist in International Trade and Finance, Economics Division; Stanley Bach, Senior Specialist in the Legislative Process, Government Division; and Jeanne Grimmett, Legislative Attorney, American Law Division. He also appreciates support and apt review from his supervisors, Steve Stathis, Head, Congress Section, and Michael Koempel, Chief, Government Division.

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Expedited Procedures under the Trade Act

The term "fast track" is commonly used in Congress to refer to what are more formally called expedited procedures. Expedited procedures are designed to assure that Congress will be able to consider a specified kind of legislation on the floor and actively decide whether to enact it. Typically, expedited procedures are established in statutes that identify a category of legislative measure to which the procedures apply.

Often, the measures specified are joint resolutions to approve or disapprove some action that the statute empowers the President to take, but only with that approval or in the absence of that disapproval. The *House Rules and Manual* contains a compilation of statutory provisions establishing expedited procedures relating to more than 30 policy areas. These include reorganizations of the executive branch (for which the expedited procedure mechanism seems to have originated), war powers, budgetary impoundments, arms exports, energy conservation, nuclear waste storage, and military base closings.[1]

In recent years, however, the term "fast track" has most often been used to refer to certain expedited procedures first established by the Trade Act of 1974.[2] These expedited procedures, which this report refers to as the "trade fast track procedures," govern consideration of certain bills to implement international trade agreements that contain provisions to reduce nontariff barriers to trade, or to establish a free trade area. These agreements may be referred to as "nontariff trade agreements," although they generally contain provisions affecting tariffs as well.[3]

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[1] U.S. Congress, House of Representatives, *Constitution, Jefferson's Manual, and Rules of the House of Representatives of the United States, One Hundred Fourth Congress*, H.Doc. 103-342, 103rd Cong., 2nd sess., [compiled by] Charles W. Johnson, Parliamentarian (Washington: GPO, 1995), §§1013(1)-1013(32). Hereafter cited as *House Rules and Manual*.

[2] P.L. 93-618 (88 Stat. 1978), as amended. The fast track provisions appear chiefly in §§151-152 (19 U.S.C. 2191, 2192); in *House Rules and Manual*, §1013(11D).

[3] U.S. Library of Congress, Congressional Research Service, *Fast-Track Implementation of Trade Agreements: History, Procedure, and Other Options*, by Vladimir

(continued...)

The law governing use of trade fast track procedures provides that any nontariff trade agreement may enter into force only through enactment of a bill to implement it. This "implementing bill" may qualify for fast track consideration only if the provisions of the trade agreement, and the process of negotiating it, meet certain conditions, elaborated below.[4] These conditions define and delimit the President's authority to negotiate trade agreements that may receive fast track consideration, which may be called the "fast track negotiating authority."

The 1974 Trade Act established the trade fast track procedure as permanent law, and its provisions have since remained largely unchanged. That act, however, provided the President with fast track negotiating authority only for a specified period of time. Subsequent statutes have renewed this negotiating authority for additional, but always limited, periods. The most recent general renewal, enacted in the Omnibus Trade and Competitiveness Act of 1988,[5] expired in 1993. (Subsequent legislation authorized fast track treatment solely for agreements made pursuant to the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) entered into before April 16, 1994.)[6]

After the fast track negotiating authority expired, President Clinton sought its renewal, and the 104th Congress (1995-1996) considered legislation for this purpose. No legislation on the subject was enacted, however, in part because of controversy about the extent to which nontariff trade agreements should remain qualified for fast track action if they addressed labor and environmental issues.[7] On September 16, 1997, President Clinton submitted to the 105th Congress a new proposal for renewal of this authority.[8] Both the House Committee on Ways and Means and the Senate Committee on Finance have since reported bills on the subject.[9]

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[3](...continued)
N. Pregelj, CRS Report 97-41 E (Washington: updated September 29, 1997), p. 3.

[4] These conditions and their development are discussed in detail in Pregelj, *Fast-Track Implementation*, especially pp. 3-9.

[5] P.L. 100-418 (102 Stat. 1107). Hereafter cited as OTCA 1988.

[6] P.L. 103-49 (107 Stat. 239, 19 U.S.C. 2902(e)); Pregelj, *Fast-Track Implementation*, pp. 6-7.

[7] Pregelj, *Fast-Track Implementation*, pp. 13-14.

[8] U.S. Congress, House, *Proposed Legislation: "Export Expansion and Reciprocal Trade Agreements Act of 1997," message from the President of the United States transmitting a draft of proposed legislation to establish procedures for notice, consultations, and implementation with regard to certain trade agreements, and for other purposes*, H. Doc. 105-130, 105th Cong., 1st sess. (Washington: GPO, 1997), 41 pp.

[9] For details of congressional action on these proposals, see U.S. Library of Congress, Congressional Research Service, *Trade Agreements: Renewing the Negotiating and Fast-Track Implementing Authority*, by Vladimir N. Pregelj, CRS Issue Brief 97016 (Washington: continually updated); and U.S. Library of Congress, Congressional Research Service, *Fast-Track Authority: The Debate over Reauthorization*, by George Holliday, CRS Report 97-876 E (Washington: October 10, 1997), 6 pp.

This report describes the provisions and operation of the trade fast track procedure. It examines the relationship of these procedures to the fast track negotiating authority, some procedural issues involved in this relationship, and how the relationship balances pertinent powers and prerogatives of the institutions involved. The report also looks at ways in which the constitutional authority of each house over its rules affords Congress opportunities to overcome the legislative constraints of fast track procedures. Finally, the report discusses current proposals for change in the trade fast track procedure and in the fast track negotiating authority.[10]

Trade Fast Track Procedure and the Role of Congress

Balancing Institutional Prerogatives

Negotiating and Legislating. Trade fast track procedures and the associated negotiating authority are made up of several major elements, which collectively embody a balance and accommodation among the roles, authority, and prerogatives of the various institutions involved. The authorities and prerogatives affected include those of the President to conduct foreign policy and international negotiations, of Congress to legislate, of the House of Representatives to initiate revenue legislation, of the Senate to oversee foreign relations, and of the revenue committees to exercise their jurisdictions.

The Constitution generally empowers the President to conduct foreign policy, and, in practice, only the executive can effectively speak for the United States in negotiations.[11] For these reasons, it is accepted that only the executive can negotiate a trade agreement. Implementing the agreement, on the other hand, normally requires changes in existing law, which, under the Constitution, requires congressional action.[12]

Yet the congressional power to legislate entails the power to determine the content of any legislation acted on, and also to decide whether or not to legislate at all. In principle, if the President negotiated a trade agreement that required implementation in law, Congress might enact legislation at variance with the terms negotiated, or might even decline to act on the subject at all. Declining to act would prevent the agreement from being implemented. Altering a negotiated agreement

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[10] For details of the present procedure, the conditions for its use, and their development, see Pregelj, *Fast-Track Implementation.*

[11] Article II, section 3. In U.S. Congress, Senate, *The Constitution of the United States of America: Analysis and Interpretation*, S. Doc. 103-6, 103rd Cong., 1st sess., prepared by the Congressional Research Service, Library of Congress, Johnny H. Killian, George H. Costello, Co-Editors, (Washington: GPO, 1996), pp. 539-553. (Hereafter cited as *Constitution Annotated.)*

[12] Constitution, Article I, section 1. In *Constitution Annotated*, pp. 63, 73-90, see especially. pp. 76-78; see also pp. 496-497.

would also be tantamount to not accepting it, since it would leave the parties still in disagreement over what terms they will accept.

The possibility that Congress might exercise its discretion over lawmaking in either of these ways would present an obstacle to successful negotiations. In practical terms, it would put the President in the position of having to negotiate without being able to give assurances that the United States would carry out any undertakings to which he might agree, or even reach a decision on whether to do so. Without assurances of this kind, potential partners could face a potentially endless process of re-negotiation, into which they might be unwilling to enter.

Treaty Power and Revenue Power. For trade agreements dealing with tariffs alone, the Reciprocal Trade Act of 1934[13] and subsequent enactments provide a resolution to this dilemma. In these acts Congress has delegated to the President, within limits, power to implement negotiated reductions in tariffs by proclamation — by his unilateral action. Since at least the 1960s, however, trade agreements have increasingly addressed nontariff barriers to trade and the establishment of free trade areas.[14] Congress has always chosen to retain legislative authority over implementation of these "nontariff" trade agreements.

Requiring the President to submit these agreements in the form of treaties might reduce the likelihood of their alteration by Congress, although not that of congressional inaction. Treaties take effect only if the Senate, by a two-thirds vote, gives "advice and consent" to their ratification.[15] The Senate may accompany this action with a statement of reservations, understandings, etc. Any amendment made by the Senate to the treaty itself, however, would vitiate its character as an agreement with other parties, as suggested above, and would presumably make necessary its renegotiation.

It is generally held, as well, that nontariff trade agreements are not self-executing, but must be implemented by legislation. Even if the Senate approved a trade agreement in the form of a treaty, implementing legislation would still require action by both houses of Congress. Further, a nontariff trade agreement typically includes provisions requiring changes in tariffs. A bill to implement the agreement would therefore constitute revenue legislation, which, under the Constitution, must originate in the House of Representatives.[16] A treaty approach would entirely circumvent this prerogative of the House.[17]

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[13] Reciprocal Trade Agreement Act of 1934 (P.L. 73-316, 48 Stat. 943) and its subsequent renewals. See also Pregelj, *Fast-Track Implementation*, pp. 1-2.

[14] Pregelj, *Fast-Track implementation*, p. 3-6.

[15] Constitution, Article II, section 2, clauses 2-3. In *Constitution Annotated*, pp. 469-504, 539-547.

