Order Code RL31192

Trade Agreement Implementation: Expedited Procedures and Congressional Control in Existing Law

November 26, 2001

Richard S. Beth
Specialist in the Legislative Process
Government and Finance Division

Trade Agreement Implementation: Expedited Procedures and Congressional Control in Existing Law

Summary

Expedited procedures for trade agreements were established by Section 151 of the Trade Act of 1974, and took their current form with the Omnibus Trade and Competitiveness Act of 1988 (OTCA 1988). These statutory expedited procedures act as procedural rules of each chamber governing consideration of bills to implement certain trade agreements. They are designed to insure that (1) Congress will take up the implementing bill and reach a final disposition within specified time limits, and (2) the bill will not be subject to amendment.

These procedural restrictions are designed to assure the President, and other countries involved in trade negotiations, that Congress will consider or implement a covered trade agreement only as a package, in the form negotiated. Affording this assurance requires limiting the usual discretion of Congress over the enactment and contents of laws. In exchange for accepting these limits on its discretion, Congress has (1) enacted restrictions on the circumstances in which they apply, and (2) retained to itself, or provided itself with, means of enforcing these restrictions.

Under OTCA 1988, the President could implement certain trade agreements that affected only tariffs without congressional action. An agreement including nontariff provisions, however, qualified for expedited consideration only if (1) it was negotiated during a specified time period, the most recent of which expired in 1994; (2) it advanced trade objectives established by Congress in law; (3) the implementing bill contained only provisions "necessary and proper" to implement the agreement; and (4) in the course of negotiations, the President notified and consulted with Congress in specified ways. Some of these consultations permitted the revenue committees to draft the implementing bill the President then submitted.

Congress could enforce the time limitation through adoption by either House of an "extension disapproval resolution" denying a presidential request to extend the period. It could enforce the notification and consultation requirements by terminating the availability of the expedited procedures, through adoption by each house of a "procedural disapproval resolution" stating that the requisite consultations had not occurred. Both kinds of resolutions were eligible for consideration under a second set of expedited procedures, established by Section 152 of the Trade Act of 1974.

Congress could enforce the other limitations on the eligibility of trade agreements for expedited consideration by using the constitutional authority of each house to make its own rules. First, in principle, the chair might rule that an implementing bill did not meet the statutory requirements for expedited consideration. Second, each house has procedural means for either altering the procedures applicable to any implementing bill, or considering an alternative measure instead. Finally, either house could at any time permanently amend the statutory expedited procedures, just as with any other procedural rules. These capacities afford Congress the ultimate ability to recover its full legislative discretion over the implementation of any trade agreement.

Contents

Trade Agreement Implementation: Expedited Procedures and Congressional Control in Existing Law

Expedited Procedures and Trade Promotion Authority

Nature of Expedited Procedures

Expedited procedures, also known more colloquially as "fast track" procedures, are provisions of statute that operate as rules of each house to govern consideration of a certain category of legislative measures. The pertinent statute normally also identifies the category of measures to which it applies. Expedited procedures are typically designed to assure that any measure falling into the specified category will be able to reach the floor, so that Congress can actively decide whether to enact it, within a limited period of time.

Often, the measures specified are joint resolutions to approve some action that the statute empowers the President to take only if he receives that approval, or to disapprove some action that the statute empowers him to take only if Congress does not disapprove. The *House Manual* contains a compilation of statutory provisions establishing expedited procedures relating to some 30 policy areas. Among others, these include executive branch reorganization (for which the expedited procedure mechanism seems to have originated), war powers, budgetary impoundments, regulations proposed by agencies, nuclear waste storage, arms exports, energy conservation, and military base closings.[1]

Expedited Procedures for Trade Agreements

In recent years, the term "fast track" has most often been used with particular reference to expedited procedures for bills to implement certain international trade agreements. These expedited procedures were first established by the Trade Act of

---

[1]U.S. Congress, House of Representatives, *Constitution, Jefferson's Manual, and Rules of the House of Representatives of the United States, One Hundred Seventh Congress*, H.Doc. 106-320, 106th Congress, 2nd session, [compiled by] Charles W. Johnson, Parliamentarian (Washington: GPO, 2001), Sections 1130(1)-1130(30). Hereafter cited as *House Rules and Manual*.