[16] Constitution, Article I, section 7, clause 1. In *Ibid.*, pp. 135-137.

[17] These considerations are elaborated in U.S. Library of Congress, Congressional Research Service, *Why Certain Trade Agreements Are Approved as Congressional-Executive Agreements rather than as Treaties*, by Jeanne J. Grimmett, CRS Report 97-896

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The fast track negotiating authority has therefore provided that a nontariff trade agreement may enter into force only when approved by Congress through legislation. (As described below, the trade fast track procedure also ensures that when this legislation contains revenue provisions, it will originate in the House). Under the Trade Act of 1974 and subsequent statutes, after the President signs a nontariff trade agreement, he is to submit it to Congress along with a draft implementing bill.[18] If the President meets these requirements, and if the agreement and its negotiation meet the conditions defining the fast track negotiating authority, then the implementing bill is to be considered under the fast track procedures defined in the 1974 act.

To deal with the possibility that Congress might alter an implementing bill, the Trade Act of 1974 provides that neither chamber may consider any amendment thereto, either in committee or on the floor. To deal with the possibility that Congress might fail to take up the bill, the act establishes procedures under which obstacles to action at each stage may be overcome, so as to allow House and Senate action within specified time periods. These two elements, of preventing amendment and preventing inaction, are the key characteristics of an expedited procedure.

The Trade Fast Track Procedure

Many provisions of the trade fast track procedure first established by §151 of the Trade Act of 1974[19] reflect features common among expedited procedure statutes. As with other expedited procedures, these provisions operate as procedural rules of the House and Senate, and the statute itself declares them to be enacted as an exercise of the constitutional authority of each house of Congress to determine its own rules.[20] A statutory expedited procedure is considered to supersede general rules of the House or Senate only to the extent it is incompatible with them, so that where the statute is silent, those general rules will apply.[21] Often, therefore, at points where general rules already tend to foster the objectives of expedited procedures, the statutory procedures rely on, or work in conjunction with, those general rules.

Prohibiting Amendment. The trade fast track procedure addresses the objective of preventing amendment by a single blanket prohibition on amendment in both houses (§151(d)). It reinforces this prohibition by forbidding its suspension either by motion or by unanimous consent. This single prohibition covers not only initial action in both houses, but also any attempt by either chamber to amend an

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[17](...continued)
A (Washington: updated September 29, 1997), 5 pp.; and U.S. Library of Congress, Congressional Research Service, *GATT and Other Trade Agreements: Congressional Action by Statute or by Treaty?*, by Louis Fisher, CRS Report 94-890 S (Washington: November 17, 1994), 12 pp.

[18] Most recently stated in OTCA 1988, §1103(a)(1)(C) (19 U.S.C. 2903(a)(1)(c)).

[19] These provisions, now codified at 19 U.S.C. 2191, are hereafter often referred to as §151.

[20] Article I, section 5, clause 2. In *Constitution Annotated*, p.123-125.

[21] Trade Act of 1974, §151(a)(1), §151(f)(5) (19 U.S.C. 2191); OTCA 1988, §1103(d)(1) (19 U.S.C. 2903).

implementing bill received from the other. (As a result, no conference to resolve differences can occur, so that there can be no amendments proposed in a conference report.)

Section 151 includes no explicit reference to committee amendments, and does not need to. Committees technically only recommend amendments to the floor. Section 151 does not prevent a committee from reporting a bill with proposed amendments, but it prevents either house from considering or adopting any of these amendments. A committee does retain its usual option of reporting, as an original bill or clean bill, a new measure whose text would incorporate the committee's changes to the original measure. This new measure, however, would not be covered by the statutory requirement for fast track consideration, which is applicable only to the bill originally introduced pursuant to the President's submission of the trade agreement.

The prohibition on amendment also shares the function of preventing inaction, for it ensures that the implementing bills initially passed by the House and Senate will be identical. If the two versions could differ, it would be most difficult to ensure that Congress, by conference committee or otherwise, could reach agreement on a final version acceptable to both Houses. Neither mandatory time limits nor any other mechanism can force negotiators to come into agreement.[22]

Preventing Inaction. The second objective of expedited procedures is to assure the covered bills an opportunity to move forward at each essential step in the legislative process. The provisions of the trade fast track procedure foster this objective either by: (1) providing for the bill to move through a step automatically or (2) ensuring that supporters will be able to act to accomplish the step.

Pre-floor action. First, the trade fast track directs that the implementing bill be introduced in each chamber, by the two floor leaders jointly or their designees, on the first day that house meets after the President submits the draft bill.[23] The presiding officer in each house is directed to refer the bill to the committee or committees of jurisdiction. This referral provision reflects normal procedure in each chamber, except that a joint referral may in some cases be at variance with the Senate's general rule that a measure be referred solely to the committee whose jurisdiction predominates in the subject matter of the bill.[24] The committees receiving these referrals would normally be expected to include the House Committee on Ways and

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[22] The two chambers must pass a measure in identical form before it can be presented to the President for approval; neither can override the other in this process. Constitution, Article I, section 7, clauses 2-3. In *Constitution Annotated*, pp.132-139.

[23] Trade Act of 1974, §151(c)(1). The introduction is "by request," signifying that the sponsors have introduced the measure on behalf of another (in this case, the President).

[24] Senate Rule XVII, paragraph 1. In U.S. Congress, Senate, *Senate Manual, Containing the Standing Rules, Orders, Laws, and Resolutions Affecting the Business of the United States Senate* [104th Congress], S.Doc. 104-1, 104th Cong., 1st sess., prepared by Lana R. Slack (Washington: GPO, 1995), §17.1. (Hereafter referred to as *Senate Rules Manual*.).

Means and the Senate Committee on Finance, which exercise primary jurisdiction over "tariffs" and "reciprocal trade agreements."[25]

If any committee to which the bill is referred does not report after 45 days of session in the respective chamber, the committee is automatically discharged (§151(e)).[26] This time limit eliminates the normal discretion of the committee not to act on a measure referred to it. If the implementing bill contains revenue provisions (called an "implementing revenue bill"), any Senate committees are instead to report, or be discharged from, the House bill, and this action need not occur until 15 days of session after the Senate receives the House bill, if that period ends later than the 45-day deadline. This device ensures that final action will take place on a measure originating in the House, as the Constitution requires for revenue bills.

Floor Action. Once the committees of referral report an implementing bill, or are discharged from considering it, the measure is *available* for floor consideration. In the House, where a measure becomes actually *eligible* for floor consideration only through obtaining "privileged" status,[27] the statute automatically ensures this eligibility by making the motion for consideration itself "highly privileged."

In each chamber, however, consideration actually *occurs* only through procedural actions on the floor, which in practice are normally in the control of the leadership of the majority party. The fast track provisions accordingly do not make these actions automatic, but instead protect the ability of supporters of an implementing bill to accomplish them,[28] depriving the leadership in this situation of its usual control of scheduling. In the House, this protection is afforded by the privilege given to the motion to consider, and by making the motion itself nondebatable, instead of debatable for one hour (or more if the House defeats the motion for the previous question). In the Senate, the motion to consider is made "privileged and nondebatable," which prevents opponents from blocking the measure by dilatory debate on whether to take it up.[29]

Once an implementing bill is under consideration in either chamber, the statute secures the possibility of reaching a final vote by limiting debate on the measure to 20 hours, which may be reduced by vote. For the Senate, the time is equally divided and controlled by the two party floor leaders; for the House, equally divided between

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[25] House Rule X, clause 1(s), in *House Rules and Manual* , §688. Senate Rule XXV, paragraph 1(g), in *Senate Rules Manual*, §25.1.

[26] "Days of session" here means calendar days on which the respective chamber is in session. §151(e)(3).

[27] See "Privilege" in Kravitz, Walter. *Congressional Quarterly's American Congressional Dictionary*. 2nd ed. (Washington: Congressional Quarterly, 1997), pp. 195-196.

[28] Procedures to govern floor action on the measure are contained in §151(f) (House and 151(g) (Senate).

[29] Some expedited procedures specify that the motion to consider remains privileged even after having previously been disagreed to. This further protection of the means to secure consideration is not explicit in the trade fast track.

supporters and opponents. Normally, the House will give control of the time to the chair and ranking minority member of the reporting committee (presumably the Committee on Ways and Means). If the chair and ranking minority member are on the same side of the question, the latter might be replaced by another minority member of the reporting committee holding a contrary view.

The statute also requires each chamber to complete floor action within 15 days of session after committees report or are discharged. No mechanism appears to be available to enforce this time limit directly. Senate procedure affords no motion or other means to close consideration and take an immediate vote. House procedure does permit achieving that result, but only by vote, so that an attempt to conclude consideration could be voted down. Also, §151 does not explicitly create a point of order against actions that would prevent a final vote on the bill from taking place as required, and the general practice of neither chamber recognizes any point of order to this effect. Normally, however, the statutory mechanisms limiting debate, including the motion to reduce the time for debate, would probably suffice to bring about this result.

Other provisions on floor consideration, similar to those in many expedited procedure statutes, restrict possible dilatory tactics that could block the measure. Some of these automatically exclude certain actions otherwise in order. In both chambers:

- the motion to consider may not be amended;
- the vote on neither the motion nor (in the House) the bill may be reconsidered;
- no motion to recommit the bill is in order.

Further provisions of this sort limit debate on actions that remain permissible, ensuring that none of those actions will unduly delay the progress of the measure. In both chambers, a motion to limit debate to less than 20 hours is nondebatable. For the House, appeals, and motions to postpone consideration of the bill or proceed to other business, are also nondebatable. For the Senate, debate on an appeal or other debatable motion is limited to one hour, divided between the Senator raising the appeal and the bill manager (or minority leader); this time would be in addition to the 20 hours for the measure itself.

Final Action. A bill passed by either chamber is routinely transmitted to the other for its action. The statute directs that after either chamber so receives an implementing bill, the final vote in that chamber shall be on the measure from the other. This requirement ensures that both chambers can pass the same one of the two identical measures, so that one can be presented to the President.[30]

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[30] For legislation not being considered under expedited procedures, this result is normally reached through routine procedures in whichever house acts second on the measure.

Unlike some expedited procedures, the trade fast track contains no special provisions for overriding a veto. The President would not likely veto a measure whose exact terms he had submitted to Congress. Also, the Constitution specifies that the house receiving a veto message must take it up, though by precedent, it may refer the message to committee or lay it aside rather than vote directly on whether to override.[31]

Some expedited procedures provide that if Congress adjourns *sine die* before statutory time limits expire, the time periods provided begin anew upon the reconvening of Congress or resubmission of the proposal. The trade fast track lacks a provision of this kind.

Congressional Control of the Fast Track Negotiating Authority

The intent of the fast track procedures in §151 of the 1974 Trade Act is to ensure that a bill implementing a nontariff trade agreement will be able to reach an "up-or-down" vote in the form submitted and in a timely manner. Under these procedures, Congress loses the alternatives of altering an implementing bill or declining to act, but retains those of enacting or rejecting it. By this means it retains authority to legislate in the areas covered, yet affords the President conditions for effective negotiation.

Nevertheless, the power of Congress to accept or reject a proposition negotiated and submitted by the President is far from a full power to legislate on the subject. Laws providing fast track negotiating authority for nontariff trade agreements have therefore compensated for the restrictions placed on the legislative powers of Congress by providing, instead, opportunities for Congress to influence the terms of nontariff trade agreements, and of their implementing legislation, through other phases of the process.[32]

Fast Track Procedures and Fast Track Negotiating Authority

Rulemaking Provisions; Provisions that Expire. Some of these opportunities for Congress to influence the terms of trade agreements are established by provisions that define what implementing bills qualify for fast track consideration, chiefly those of §151. Because these provisions of §151 have the effect of governing proceedings in Congress, they constitute what are known as "rulemaking provisions" of the

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[31] Article I, section 7, clause 2. In *Constitution Annotated*, pp. 137-141; *House Rules and Manual* , §108; and U.S. Congress, Senate, *Riddick's Senate Procedure: Precedents and Practices*, S.Doc. 101-28, 101st Cong., 2nd sess., by Floyd M. Riddick and Alan S. Frumin (Washington: GPO, 1992), p. 1382-1385.

[32] Provisions of this kind, most recently effective in §§1102 and 1103 of OTCA 1988, (19 U.S.C. §§2902 and 2903), are more fully discussed in Pregelj, *Fast-Track Implementation*, pp. 4-9.

statute, meaning that they were enacted under the constitutional authority each house has to make its own rules.[33]

Other opportunities for Congress to influence trade agreements have been established by provisions that either specified the contents that nontariff trade agreements may have, or regulated the process of negotiating them. Most of these specifications and regulations could not be enacted as rulemaking provisions, because they regulated actions not of Congress, but of the executive. Therefore, they were enacted instead as conditions of the grant of fast track negotiating authority.

The rulemaking provisions of §151 of the 1974 act are permanent law, but Congress has always provided the fast track negotiating authority only for a specified period. Most provisions defining that negotiating authority, therefore, have been effective only during the periods when that authority itself was in effect, though some appear in provisions of permanent law that do not expire. In the course of reenacting the fast track negotiating authority from time to time, Congress has also modified the conditions restricting its use.

The following discussion describes those conditions as they were most recently found in the Omnibus Trade and Competitiveness Act of 1988 ("OTCA 1988"), whose effectiveness expired in 1993. The trade fast track procedures in §151, and other provisions of permanent law (whether rulemaking provisions or not), are described as they currently stand.

Relation of Fast Track Procedure to Negotiating Authority. Even though the conditions of the fast track negotiating authority were not enacted as procedural rules, they were connected to the fast track procedure in a way that allowed Congress to enforce their performance. The definition of the fast track procedure in §151 specifies that a bill qualifies for fast track consideration only if the agreement it implements was negotiated pursuant to the fast track negotiating authority. This specification in effect incorporates by reference, in the rulemaking provisions defining the fast track procedure, the conditions placed on the scope of the fast track negotiating authority. If a trade agreement resulted from negotiations that did not meet the conditions of the negotiating authority, the implementing bill would not qualify for fast track consideration.

The conditions that OTCA 1988 (and its predecessors) placed on the scope of the fast track negotiating authority could not, and did not, impair the ability of the President, in principle, to use any negotiating process to arrive at trade agreements on any subjects, or to propose bills to implement them containing any desired provisions. Nevertheless, if any agreement did not meet the statutory requirements, a bill to implement it would not qualify for fast track consideration. Congress would therefore be able to amend the bill or withhold action on it. Thus, even though Congress could not ultimately restrict the contents of trade agreements or the process

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[33] The use and implications of this rulemaking authority are further discussed in the section below on "Control through the rulemaking power" (over the use of the trade fast track procedure).

of negotiating them, it did restrict those that could be implemented through the trade fast track procedures.

By placing these limitations on the scope of the fast track negotiating authority, Congress was effectively able to limit the kinds of trade agreement covered, to those for which it was willing to limit, in advance, its usual legislative prerogatives. Establishment of these limitations enabled Congress more readily to accept the trade fast track procedure itself as practicable and effective.

Limiting the Scope of the Negotiating Authority

Some of the restrictions that OTCA 1988 (and its predecessors) placed on the fast track negotiating authority operated by placing limits on the substance of both the agreements covered and the implementing bills. Others regulated the process by which the President negotiated these agreements and submitted the implementing bills. An especially significant category of process restrictions required the President to notify and consult with Congress in connection with pertinent stages in the course of negotiations. These notifications helped enable Congress to monitor a negotiation, and the corresponding consultations enabled it to try to influence the results.

Unlike its predecessors, OTCA 1988 specified the scope of the fast track negotiating authority separately for two different categories of "nontariff trade agreements": those addressing solely nontariff barriers to trade, and those establishing free trade areas. The two sets of requirements were generally parallel, and those for *nontariff barriers alone* remained similar to those previously in effect. The negotiating authority for *free trade areas*, however, instituted some new requirements, especially for notification and consultation, which will be discussed at appropriate points in this section. That Congress enacted these special requirements applying only to negotiations for free trade areas suggests that Congress regarded agreements of this kind with caution, and desired to maintain an enhanced level of scrutiny and control over them.

Many of the requirements established by OTCA 1988 (and preceding statutes), especially the ones for consultations, were so structured that Congress would carry them out chiefly through the agency of its revenue committees, the House Committee on Ways and Means and the Senate Committee on Finance. These arrangements recognized and reinforced the prerogatives of the committees exercising primary jurisdiction over the subjects addressed.

Restrictions on Substance and Process. OTCA 1988 included general restrictions both on how nontariff trade agreements could be concluded under the fast track negotiating authority, and on when bills to implement them qualified for consideration under fast track procedures. The requirements for concluding agreements were stated as conditions on the negotiating authority, but those for implementing bills were enacted as amendments to the rulemaking provisions of §151 defining the fast track procedure.[34] Both kinds of requirement affected both the

[34] §151(b) of the Trade Act of 1974 (19 U.S.C. 2191).

substantive contents permitted in the agreement or bill and the process for arriving at the agreement or enacting the bill.

The *restrictions on the negotiating authority* itself operated, in advance of negotiations, to regulate the kind of nontariff trade agreement that might be negotiated. A key limitation that OTCA 1988 (and predecessors) placed on the process of negotiating these agreements was, of course, the determinate period during which the negotiation had to be concluded in order for the implementing bill to qualify for fast track consideration.[35] To restrict the substance of negotiations, OTCA 1988 (and predecessors) established statements of the objectives that a nontariff trade agreement could reflect, which appear in provisions of permanent law. In current law, some of these objectives relate to the structure of trade generally, agriculture, services, intellectual property, and high technology, as well as the protection of worker rights.[36]

Restrictions on implementing legislation, on the other hand, come into effect after the conclusion of negotiations. They presumably have their effects on the negotiations themselves retrospectively, by encouraging the President to proceed from the outset in a way that will not impair the ultimate qualification of a trade agreement for fast track implementation. Section 151(b) of the 1974 act restricts the substance of an implementing bill by limiting its contents to provisions approving the agreement and the administrative action proposed for the purpose, together with any provisions amending existing law that are "necessary or appropriate" to implement the agreement. Section 151(c) regulates the process for an implementing bill by requiring it to be introduced in the fashion already described in the discussion of the fast track procedure.

Requirements for Notice and Consultation. Some of the consultations mandated by OTCA 1988 and related permanent law are to take place in advance of negotiations. These consultations are not tied to the fast track negotiating authority, but are required by permanent law applying to all trade negotiations. In particular, permanent law requires the U.S. trade representative to consult on overall trade policy, on a continuing basis, with the two revenue committees.[37] Also, as "advisers" to any U.S. trade negotiation delegation, the President is to accredit 10 Members of Congress drawn from the two revenue committees, in each case three from the majority party and two from the minority. He may also draw additional advisers from other pertinent committees. These advisers are to receive briefings on the talks and "provide advice on the development of trade policy for the implementation thereof."[38]

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[35] Trade Act of 1974, §151(b) (19 U.S.C. 2191); OTCA 1988, §1102(b)(1), §1102(c)(1) (19 U.S.C. 2902); 1103(b)(1)(A) (19 U.S.C. 2903).