1974,[2] then renewed by several subsequent laws, especially the Omnibus Trade and Competitiveness Act of 1988 ("OTCA 1988").[3] Under these statutes, if a trade agreement proposes to do more than reduce tariffs in accordance with the President's reciprocal trade authority, it can enter into force only through enactment of a bill to implement it. If the trade agreement and implementing bill meet a number of additional conditions, the bill is eligible for consideration under the expedited procedure.[4]

The 1974 Trade Act and its successors did not purport to restrict the President's general authority to negotiate trade agreements. They placed restrictions only on what kinds of trade agreements could be implemented through the expedited procedures that the 1974 Act established. The conditions that a trade agreement must meet, in order to make its implementing bill eligible for expedited consideration, delimit what has recently been called the President's "trade promotion authority."

Renewal and Development of Trade Promotion Authority

The expedited procedures of the 1974 Act were enacted as permanent law and remain in effect today. This Act and its successors, however, always made the trade promotion authority available to the President only for a limited period. The trade promotion authority is "renewed" by enacting legislation making the expedited procedure available for specified trade agreements negotiated during a new availability period.

In enacting renewal legislation, Congress has usually also altered the other conditions that must be met by (1) a trade agreement, (2) the process of negotiating it, and (3) its implementing bill, if the bill is to be eligible for expedited consideration. Most of these alterations have affected the conditions of the trade promotion authority; Congress has left the expedited procedure itself largely unchanged.

Congress last renewed the President's trade promotion authority in 1993, but solely for an agreement establishing the World Trade Organization if entered into before April 16, 1994.[5] In the 104th and 105th Congresses (1995-1998), President Clinton requested renewal of the general trade promotion authority, and legislation for the purpose was reported, but not enacted. A key issue in these deliberations was the extent to which agreements reached under the trade promotion authority should

---

[2]P.L. 93-618 (88 Stat. 1978), as amended. The expedited procedures appear chiefly in Sections 151-152 (19 U.S.C. 2191, 2192); in *House Rules and Manual*, Section 1130(11D).

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

[4]The agreements covered were generally those that contained provisions affecting nontariff barriers to trade, including those establishing free trade areas. The conditions defining the agreements covered are discussed in CRS Issue Brief IB10084, *Trade Promotion Authority (Fast-Track Authority for Trade Agreements): Background and Developments in the 107th Congress*, by Lenore Sek.

[5]P.L. 103-49 (107 Stat. 239, 19 U.S.C. 2902(e)); CRS Issue Brief IB10084, *Trade Promotion Authority (Fast-Track Authority for Trade Agreements): Background and Developments in the 107th Congress*, by Lenore Sek.

address labor and environmental issues.[6] Efforts to renew the trade promotion authority have now been continued in the 107th Congress.

Coverage of Report

The chief purpose of this report is to describe the expedited procedure for trade agreements as it now stands in permanent law. As background to this description, the report sketches the institutional interests and prerogatives that these provisions of law have sought to balance. The report also shows how OTCA 1988 sought to achieve this balance by countering the constraints that the expedited procedure placed on the legislative prerogatives of Congress with restrictions on the scope of the trade promotion authority, and by providing the means for Congress to enforce these restrictions.[7] Many of these features of OTCA 1988 have been reflected in current proposals to renew the trade promotion authority.

Expedited Procedures for Trade Agreements and the Role of Congress

The trade promotion authority and its expedited procedures embody a balance among the prerogatives of the:

- President to conduct foreign policy and international negotiations;
- Congress to legislate;
- House of Representatives to initiate revenue legislation;
- Senate to oversee foreign relations; and
- House Committee on Ways and Means and Senate Committee on Finance to develop revenue legislation.

Negotiating and Legislating

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.[8] For these reasons, it is accepted that only the executive can negotiate a trade agreement. Implementing a trade agreement, on the other hand, normally

---

[6]CRS Issue Brief IB10084, *Trade Promotion Authority (Fast-Track Authority for Trade Agreements): Background and Developments in the 107th Congress*, by Lenore Sek.

[7]For details on the development of the procedures under OTCA 1988 and the conditions of their use, see CRS Issue Brief IB10084, *Trade Promotion Authority (Fast-Track Authority for Trade Agreements): Background and Developments in the 107th Congress*, by Lenore Sek.