[36] OTCA 1988, §1101 (19 U.S.C. 2901).

[37] OTCA 1988, §1632(c) (19 U.S.C. 2211).

[38] OTCA 1988, §1632(a) and §1632(b) (19 U.S.C. 2211). Pregelj, *Fast-Track Implementation*, p. 5-6.

Most of the notifications and consultations required by OTCA 1988, however, were to occur in the course of ongoing negotiations for nontariff trade agreements, and were designed to permit Congress to exercise influence on those negotiations. Principally, OTCA 1988 prohibited the President from signing any nontariff trade agreement if he had not notified Congress of his intention to do so at least 90 calendar days beforehand. During the period between this notice and the signing, the President was to consult with the two revenue committees, and any others whose jurisdictions would be affected. These consultations were to cover "the nature of the agreement," how it achieved any established objectives, and the process by which it would be implemented.[39] These consultations in practice consisted of "mock markups," and sometimes also "mock conference committees," in which the committees participate in drafting the terms of the implementing bill that the President then submits.[40]

Only for negotiations to establish a free trade area, and not for nontariff trade negotiations generally, Congress chose to impose an additional set of negotiation and consultation requirements before the pre-submission stage was reached. The President was to give additional notice of the negotiations to the two revenue committees, at least 60 days of congressional session before the 90-day notice, and then to consult with the committees on those negotiations.[41]

OTCA 1988 applied further notification requirements at the point when the President signed any nontariff trade agreement. The President was then required to submit specified supporting documentation to Congress, including the text of the agreement, a statement of administrative action to be taken to carry it out, and a draft implementing bill. Also required was a statement of how the agreement advanced the negotiating objectives originally prescribed by Congress, which would help enable Congress to judge how well its purposes in according the fast track negotiating authority were served.

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[39] OTCA 1988, §1102(d) (19 U.S.C. 2902).

[40] See, for example, U.S. Congress, House of Representatives, Committee on Ways and Means, *Trade Agreements Authority Act of 1995*, report to accompany H.R. 2371, 104th Cong., 1st sess., H. Rept. 104-285 (Washington: GPO, 1995), pp. 16, 19; U.S. Library of Congress, Congressional Research Service, *Trade Legislation in 1988: Conflict and Compromise*, by George Holliday and Arlene Wilson, CRS Report 89-494 E (Washington: August 24, 1989), p. 20; and "U.S.-Canada Free-Trade Agreement Finalized," in *Congressional Quarterly Almanac 1988* (Washington: Congressional Quarterly, 1989), pp. 222-223, 226-227.

[41] OTCA 1988, §1102(c)(3)(C) (19 U.S.C. 2902). "Days of congressional session" here includes all days except those on which at least one house is not in session on Saturday, Sunday, or during an adjournment of more than three days. OTCA 1988, §1103(e) (19 U.S.C. 2903) and §1102(c)(4) (19 U.S.C. 2902). Normally, under these provisions, the "clock" will "run" at the rate of five days per week, except during recesses of Congress, when it will be stopped.

Enforcing Restrictions on the Trade Fast Track

The Rulemaking Authority of Congress

By establishing the specifications in OTCA 1988 for when nontariff trade agreements may qualify for fast track consideration, Congress enhanced its potential to exercise influence, in advance, over the substance of those agreements. When Congress had to decide, under the restrictions of a fast track procedure, whether to implement a nontariff trade agreement, those mechanisms enabled it to do so on the basis of substantial information obtained throughout the negotiation process.

On some occasions, nevertheless, Congress might conclude that a negotiation process or its outcome did not appropriately reflect the intent of the conditions it had prescribed. Under these conditions, the fast track process might require Congress to consider an implementing bill under constraints on its discretion even when it found those constraints inappropriate for that specific situation. In a case of this kind, however, Congress retains several additional ways of recovering its normal legislative prerogatives. All of these ways rest ultimately on the constitutional rulemaking authority of each house of Congress.

Under this rulemaking authority, each house normally adopts or amends its rules by a simple resolution (a measure acted on only by the house to which it applies). By contrast, laws establishing expedited procedures, like other statutes containing rulemaking provisions, are enacted by the joint action of both chambers as well as the President, just as are other laws. As a practical matter, expedited procedures may need to be established in this way, because they may affect the prerogatives of several institutions in ways that each might be willing to accept only as part of an overall accommodation among all. Yet to embody congressional rules in statute seems to give power over the rules of each house to the President and the other house, even though, under the Constitution, those bodies have no claim to that power.

To avoid this problem, each rulemaking statute typically includes a declaration that the rulemaking provisions are enacted as rules of each house, "as an exercise of the rulemaking power" of each. The declaration asserts that, for this reason, each house retains the constitutional right to change those rules "(so far as relating to the procedure of that House) at any time, in the same manner and to the same extent as in the case of any other rule of that House."[42] These declarations affirm the authority of each chamber, by its own sole action, to alter the procedures to which they apply, even though those procedures were established by statute rather than by resolution.[43]

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[42] Specific language quoted is that of §151(a) of the Trade Act of 1974 (19 U.S.C. 2191), covering §151-§153 of that act (19 U.S.C. 2191-2193). Similar language in §1103(d) of OTCA 1988 covers §1103(b)-§1103(c) of that act (19 U.S.C. 2903). Note that these declarations do not cover the provisions setting conditions for the use of these procedures, which require actions by the executive and not only by Congress.

[43] These declarations assert the ability of either chamber of Congress, acting alone, to overturn certain provisions of statute. In *I.N.S.* v. *Chadha,* 462 U.S. 919 (1983), the Supreme Court held that authority granted pursuant to statute could be rescinded or

(continued...)

Some of the means by which Congress might alter the procedures or conditions of the trade fast track rest directly on this constitutional authority, while others are specifically established in statute as additional rulemaking provisions, resting in turn on that ultimate authority. Some permit a chamber to make permanent, general changes in its rules, including changes in those rules enacted as rulemaking provisions of statute. Others allow it to suspend, waive, or alter the application of rules temporarily, in relation to any specific legislation. Still others merely allow Congress to determine how and to what its procedures will apply. All represent additional means by which Congress can further protect its fundamental legislative prerogatives from possible adverse consequences of the restrictions that the fast track negotiating authority places on them.

Controls Specifically Provided in Statute

From the 1974 Trade Act through OTCA 1988, trade statutes established several mechanisms by which Congress could alter the conditions it originally prescribed for use of the fast track procedure. Most of these mechanisms appear in permanent rulemaking provisions of law, even though the negotiating authority to which they relate has been effective only for limited periods. These mechanisms operate by permitting Congress to deny fast track consideration to implementing bills if it concludes that the executive is not conducting negotiations in accordance with statutory requirements. In other words, if Congress finds that negotiations are not fulfilling the conditions in return for which it accepted constraints on its normal legislative discretion, Congress may by its own action vitiate those constraints. In the use of each of these mechanisms, the revenue committees again possess special discretion.

Extension Disapproval Resolutions. Although each renewal of the fast track negotiating authority has been for a fixed period, some, including OTCA 1988, also permitted the authority to be extended for one specified additional period, if the President so requested and neither house adopted a simple resolution disapproving the request by 15 days before the beginning of the extension period.[44] The text mandated for a resolution of this kind, called an "extension disapproval resolution," includes language specifying that the disapproving house is acting "because sufficient

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[43](...continued)
overridden only by a further statutory enactment, and that Congress could not provide for results like those to arise from action by one or both chambers alone. That Congress continues to use the device of the rulemaking statute suggests that it considers this mechanism not to violate the *Chadha* doctrine, because the mechanism governs only procedures that regulate the internal operations of Congress itself, and therefore rests not at all on the legislative power of Congress, but on its rulemaking power instead.

[44] OTCA 1988, §1103(b) (19 U.S.C. 2903). The initial authority extended through May 1991, the extension through May 1993. The mechanism permitting action by one house again was apparently considered permissible under *I.N.S.* v *Chadha* because its effect was only to specify the application of the internal congressional rules of the fast track procedure. See note 43.

tangible progress has not been made on trade negotiations."[45] This mechanism, accordingly, is designed to enable Congress to decide whether continuation of the President's fast track negotiating authority was warranted by the state of negotiations then in progress.

An extension disapproval resolution is to be considered under an expedited procedure established in rulemaking provisions separate from those for an implementing bill, but essentially identical in operation. Differences are that: (1) this procedure lacks the language forbidding suspension of the prohibition against amendments, and (2) in the Senate, the hour provided for debate on a debatable motion or appeals is included in, rather than additional to, the overall 20 hours for debate on the measure.[46] In each chamber, the resolution is to be reported from the respective revenue committee (and, in the House, from the Committee on Rules as well). In practice, a motion to consider the measure would presumably be offered by direction of the reporting committee, and members of that committee would likely have charge of the debate and other essential motions.

Procedural Disapproval Resolutions. Rulemaking provisions of OTCA 1988 also embody a process by which Congress can in effect rescind the fast track negotiating authority at any time during a period for which it may be authorized. If each chamber separately adopts a "procedural disapproval resolution" within any period of 60 days of session,[47] the fast track procedures cease to apply to any bill implementing a nontariff trade agreement. This mechanism was evidently designed specifically to offer Congress a means to enforce the satisfactory occurrence of the consultations mandated by statute. The disapproval resolution must state that "the President has failed or refused to consult with Congress on trade negotiations and trade agreements in accordance with" the statute.[48]

In each chamber, a procedural disapproval resolution is to be a simple resolution reported from the respective revenue committee. In the House, the resolution is to be submitted also by the chairman or ranking minority member of the Committee on Ways and Means or on Rules, and reported from the Committee on Rules as well. In the Senate, the Committee on Finance is to report the resolution as an original measure.[49] These resolutions are to be considered under the same expedited procedure as for extension disapproval resolutions.[50]

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[45] OTCA 1988, §1103(b)(5)(A) (19 U.S.C. 2903).

[46] OTCA 1988, §1103(b)(5)(C) (19 U.S.C. 2903); and Trade Act of 1974, §152(d)-152(e) (19 U.S.C. 2192).

[47] Calculated, here again, to exclude days on which at least one House was not in session on a Saturday or Sunday, or during a recess or adjournment of more than three days. OTCA 88, §1103(e) (19 U.S.C. 2903).

[48] OTCA 1988, §1103(c)(1)(a) and §1103(c)(1)(E) (19 U.S.C. 2903).

[49] OTCA 1988, §1103(c)(1)(B) and §1103(c)(1)(D) (19 U.S.C. 2903).

[50] OTCA 1988, §1103(c)(1)(C) (19 U.S.C. 2903).

By requiring action by both chambers, the process reduced the likelihood that one chamber would continue to operate under the fast track procedure while the other declined to do so. At the same time, by requiring each chamber to act separately, the process respected the doctrine that the force of a rulemaking statute rests on the authority of each chamber separately.

Committee Disapproval for Free Trade Area Negotiations. For proposals specifically to establish a free trade area, OTCA 1988 afforded Congress not only additional consultation requirements, but also additional means for revoking the fast track authority. Unlike the procedural disapproval resolution, however, this mechanism applied against a specific negotiation, not against the general fast track negotiating authority itself.

This procedure placed full discretion for this form of disapproval with each revenue committee, acting alone, and worked in conjunction with the special additional notification to those committees that OTCA 1988 required for negotiations on a free trade area (described in the section on "requirements for notification and consultation," above). The Committee on Ways and Means and the Committee on Finance were each authorized to disapprove the negotiation of any free trade area agreement during the 60 days of session after that special notification. If either panel did so, the implementing bill could not be considered under fast track procedures.

Control through the Rulemaking Power

General Changes in Rules. Either house may at any time use its rulemaking authority explicitly to repeal or alter any of the rulemaking provisions in the 1974 act (or elsewhere in trade statutes). In this way, for example, the House or Senate may change the procedures provided in §151 for consideration of an implementing bill so as to permit amendments or additional motions, or make certain motions debatable.

This course of action would permit either house to alter directly only those provisions that define the fast track procedure itself, which were enacted as rulemaking provisions of statute. It would not permit either house directly to alter provisions defining the scope of the fast track negotiating authority, which were not rulemaking provisions. Therefore, neither house, by unilateral action under its rulemaking authority, could use this means to alter statutory specifications determining whether an implementing bill would qualify for fast track consideration.

Yet as already noted, §151 itself includes some specifications of what measures are subject to fast track consideration, and incorporates others by reference to the conditions defining the negotiating authority.[51] Accordingly, if either house of Congress wished to narrow or broaden the range of legislation to which the fast track procedure would apply, it could rewrite these provisions to alter the conditions of qualifying a bill for that procedure. It might, for example, amend §151 to provide that a trade agreement fostering specified objectives was not an implementing bill within the meaning of the fast track rulemaking provisions, even though the fast track

[51] Trade Act of 1974, §151(b) and §151(c) (19 U.S.C. 2191)..

negotiating authority continued to encompass a trade agreement pursuing those objectives.

One difficulty with action in this form is that the rulemaking authority of each chamber extends to the application of the fast track procedure only in that chamber. If either chamber used its rulemaking authority as just described, some measures might remain qualified for fast track consideration in one chamber but not the other. To make similar changes affecting both chambers, the two chambers would both have to act, either in parallel or jointly. If they jointly passed a new rulemaking statute amending existing rulemaking provisions, it would have to be presented to the President, so that Congress might have to enact the changes over his veto. It might be possible for the two houses to take common action for this purpose, without requiring presidential assent, through a concurrent resolution. In practice, however, Congress has not used concurrent resolutions for altering rulemaking provisions of statute.

Normally, either chamber alters provisions of its rules, including rulemaking provisions of statute, by simple resolution of that chamber. The procedure for considering a resolution for this purpose, however, differs between the House and Senate. The House may normally consider a resolution to change rules only when it is reported from the Committee on Rules. The House can limit debate thereon to one hour, and preclude amendment, by ordering the previous question. The Committee on Rules is so structured that it normally operates in cooperation with the leadership of the majority party, and can secure the support of that party for the previous question. As a result, general and permanent changes in House rules are normally within the control of the Committee on Rules and the House majority leadership.

Proposals to change Senate rules, similarly, would normally be reported from the Committee on Rules and Administration, and would reach the floor only on motion of the leadership of the majority party. The Senate, however, normally can limit debate only by unanimous consent or by obtaining a super-majority vote for cloture, and can preclude the offering of amendments only by unanimous consent. Under these conditions, a minority might be able to use dilatory tactics to prevent a vote on a change in a rulemaking statute. Although the Senate normally operates under more flexible procedures than the House, once it has established a rule, it may be less readily able to alter it.

Determining Application of Rules. The authority of each house over its own rules fundamentally includes not only the power to establish and alter rules, but also the authority to decide whether and in what way it intends its rules to apply in specific cases. Either house might apply this principle in a way that would allow it to avoid being constrained to consider, under fast track restrictions, a bill that did not meet the conditions for which Congress had agreed to accept those restrictions. It could also use the same principle to avoid considering even an implementing bill that did meet those conditions.

The statutory definition of the fast track procedure in §151 specifies that a measure qualifies for consideration under that procedure only if it implements a trade agreement negotiated pursuant to the conditions prescribed by some fast track

negotiating authority. If a bill implementing a specific trade agreement failed to meet any of these conditions, a point of order could be raised that the bill did not meet the requirements for fast track consideration. For example, leaders of one of the revenue committees might conclude that a specific implementing bill did not advance the objectives specified, or that required notifications had not taken place as intended. If any Member offered the prescribed motion to consider the bill, those leaders might raise a point of order that the motion was not in order, because the motion was privileged only for a bill implementing a trade agreement negotiated pursuant to the conditions specifying the fast track negotiating authority, and the agreement in question failed to meet those specifications. If the chair ruled that the agreement did in fact not meet those specifications, the measure would not qualify for fast track consideration under the rules — that is, under the rulemaking provisions of §151.

The trade fast track procedure itself does not explicitly establish any point of order of this kind. Instead, this sort of proceeding would generally be the normal congressional practice for ensuring that the requirements of rules are met. Action in this form would permit either chamber to enforce statutory conditions limiting the substance of the trade agreement and implementing bill, governing the negotiating process, or requiring notifications and consultations. By this form of action, the chamber would be able to use the rulemaking power to enforce the statutory requirements of the fast track negotiating authority, even though those requirements were not themselves established in rulemaking provisions.

Using a proceeding of this kind to decide the applicability of the trade fast track procedure involves a difficulty, in that it would compel the chair to make determinations about whether the implementing bill did in fact meet the requirements for fast track consideration. This determination would have to rest not on procedural considerations, but on substantive information about the negotiations in question, to which the chair would presumably lack authoritative access. At least in the House of Representatives, therefore, a point of order of this kind would in practice not likely be raised on the floor.

Instead, in advance of considering the implementing bill, the House would likely adopt a special rule waiving the point of order, as discussed in the next section. By doing so, the House would preserve the qualification of the bill for fast track consideration. Alternatively, the House might adopt a special rule providing that the bill be considered under procedures other than the fast track. This action would prevent fast track consideration of the bill, just as would sustaining the point of order. The decision of which course to take would normally depend on the views of the leadership and pertinent committees about the desirability of considering the bill under the restrictions of the fast track, not only on the actual compliance of the bill with the technical requirements of qualification for fast track consideration. These uses of special rules therefore again illustrate the means Congress possesses to recover its normal legislative prerogatives, through use of its authority over its own rules, even when statutory provisions would impose the constraints of fast track consideration.

The ability to determine the application of its rules also affords Congress a means to enforce requirements, like those of OTCA 1988, that the President give 90 days' notice before signing a covered trade agreement, and submit specified

supporting documentation at the time of signing. Like other acts granting fast track negotiating authority, OTCA 1988 provided that if these requirements were not met, the agreement in question could not enter into force (that is, take effect).[52] Congress, of course, could always have overridden a provision of this kind by exercising its normal legislative prerogatives and its rulemaking authority. It could have enacted a bill to implement the trade agreement, and could even have decided to apply the statutory fast track procedures in its consideration of such a bill, despite the failure of the bill to meet the requirements specified in statute. Absent action of this kind, nevertheless, this prohibition would presumably have prevented the President from implementing the agreement through administrative action. The provision therefore effectively permitted Congress to enforce the requirements in question by declining to enact a bill to implement an agreement if its submission did not meet those requirements.

Altering Procedures for Individual Measures. It is also well established that the rulemaking power of each house extends to authorizing exceptions to its rules, including rulemaking provisions of statute, and to altering their application in specific cases. Congress could use the rulemaking authority in this way to suspend or deny the application of fast track procedure to a specific implementing bill, while still retaining in force the existing trade fast track generally.

Each chamber often considers a specified measure by unanimous consent, and, especially in the Senate, a unanimous consent agreement for this purpose often alters the terms for amending the measure. On a bill to implement a covered trade agreement, however, the chair could not entertain a unanimous consent request to permit amendments, because of the provision of §151 that prohibits action superseding the prohibition on amendment. Under these conditions, unanimous consent to permit amendments could be given only tacitly; if no Member were to raise a point of order to enforce the fast track rules, the chamber could consider the measure while ignoring those rules. The same provision of §151 would rule out a motion to suspend the rules for the purpose. Besides, the Senate seldom uses a motion to suspend the rules, and the House procedure for doing so permits amendments to a measure only insofar as they are included as part of the motion.