[8]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 Congress, 1st session, prepared by the Congressional Research Service, Library of Congress, Johnny H. Killian [and] George H. Costello, eds. (Washington: GPO, 1996), pp. 539-553. (Hereafter cited as *Constitution Annotated.)*

requires changes in existing law, which, under the Constitution, requires congressional action.[9]

Congress therefore may prevent a trade agreement from being implemented by rejecting the necessary legislation, or simply by declining to act. The congressional power to legislate also entails the power to determine the contents of any legislation enacted. In principle, Congress might enact legislation to implement a trade agreement whose provisions, in effect, altered the negotiated terms of the agreement. Making these alterations would be tantamount to not accepting the agreement, for it would leave the parties still in disagreement over what the terms of the agreement are.

Supporters of trade promotion authority commonly argue that the possibility of amending an implementing bill presents a potential obstacle to successful negotiations. If an implementing bill could be amended, the argument runs, the President would be unable to assure negotiating partners 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, prospective 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[10] and subsequent enactments provide a resolution to this dilemma. In these acts Congress has delegated to the President, within limits, the power to implement negotiated reductions in tariffs by proclamation – by his unilateral action.

Since at least the 1960s, however, trade agreements have ceased to deal solely with tariff issues. Instead, they have increasingly addressed nontariff barriers to trade and the establishment of free trade areas[11]. Congress has always chosen to retain authority over implementation of these "nontariff" trade agreements.

Congress did not choose to preserve this authority by requiring that a covered trade agreement be ratified in the form of a treaty. Under such an arrangement, the trade agreement would take effect only if the Senate, by a two-thirds vote, gave

---

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

[10]Reciprocal Trade Agreement Act of 1934 (P.L. 73-316, 48 Stat. 943) and its subsequent renewals. See also CRS Issue Brief IB10084, *Trade Promotion Authority (Fast-Track Authority for Trade Agreements): Background and Developments in the 107th Congress*, by Lenore Sek.

[11]CRS Issue Brief IB10084, *Trade Promotion Authority (Fast-Track Authority for Trade Agreements): Background and Developments in the 107th Congress*, by Lenore Sek.

"advice and consent" to its ratification.[12] This arrangement, however, would have raised several difficulties:[13]

- First, it would not avoid the problems mentioned earlier, for the Senate might still either amend the treaty or decline to act on it.

- Second, even if the Senate advised and consented to the treaty, the nontariff trade agreement generally would have to be implemented through legislation, which would still require action by both houses of Congress.

- Third, even nontariff trade agreements typically include provisions requiring changes in tariffs. Bills to implement these nontariff trade agreements would therefore constitute revenue legislation, which, under the Constitution, must originate in the House of Representatives.[14] A treaty approach would entirely circumvent this prerogative of the House.

For these reasons, the 1974 Trade Act and subsequent statutes have required instead that each nontariff trade agreement be implemented through legislation approved by both houses of Congress.[15] After the President signs a trade agreement covered by trade agreement negotiating authority, he must submit it to Congress along with a draft implementing bill.[16] This implementing bill is the legislation eligible to be considered under the expedited procedures of the Act.

These expedited procedures are designed to forestall the possibility that Congress will either (1) amend the implementing legislation or (2) decline to act on it. The intent of these procedures is to ensure that a bill implementing a covered trade agreement will be able to reach a timely "up-or-down" vote in the form submitted. These procedures secure the President's ability to negotiate for trade agreements of the pertinent kinds with the assurance that Congress will either implement them in the form negotiated or reject them. Under these arrangements, Congress loses the alternatives of either altering an implementing bill or declining to act. It retains those of determining whether or not to implement each agreement through legislation.

---

[12]Constitution, Article II, Section 2, Clauses 2-3. In *Constitution Annotated*, pp. 469-504, 539-547.

[13]These considerations are elaborated in CRS Report 97-896, *Why Certain Trade Agreements Are Approved as Congressional-Executive Agreements Rather Than as Treaties*, by Jeanne J. Grimmett; and CRS Report 94-890, *GATT and Other Trade Agreements: Congressional Action by Statute or by Treaty?*, by Louis Fisher.

[14]Constitution, Article I, Section 7, Clause 1. In *Constitution Annotated*, pp. 135-137.

[15]And if this legislation contains revenue provisions, it must originate in the House.

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

Features of the Expedited Procedures for Trade Agreements

Provisions for preventing (1) amendment and (2) inaction are the two key characteristics of an expedited procedure. Many provisions of the expedited procedures established by Section 151 of the Trade Act of 1974[17] reflect features commonly found in expedited procedure statutes. Also, where an expedited procedure is silent, the general rules of the respective houses apply. Accordingly, at points where the general rules foster the objective of expediting action, statutory expedited procedures often rely on these general rules.

Prohibiting Amendment

The expedited procedures for trade agreements address the objective of preventing Congress from altering a bill to implement a trade agreement by establishing a single blanket prohibition on amendment (Section 151(d)). The prohibition covers not only initial floor action in each house, but also any attempt by either house to amend an implementing bill received from the other. Neither house may suspend this prohibition, either by motion or unanimous consent.

Committee Amendments. The expedited procedures for trade agreements include no explicit reference to committee amendments, but none is required. In both houses, committees technically only recommend amendments to the floor. Although Section 151 would not prevent a committee from recommending amendments, the prohibition on floor amendment would prevent either house from considering or adopting them. These procedures also do not prevent a committee from reporting an original bill or clean bill, whose text might incorporate committee amendments to the original measure. The original or clean bill, however, would not qualify for expedited consideration. Only the implementing bill introduced pursuant to the President's submission of the trade agreement would be eligible for consideration by these procedures.

House-Senate Differences. Because the implementing bills introduced in each house must be identical and cannot be amended, the implementing bills initially passed by each chamber must be identical. As a result, no occasion can arise for resolving such differences, either through a House-Senate conference or through motions to concur in the position of the other house. Otherwise, either of these proceedings might become a means for introducing additional changes into the legislation.

---

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

Preventing Inaction

The expedited procedures for trade agreements attempt to prevent an implementing bill from being blocked through inaction by assuring, at each essential stage of the legislative process, that either the bill can move forward automatically, or supporters can act to move it forward.

Pre-Floor Action. The expedited procedures direct that the implementing bill be introduced in each house, by the two floor leaders (or their designees) jointly, on the first day each house meets after the President submits the draft bill.[18] The presiding officer in each house is to refer the bill to the committee or committees of jurisdiction. These committees will normally include the House Committee on Ways and Means and the Senate Committee on Finance, which exercise primary jurisdiction over "tariffs" and "reciprocal trade agreements."[19] This referral provision reflects normal procedure in each chamber, except to the extent that the Senate normally refers a measure solely to the committee whose jurisdiction predominates in the subject matter of the bill.[20]

If any committee of referral does not report after 45 days of session in the respective chamber, the committee is automatically discharged (Section 151(e)).[21] 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 committee is to report, or be discharged from, the House bill rather than the Senate one. If the Senate receives the House bill more than 30 days after the bills are introduced, the original 45-day deadline is extended so that the Senate committee is not discharged, and may report, until 15 days after it receives the House bill. This device ensures that final action will take place on a measure originating in the House, as the Constitution requires for revenue bills.

Taking up the Implementing Bill. In each house, measures normally come to the floor through procedural actions that are controlled by the majority leadership. The expedited procedures for an implementing bill do not make these actions automatic, but instead protect the ability of supporters of the bill to accomplish

---

[18]Trade Act of 1974, Section 151(c)(1) (19 U.S.C. 2191). The introduction is "by request," signifying that the sponsors have introduced the measure on behalf of another (in this case, the President).

[19]House Rule X, Clause 1(s), in *House Rules and Manual* , Section 741. Senate Rule XXV, paragraph 1(i), in U.S. Congress, Senate, *Senate Manual, Containing the Standing Rules, Orders, Laws, and Resolutions Affecting the Business of the United States Senate* [106th Congress], S.Doc. 106-1, 106th Congress, 1st session, prepared by Lori Breneman (Washington: GPO, 2000), Section 25.1i. (Hereafter referred to as *Senate Rules Manual*.)

[20]Senate Rule XVII, paragraph 1, in *Senate Rules Manual*, Section 17.1.

[21]"Days of session" here means calendar days on which the respective chamber is in session. Trade Act of 1974, Section 151(e)(3) (19 U.S.C. 2191).

them.[22] The leadership exercises a smaller degree of control over scheduling these bills than usual.

In the House, the expedited procedures afford this protection by making the motion to consider the bill "highly privileged" and nondebatable.[23] Such a motion would otherwise be debatable for one hour (or more, if the House defeated a motion for the previous question). In the Senate, the procedure makes the motion to consider "privileged and nondebatable," which prevents opponents from blocking the measure by dilatory debate on whether to take it up.[24]

Limits on Consideration. The trade fast track procedure requires each house to complete floor action within 15 days of session after committees report or are discharged. The statute, however, creates no mechanism for the direct enforcement of this time limit, such as a point of order against actions that would delay a final vote past the time specified. Nor do the general rules of either house appear to make available any such mechanism. Senate procedure affords no motion or other means by which consideration could be concluded and an immediate vote taken. House procedure provides means to conclude consideration and proceed to a vote, but only with the voting support of a majority; as a result, an attempt to conclude consideration could be defeated.