Instead, the House routinely achieves ends like these by the adoption of special rules, which are resolutions setting terms for the consideration of a specified measure. They are reported by the Committee on Rules and adopted by simple majority vote of the House. The House normally limits debate on a special rule to one hour, and precludes amendment, by ordering the previous question. By this means the House may at any time determine to take up an implementing bill under terms providing whatever latitude for its debate and amendment the Committee on Rules finds appropriate and that a majority is willing to accept. Senate practice, on the other hand, includes no comparable device for waiving or adapting the application of rules to a particular measure.

Alternative Measures under General Rules. Each house always retains the capacity to recover its effective freedom of choice by circumventing the fast track

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[52] OTCA 1988, §1103(a) (19 U.S.C. 2903)

procedure. Several means exist by which each house might exercise this capacity. First, although §151 protects the motion to consider the bill, it does not require any Member to offer that motion, and cannot require either House to adopt it. To this extent, Congress retains its usual discretion not to act.

Second, the constraints of the statutory procedure cannot prevent Congress from considering some other measure that might deal with the same subjects as an implementing bill. After the President has submitted a draft implementing bill, or even before then, the revenue committee in either chamber might report a measure dealing with the same subjects, but containing different provisions. That chamber might take up, amend, and pass this alternative, instead of acting on the implementing bill prescribed by OTCA 1988 (or other pertinent statutes). The House would most likely take this kind of action pursuant to a special rule that also provided that the original implementing bill not be considered; the Senate, again, would most readily achieve similar results by unanimous consent.

Even if the other house subsequently acts on the original implementing bill under the fast track procedure, the first house could ask for a conference on the differences between that bill and its own, and the conference could report a new version of the bill, which both chambers might accept. As a result, in spite of the intent of the fast track procedure, the President may be faced with the choice of signing a measure implementing terms different from those negotiated, or, by vetoing it, risking that no legislation on the subject be enacted.

Third, even if Congress enacts an implementing bill without amendment, pursuant to fast track procedures, that action does not vitiate its authority subsequently to enact further legislation amending, or altering the terms of, a previous law. Congress could use this authority to enact subsequent amendments to the implementing legislation. By this means, Congress could follow the fast track procedure, yet also continue to exercise its full legislative discretion on the subjects covered. In a case of this kind, of course, the President could attempt to prevent the subsequent enactment by veto.

Congress might for prudential reasons hesitate to use this course of action, which could have serious effects on the international negotiating credibility of the United States, and on relations with its trading partners. Yet no constraints that a fast track statute may place on congressional discretion with respect to specified measures can ultimately displace the normal authority of Congress to initiate and consider legislation. The possibility of using this authority constitutes the final, irrevocable means whereby Congress is able to avoid being constrained by the alternatives to which a fast track statute attempts to restrict it.

Proposals to Renew Trade Fast Track Authority

President Clinton first requested renewal of his fast track trade negotiating authority during the 104th Congress, and in 1995, the House Committee on Ways and Means reported a bill for this purpose (H.R. 2371). This measure received no further action, but the President's proposal in the 105th Congress appears to draw closely on

its overall structure and approach. After the President submitted his new proposal in September 1997, the Senate Committee on Finance and the House Committee on Ways and Means each marked up and reported its own bill on the subject in early October.[53] These bills, S. 1269 and H.R. 2621, respectively, also retain the general structure of the 1995 House bill.[54]

This section examines features of the President's current proposal and of the two bills reported by the Senate Finance and House Ways and Means Committees. The discussion emphasizes the features of each proposal that affect congressional procedures and prerogatives in relation to nontariff trade agreements.[55]

The three proposals are generally similar in the negotiating authority they grant, the notifications and consultations they require, and the processes of implementation and enforcement they provide:

- All retain the basic requirement that a covered trade agreement may enter into force for the United States only if an implementing bill is enacted into law (§5(a)(1)(D)).

- They also retain unaltered the procedural mechanisms of fast track under which an implementing bill is to be considered.[56]

- Like predecessor statutes, each grants fast track negotiating authority for a specified time and permits the President to request one extension, granted automatically if neither house of Congress disapproves (§3(c)).[57]

However, all consolidate the trade agreements subject to fast track implementation into a single category, eliminating the distinction established by OTCA 1988 between agreements dealing with nontariff barriers alone and those for free trade areas (§3(b)).

Each proposal would also make different alterations in the criteria qualifying an implementing bill for fast-track consideration. Some of these alterations would be

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[53] S. 1269 was reported on Oct. 8, 1997 (S.Rept. 105-102). H.R. 2621 was reported on Oct. 22, 1997 (H.Rept. 105-332). For congressional consideration of these proposals, see Pregelj, *Renewing the Negotiating Authority*, and Holliday, *Debate over Reauthorization*.

[54] Similar provisions to S. 1269 are also contained in H.R. 2629, introduced in the House on October 7, 1997, and referred to the Committees on Ways and Means and on Rules.

[55] Section numbers in text refer to those of the President's proposal, which generally correspond with those of the 1995 House bill, S. 1269, and (with 100 added) title I of H.R. 2621. Where appropriate, notes to the text also identify corresponding features in certain other related measures in the current Congress.

[56] Only §3(c) and 5(b), dealing respectively with extension disapproval resolutions and procedural disapproval resolutions, would be enacted as explicit exercises of the rulemaking power (§5(c)).

[57] All three proposals authorize fast track consideration for covered implementing bills submitted before October 1, 2001; the extension would run through October 1, 2005.

accomplished by amending the definition of what constitutes an implementing bill, in the fast track procedure for trade agreements itself. Other alterations would be established by making changes in specifications of the scope of the fast track negotiating authority being granted. As with previous statutes, alterations of the fast track procedure would be enacted as permanent rulemaking provisions, but most of those specifying the fast track negotiating authority would be effective for a limited period and would not be rulemaking.

All three proposals add a provision specifying conditions that a negotiation must meet in order to be covered by the negotiating authority granted (§3(b)(2)).[58] In all three proposals, one of these conditions specifies how a covered trade agreement must relate to the negotiating objectives it establishes. The President's proposal contains no specification that required consultations must occur if the agreement is to be covered by the negotiating authority,[59] but the two bills before Congress do.

Notification and Consultation Requirements

All three proposals retain most of the notification and consultation requirements that were effective in OTCA 1988. They also explicitly renew the previous general requirement for consultation with the members of the revenue committees appointed as advisers to trade negotiations (§2(c)(2)(A)).[60] S. 1269 extends this requirement further, mandating consultations of this kind also with the committees themselves.

Submissions by President and Consultations to Precede Them. All three proposals continue the requirement of OTCA 1988 that, after signing a nontariff trade agreement, the President submit to Congress (1) the text of the agreement, (2) a draft implementing bill, (3) a statement of administrative intent, and (4) specified supporting information. All also continue to require that before signing, the President must notify Congress of his intent 90 days in advance (§5(a)),[61] and then consult with the revenue committees and others having jurisdiction (§4(b)). These consultations are the ones intended especially to permit those committees to participate in drafting the implementing bill. [62]

Notice and Consultation Before Negotiations. In consolidating the negotiating authority for nontariff barriers alone and that for free trade areas, all three proposals also extend to negotiations for all nontariff trade agreements , in modified form, the former special notice and consultation requirements of OTCA 1988 for free

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[58] This provision had no equivalent in OTCA 1988, but did appear in the 1995 House bill.

[59] A provision of this kind was proposed by the 1995 House bill.

[60] The 1995 House bill contained no provision of this kind.

[61] The supporting information is modified to omit addressing effects on exchange rate and monetary stability and effects from nonmarket economies, but instead to add discussion of effects on previous agreements.

[62] The three proposals vary in detail on how these submissions and consultations must address matters like negotiating objectives and possible side agreements. These variations are discussed in the respective sections on those subjects below.

trade area negotiations alone, (§4(a)). Ninety days before starting negotiations for any form of nontariff trade agreement, the President is to notify Congress of his intent to do so, and of the specific objectives of the negotiations. Both before and after that notification, he is to consult on those negotiations with the revenue committees and any other committees he "deems appropriate." S. 1269 would additionally require these consultations to include any other committees requesting to be consulted.

In several respects, these new notice and consultation requirements are broader than those of OTCA 1988. They encompass all nontariff trade negotiations, rather than being limited to free trade area negotiations, and require that:

- the notification goes to Congress rather than only the revenue committees,
- the notification must come 90 days before negotiations begin, rather than 90 days, plus 60 days of session, before their conclusion,
- the consultations must begin even before the notification, and
- the consultations may include committees beyond just the revenue panels.

The three proposals provide an exception to these requirements for several identified negotiations for which advance notice and consultation are no longer possible, because the negotiations have already commenced (§6). This provision authorizes fast track consideration for the results of these negotiations on the implicit grounds that Congress already actually has information of their existence. H.R. 2621 reestablishes a degree of congressional involvement for these specified negotiations, by providing that the consultations normally required in advance of negotiations occur instead as soon as possible after H.R. 2621 is enacted. The President's proposal and S. 1269 offer no corresponding provision.