Once an implementing bill is under consideration, however, the expedited procedure secures the possibility of reaching a final vote by limiting debate to 20 hours. Either house may vote to reduce this time further. These statutory mechanisms limiting debate would probably suffice to bring about action in conformity with the overall time limit.

Under Section 151, the time available for debate is equally divided and controlled, in the Senate between the two party floor leaders, and in the House between supporters and opponents. Normally, debate time in the House is controlled by the chair and ranking minority member of the reporting committee. To meet the requirements of this fast track procedure, if both committee leaders took the same position on an implementing bill, the ranking minority member might be replaced by some other minority member of the committee who held a contrary view.

Motions and Other Actions. Other provisions on floor consideration included in the expedited procedures for trade agreements, similar to ones in many other expedited procedure statutes, restrict possible dilatory tactics that could block the measure. Some of these automatically exclude certain actions otherwise in order. Specifically:

---

[22]Procedures to govern floor action on the measure are contained in Sections 151(f) (House and 151(g) (Senate) (19 U.S.C. 2191).

[23]See "Privilege" in Walter Kravitz, *Congressional Quarterly's American Congressional Dictionary*, 3rd ed. (Washington: CQ Press, 2001), pp. 188-189.

[24]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.

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

Other provisions against dilatory tactics limit or preclude debate on actions that remain permissible. Specifically, in:

- both houses, a motion to limit debate to less than 20 hours is nondebatable;
- the House, appeals, and motions to postpone consideration of the bill or proceed to other business, are nondebatable; and
- the Senate, debate on an appeal or other debatable motion is limited to one hour.[25]

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.[26]

The function of preventing inaction is also shared by the prohibition on amendment. If it were possible for the House and Senate versions of an implementing bill to 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.[27]

Unlike some expedited procedures, that for trade agreements 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.[28]

Some expedited procedures provide that if Congress adjourns *sine die* before statutory time limits expire, the time periods provided begin anew upon the

---

[25]This time is divided between the Senator raising the appeal and the bill manager (or minority leader), and is in addition to the 20 hours for the measure itself.

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

[27]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.

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

reconvening of Congress or resubmission of the proposal. The expedited procedures for trade agreements lack a provision of this kind.

Statutory Mechanisms to Enforce Limits on Trade Promotion Authority

The power to accept or reject a proposition negotiated and submitted by the President is far from a full power to legislate on a subject. Yet the limitations imposed by the expedited procedures for trade agreements do not ultimately constrain the powers of Congress in this area. Instead, Congress has protected its ability to exercise its legislative authority in this area by (1) restricting the class of trade agreements eligible for approval under the expedited procedure, and (2) providing itself with procedural means of enforcing these restrictions. Additionally, Congress may always ultimately retrieve its plenary authority to legislate in this area by invoking the constitutional authority of each house to change its own rules.

By placing limits on the scope of the President's trade promotion authority, and giving itself means of enforcing these limits, Congress attempted to ensure that it would not have to consider any trade agreement under the constraints of the expedited procedure, except when that agreement addressed subjects on which it was willing to accept these constraints. In OTCA 1988, the chief ways in which Congress has restricted the class of trade agreements eligible for expedited approval were three:

- **Time limitations:** limitations on the time period during which the President can exercise the trade promotion authority;

- **Informational requirements:** an array of notifications to and consultations with Congress that must occur in the course of negotiating an eligible trade agreement; and

- **Substantive restrictions:** restrictions on the objectives that an eligible trade agreement may seek to promote, and the kinds of provisions an eligible implementing bill may contain.

The following sections describe the way OTCA 1988 provided for each of these kinds of limitation and the procedural means made available by the Act for Congress to ensure the effectiveness of each.