Consultations Related to Specified Objectives. Some in Congress have expressed concern that, especially in relation to objectives dealing with labor, the environment, and agriculture, negotiations for nontariff trade agreements might produce results divergent from congressional intent. H.R. 2621 responds to this concern by instituting some additional new consultation requirements, which seem intended to allow the pertinent committees special opportunities to make the President aware of congressional concerns in these areas. These consultations are required for negotiations "directly related to" specified negotiating objectives (§104(a)(2) and §104(a)(3)):

- If negotiations relate either to trade barriers or distortions generally, or to labor and environmental issues, the President must consult with the revenue committees on how "the negotiation will address the objective" of reducing "a specific ... barrier or ... foreign ... practice directly related to trade that decreases ... market opportunities or otherwise distorts United States trade."
- If negotiations relate to agriculture, the President must consult with the revenue and the agriculture committees over the relative levels of tariffs

imposed on agricultural products by the United States and by its negotiating partners.

The President's draft and S. 1269 include no approach of this kind to these concerns.

Provisions Permitted in Implementing Bills

"Necessary" Provisions. Section 151 of the 1974 act includes a statement of what bills are qualified for fast track consideration under that section. The three proposals all amend this statement to include bills implementing trade agreements reached under the negotiating authority they grant (§7(b)(1)). Section 151 also requires an implementing bill to include provisions approving the trade agreement itself and the President's statement of proposed administrative action implement it. The two bills before Congress reiterate these requirements in the provisions establishing the fast track negotiating authority; the President's draft does not.

Beyond these requirements, however, each proposal makes changes in the specifications of the content permitted in an implementing bill, most of which add or tighten restrictions on that content. These changes appear to respond to congressional concern that the President might use the constraints of the fast track procedure to secure enactment of broad changes in existing domestic laws, including those other than governing trade, without giving Congress the opportunity to play its usual legislative role in developing and approving those changes.[63]

Of the three proposals, the President's addresses these concerns in the most restrained way. It retains the stipulation of §151 that an implementing bill may contain provisions changing existing laws as "necessary and appropriate" to implement the trade agreement in question. It adds to that stipulation only a requirement that those provisions be "related to trade" (§3(b)(3)(B)).

The two bills before Congress, by contrast, do not amend §151 for this purpose. Instead, each includes, in its new provisions setting conditions that delimit the fast track authority granted, an additional set of specifications of the contents permitted in an implementing bill submitted under that authority. Each reinforces those specifications by explicitly stipulating that the draft implementing bill submitted by the President must conform thereto. Each set of specifications includes one permitting the implementing bill to contain provisions changing existing law only as "necessary" to implement the agreement.[64]

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[63] This concern was already evident in 1995. See, for example, Committee on Ways and Means, *Trade Agreements Authority Act*, pp. 12, 14-16.

[64] This approach was first developed in the 1995 House bill. Several current Senate bills, including two authorizing the negotiation only of a specific trade agreement, take this approach further. They explicitly establish a point of order in the Senate against provisions that change existing law and are not "necessary" to implementation. If the Senate, by vote, sustains the point of order, the provision is stricken from the bill.

Any changes made in the implementing bill by this process would presumably, by (continued...)

Additional Provisions. If an implementing bill could include only those changes in existing law "necessary" to implement the trade agreement itself, it might be precluded from containing some kinds of provisions vital to the overall purpose of the agreement. In both H.R. 2621 and S. 1269, therefore, the new specifications of the content of an implementing bill include additional items. These seem intended to permit specific additional kinds of provisions without opening the door to an indefinitely broad range of changes in law:[65]

- S. 1269 would permit provisions "related to ... implementation, enforcement, and adjustment to" the agreement, but only if they are "directly related to trade."

- H.R. 2621 would allow provisions to "clarify ... the operation or effect" of the agreement, and those to "provide adjustment assistance to workers and firms adversely affected."

The President's proposal does not need to set forth any specifications of this kind, because it retains the existing language of §151 authorizing "appropriate" as well as "necessary" provisions.

S. 1269 and H.R. 2621 also add a requirement that the President's supporting submission at the time of signing a trade agreement include a showing of why the agreement meets the specified conditions that would qualify it for fast track consideration.[66] The President's proposal contains only a more general requirement that the submission show why the bill is "required or appropriate" to carry out the agreement (§5(a)(2)(B)(ii)(IV)).

None of the three current proposals retains the special requirement of the previous fast track negotiating authority, under which free trade area negotiations were covered only if they occurred at the request of the other country involved.

Revenue Provisions. The President's proposal would also change the requirements of §151 for the fast track procedure so as to permit implementing bills to contain provisions to offset any revenue loss from provisions of the trade agreement affecting tariff revenues. Some change of this kind would be necessary to permit implementing bills to contain revenue provisions to offset any revenue losses incurred by the terms of the trade agreement, as required by the "pay-as-you-

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[64](...continued)
definition, not impair the integrity of the negotiated agreement. They could, however, interfere with completing action on the schedule the fast track sets up. If House and Senate struck different provisions of the implementing bill, it could not be enacted until the differences were reconciled. Only one of the Senate bills offers any mechanism for ensuring that both this reconciliation and timely action will occur. This mechanism is described in note 68.

[65] This approach already appeared in the 1995 House bill, which permitted provisions that would "clarify the operation and effect" of the agreement.

[66] These provisions originated with the two current bills; the 1995 House bill included no similar provision.

go" mechanisms first established in the Budget Enforcement Act of 1990.[67] H.R. 2621 and S. 1269 meet the same need by including authorization for provisions of this kind in their specifications of content for implementing bills.[68]

Relation of Objectives to Implementing Bill

Overall Objectives and Principal Objectives. All three proposals would continue the distinction made by existing permanent law between two classes of negotiating objectives, "overall" and "principal" objectives. "Overall" objectives state general concerns like open markets and trade barriers, while "principal" objectives address specific issues like trade in services, intellectual property, and agriculture. All three proposals also define only those trade agreements that "make progress in meeting applicable objectives" as qualified for fast track implementation (§3(b)(2)).

H.R. 2621 continues the arrangement of current law under which both "overall" and "principal" objectives are "applicable" to qualify a trade agreement for fast track implementation.[69] By contrast, the President's draft and S. 1269 restrict "applicable" objectives only to the "principal" objectives. This restriction is apparently intended to place additional limits on the range of fast track authority granted.[70]

S. 1269 and H.R. 2621 also introduce a third category of objectives, "international economic policy objectives," which addresses specific goals like pursuing environmental concerns and promoting worker rights through the International Labor Organization. These two proposals limit the directive effect of this class of objectives not only by separating them from the (enforceable) principal

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[67] Originally enacted in §13101(a) of P.L. 101-508 (104 Stat. 1388-573), Title XIII, provisions amending §252 of the Balanced Budget and Emergency Deficit Control Act of 1985 ("Gramm-Rudman-Hollings," P.L. 99-177, 99 Stat. 1037), codified at 2 U.S.C. 902.

[68] Another current Senate bill, S. 253, would permit more flexibility in meeting these pay-as-you-go requirements. Provisions for this purpose in an implementing bill could be amended, as long as the amended text still met the pay-as-you-go requirements. This device, along with that mentioned in note 64, could lead to differing House and Senate versions of the implementing bill. S. 253 therefore also establishes expedited procedures to go to conference and to consider a conference report. Further, if conferees reach no agreement within a specified time, any Member may introduce a new bill reflecting the President's original proposal, and this bill may immediately be considered under the time limits prescribed for a conference report. In other words, if conferees cannot agree on a common version of the amended bills, the original text may be brought back as a vehicle for final action. Desire to avoid this proceeding would increase conferees' incentive to reach agreement. This innovative mechanism, apparently without precedent among previous expedited procedures, offers a means to ensure that action on a measure can be completed within time limits even though the two houses may amend it into differing forms.

[69] OTCA 1988, §1102(b)(2) and §1102(c)(3)(A) (19 U.S.C. 2902); §1101 (19 U.S.C. 2901).

[70] S.
authorizing fast track consideration for any trade agreement that fosters the very general "overall" objectives. This approach would broaden the fast track negotiating authority.

objectives, but also by explicitly declaring that inclusion of an objective in this class does not authorize "the use of the trade [fast track] procedures ... to modify United States law."

Both these bills also use their specifications of contents permitted in an implementing bill to place further conditions on the objectives that can be pursued under the fast track negotiating authority. H.R. 2621 permits an implementing bill to contain provisions "directly related to principal trade negotiating objectives ... achieved in" the trade agreement, but only insofar as "necessary for the operation or implementation" of the trade agreement. S. 1269 requires that, to be covered, a bill must implement an agreement that "achieves one or more of the principal negotiating objectives ...."[71]

Statement of Objectives. The President's proposal also states several objectives in a form that limits the potential range of trade agreements subject to fast track consideration. It restricts the scope of several of the "principal" objectives, which are the enforceable ones, to "matters that are directly related to trade and decrease market opportunities for United States exports or distort United States trade" (§2).[72] This approach appears to originate with the President's draft.[73] S. 1269 contains no similar language; H.R. 2621 does, but only in its statement of "overall" objectives, not in that of any "principal" objectives.

The President's proposal includes provisions dealing with labor and environmental issues among both "overall" and "principal" objectives. The "principal" objective in this area, which would be enforceable, continues to include the goal of establishing a principle against denying worker rights to gain competitive advantage, but limits pursuit of this objective to action through the World Trade Organization (§2(b)(7)). The "overall" objective, which would not be enforceable, omits this limitation, but retains the language restricting the scope of the objective to issues "directly related to trade" (§2(a)(5)).

H.R. 2621 and S. 1269, too, bring labor concerns into the statement of "overall" objectives, but only by adding reference to full employment. Like the President's proposal, however, both bills establish a new "principal" objective on labor and the environment. This objective specifically sets forth a goal of preventing foreign countries from lowering standards in either area in order to gain competitive advantage.

Existing permanent law also requires negotiators, in pursuing certain "principal" objectives, to take into account "legitimate ... health or safety, ... environmental, ... consumer or employment opportunity" interests.[74] The President's proposal, S. 1269,

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[71] These approaches develop that of the 1995 House bill, which permitted provisions "directly related to principal trade negotiating objectives ... achieved in" a trade agreement.

[72] OTCA 1988, §1101 (19 U.S.C. 2901).

[73] It did not appear in the 1995 House bill.

[74] OTCA 1988, §1101(b)(9) (trade in services) and §1101(b)(11) (foreign direct (continued...)

and H.R. 2621 all retain this language, but in various ways exclude provisions related to it from qualifying for fast-track consideration. The President's proposal moves the language into a new advisory subsection (§2(c)). S. 1269 leaves it in place, but in each instance restricts its application by providing that it "shall not be construed to authorize any modification of United States law." H.R. 2621 removes it from the statement of "principal" objectives into that of "international economic policy objectives,"[75] which are not enforceable.

Other Requirements Related to Objectives. The President's proposal also changes other requirements in ways that seem intended to reduce the role that statutory objectives might play in congressional evaluation of trade agreements and their implementing bills. OTCA 1988 permitted the President to enter into a trade agreement thereunder if he determined that doing so would promote the "purposes, policies, and objectives" of the negotiating authority. To justify a request for extension of the negotiating authority, he had to describe (among other things) progress toward those "purposes, policies, and objectives."[76] A report on that request from the pertinent private sector advisory committee was to include an assessment of the same matters. Corresponding requirements appeared for the statement submitted with an implementing bill (§5(a)(2)(B)(ii)(I))[77] and for consultation with pertinent committees before signing (§4(b)(2)(B)).[78]

The President's proposal retains all these mechanisms, but omits reference to "objectives" in each case. These changes would free the President to enter into agreements independent of their relation to statutory objectives, diminish opportunities for Congress to focus on those objectives in evaluating use of fast track negotiating authority, and presumably prevent Congress from denying fast track consideration to a bill by sustaining a procedural objection that the statement or consultations did not discuss the negotiating objectives. Neither S. 1269 nor H.R. 2621 adopts any of these changes.[79]

"Side Agreements" Separate from Fast Track

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[74](...continued)
investment) (19 U.S.C. 2901).

[75] The 1995 House bill omitted this language altogether. In the current Congress, S. 84 and S. 85 both forbid an implementing bill from containing any provision either requiring, or authorizing the establishment or amendment of, any labor or environmental protection standard. H.R. 1079, by contrast, would deny fast track treatment to a bill to implement any trade agreement that does not require adherence to specified "internationally recognized worker rights" and "internationally recognized environmental standards."

[76] OTCA 1988, §1103(b)(2)(B) (19 U.S.C. 2903).

[77] OTCA 1988, §1103(a)(2)(B)(ii)(I) (19 U.S.C. 2903)

[78] OTCA 1988, §1102(d)(2)(B) (19 U.S.C. 2902).

[79] Nor did they appear in the 1995 House bill. S. 253 again takes an opposite approach by requiring objectives, only, to be taken into account at several points where the two reported bills and OTCA 1988 refer to "purposes, policies, and objectives."

The concern, mentioned above, that the fast track procedure might be used to enact broad changes in existing domestic law under the constraints of expedited procedure, has also spurred congressional interest in having some results of trade negotiations be treated as "side agreements." Side agreements, in this sense, would be products of a trade negotiation that would be implemented in legislation separate from the bill to implement the trade agreement itself. This legislation, therefore, would not qualify for fast track procedures, but could be amended or left without action.

This approach has been proposed especially as a way of dealing with matters that trade negotiations might address, but that would not be encompassed by the negotiating objectives prescribed in statute, especially including labor and environmental questions. Provisions narrowing the scope of content permitted in implementing bills, including those described in the immediately preceding sections, would foster the use of this approach, by encouraging the President to treat agreements on subjects outside that scope as side agreements.

The President's proposal, S. 1269, and H.R. 2621 each include some provisions apparently intended to provide improved means of dealing with the possibility of these side agreements. OTCA 1988 required only that the consultations on implementation before signing a trade agreement address "all matters related to implementation."[80] The President's proposal and S. 1269 add to this requirement the specification that these consultations are to consider what terms of the agreement might require "supplemental implementing legislation ... not subject to the fast track process" (§4(b)(2)(C)).[81] The President's proposal alone would also include in these consultations discussion of other possible agreements with the same country (§4(b)(2)(D)). H.R. 2621, on the other hand, reverts to a simpler formulation, requiring these consultations to address only "the general effect of the agreement on existing laws."

All three current proposals also add, to the submissions required after a covered trade agreement is signed, a requirement for some description of changes in existing law that would be required to bring the United States into compliance with the agreement (§5(a)(1)(B)). This description is to be submitted within 60 days after the agreement is signed (the President's proposal and S. 1269 specify calendar days; H.R. 2621 does not). From this deadline it appears that the changes in law contemplated by this provision would be in addition to any made by the implementing bill itself.

Because Congress would be able to amend or take no action on separate legislation embodying side agreements, it would retain greater control over whether to enact the their terms into law, and in what form. On the other hand, these recent proposals do not appear to address the question of what effect it might have on the ability of the United States to negotiate for a trade agreement if negotiating partners knew that side agreements thereto might be subject to congressional alteration or inaction.

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[80] OTCA 1988, §1102(d)(2)(C) (19 U.S.C. 2902).

[81] They draw this approach from the 1995 House bill.

Enforcement of Conditions of Fast Track Authority

Both S. 1269 and H.R. 2621 include, as a condition of the fast track negotiating authority, a requirement that the prescribed consultations be carried out. No similar requirement appeared in previous law, except for the special consultations with committees prescribed in connection with free trade area negotiations.[82] The President's proposal (§3(b)(2)) contains no similar stipulation.

The President's proposal provides no new mechanism to enforce the new notice and consultation requirements that it would require under the fast track negotiating authority. It does retain the existing mechanism of a procedural disapproval resolution, including the language specifying that withdrawal of fast track authority rests on failure of the executive to consult as required (§5(b)).[83] Under this proposal, the fast track negotiation authority would terminate altogether if each chamber adopts a procedural disapproval resolution within 60 calendar days of the other, instead of 60 days of congressional session as previous law allowed.

S. 1269 contains similar provisions, but would retain 60 days of session as the period for action. This bill would also expand the reasons for disapproval to include also failure of the executive to provide required notifications, as well as consultations.

The President's current proposal also contains no means for Congress to deny fast track consideration to a single implementing bill. The sole previously existing mechanism for this purpose appeared in OTCA 1988, applied to free trade area negotiations alone, and permitted action by either revenue committee acting alone. S. 1269 establishes a similar mechanism for all covered trade agreements. A bill to implement a given trade agreement would lose its qualification for fast track consideration if both revenue committees disapproved its negotiation within 90 days after the newly required 90-day notice of intent to initiate the negotiations.[84]

H.R. 2621, in contrast with both other approaches, adapts the procedural disapproval resolution so that it would apply only against a specific trade agreement. Under this proposal, both houses, acting separately within any period of 60 days, could withdraw fast track implementation for a specified agreement, by passing resolutions affirming that the President had failed to provide required notices or consultations with respect to that agreement. (If the negotiation is one listed in the legislation as already in progress, and if the missing notices or consultations are ones that the legislation waives, this mechanism may not be used to deny fast track consideration on those grounds.)

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[82] This provision first appeared in the 1995 House bill. S. 1269 additionally makes the occurrence of specified consultations with industry sector advisory groups a condition for being covered under the fast track authority.

[83] This mechanism had also been retained by the 1995 House bill.

[84] S. 253 would permit similar results, but only if both houses agreed to a concurrent resolution for the purpose within either 60 calendar days, or 15 days of congressional session, after the notification. No proposal of this sort appeared in the 1995 House bill.

A mechanism of this kind would significantly enhance the means available to Congress for enforcing the conditions it places on the fast track negotiating authority. Under previous conditions, rulemaking provisions of statute permitted Congress to do so chiefly through disapproval resolutions, and available actions under the general rulemaking authority included chiefly the use of points of order.

As already discussed, the use of disapproval resolutions has had the disadvantage of permitting Congress to enforce conditions on the negotiating authority only by abolishing the fast track procedure altogether. Possible points of order have the disadvantage of being on the incorporation by reference of the conditions of the fast track negotiating authority in the rulemaking provisions of the fast track procedure, and therefore of entailing procedural decisions based on substantive criteria. This form of action would therefore likely be replaced in practice by the ad hoc use of a special rule (or perhaps unanimous consent agreement) to protect or deny the use of fast track procedures. By contrast, the mechanism that H.R. 2621 now proposes would explicitly establish in rulemaking statutes a means by which either house could exclude from fast track consideration only a single implementing bill that it found not to satisfy the conditions placed on the negotiating authority.

All three current proposals retain the mechanism permitting an extension of the period for which the fast track authority is granted if neither house adopts an extension disapproval resolution (§3(c)(5)). They all also modify the language of the resolution, however, so as to permit disapproval for any reason, rather than only for lack of progress in negotiations. In addition, all three proposals slightly modify the procedure for acting on the resolution, permitting it to be adopted at any time up to the start of the designated extension period.

Finally, the current House and Senate bills make small changes in the procedure for considering disapproval resolutions. H.R. 2621 makes explicit that the referral to the Committee on Ways and Means is primary and that to the Committee on Rules secondary. S. 1269 adds requirements that an extension disapproval resolution must be referred, in the Senate, to the Committee on Finance, and that a procedural disapproval resolution must be reported by the same panel; these additions parallel requirements already in place for corresponding House committees.