Time Limitations and the Extension Disapproval Resolution

Although each renewal of the trade promotion authority has been for a fixed period, some renewals, including that of OTCA 1988, also permitted the authority to be extended for one specified additional period. This extension would occur if the President so requested, unless either house adopted a simple resolution disapproving the request. This mechanism was designed to enable Congress to decide whether continuation of the President's trade agreement negotiating authority would be warranted by the state of negotiations then in progress. OTCA 1988 required that the text of this "extension disapproval resolution" include language specifying that the

disapproving house was acting "because sufficient tangible progress has not been made on trade negotiations."[29] The resolution had to be approved 15 days before the beginning of the extension period.[30]

An extension disapproval resolution was to be considered under an expedited procedure contained in Section 152 of the Trade Act of 1974, which is separate from the procedure for an implementing bill, though similar in operation. Differences are that (1) this separate 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 appeal is included in, rather than additional to, the overall 20 hours for debate on the measure.[31]

In each chamber, an extension disapproval resolution was to be reported from the respective revenue committee (and, in the House, from the Committee on Rules as well). It could be considered on the floor only if reported from these committees; provisions of Section 152 permitting a motion to discharge committees were not applicable to an extension disapproval resolution. Once the resolution was reported, a motion to consider it would normally be offered, in the Senate, by the majority leader, and in the House, by direction of the reporting committee. Members of the reporting committee would typically have charge of the consideration of the resolution.

Requirements for Notification and Consultation

Informational requirements under OTCA 1988 direct the President either to notify or to consult with Congress during the negotiation of a trade agreement. The Act established both kinds of informational requirement, in general, as conditions of the negotiating authority. The agreements that the President could submit for fast track implementation were in part defined as those for which the specified notifications and consultations had occurred.

Congress conditioned its grant of trade promotion authority on the fulfillment of various requirements for notification, so as to enable itself to monitor the likely outcomes of trade agreement negotiations. These notification requirements helped ensure that when Congress had to decide, under the restrictions of an expedited procedure, whether to implement a non-tariff trade agreement, it could do so on the basis of substantial information obtained throughout the negotiation process. Requirements for consultations, by contrast, were intended to permit Congress to

---

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

[30]OTCA 1988, Section 1103(b) (19 U.S.C. 2903). The initial authority was effective through May 1991, the extended authority 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 44.

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

influence the outcome of negotiations, by keeping the executive apprised of the likely congressional response.

Both kinds of informational requirements were structured in such a way that Congress could carry them out through the agency of its revenue committees, which exercise primary jurisdiction over key subjects addressed by trade agreements. These arrangements recognize and reinforce the prerogatives of the House Committee on Ways and Means and the Senate Committee on Finance.

Unlike its predecessors, OTCA 1988 established two different categories of nontariff trade agreements, and imposed different informational requirements for each. For trade agreements addressing solely nontariff barriers to trade, conditions similar to those previously in effect were retained, but for negotiations on free trade areas, Congress also imposed some additional informational requirements.

OTCA 1988 required some consultations to take place in advance of any trade negotiations, not only of those pursued under the trade agreement negotiating authority. First, the U.S. Trade Representative was to consult on overall trade policy, on a continuing basis, with the two revenue committees.[32] Second, the President was to accredit three majority and two minority members of each revenue committee as "advisers" to the U.S. delegation to each trade negotiation (and could also appoint additional advisers from other pertinent committees). These advisers were to receive briefings on the talks and provide advice pertinent to congressional approval of the agreement being negotiated.[33]

For nontariff trade agreements specifically, OTCA 1988 required additional notifications and consultations to take place during negotiations. First, the President could not sign any such agreement unless he had notified Congress of his intention to do so at least 90 calendar days previously. Between this notification and the signing, the President was to consult, with the revenue committees and others whose jurisdictions would be affected, on:

- "the nature of the agreement";
- how it achieved any established objectives; and
- the process by which it would be implemented.[34]

These consultations consisted, in practice, of "mock markups" (and sometimes also "mock conference committees"), through which the committees, in effect, drafted the terms of the implementing bill that the President would then submit.[35]

---

[32]OTCA 1988, Section 1632(c) (19 U.S.C. 2211).

[33]OTCA 1988, Sections 1632(a) and 1632(b) (19 U.S.C. 2211).

[34]OTCA 1988, Section 1102(d) (19 U.S.C. 2902).

[35]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 Congress, 1st session, H.Rept. 104-285 (Washington: GPO, 1995), pp. 16, 19; and "U.S.-Canada Free-Trade Agreement Finalized," in *Congressional Quarterly Almanac 1988*

(continued...)

Second, for free trade area negotiations, the President was to give further notice of the negotiations to the two revenue committees, at least 60 days of session before the 90-day notice, and then to consult with the committees on those negotiations.[36] These requirements did not apply to negotiations for other nontariff trade agreements. The presence of these additional informational requirements suggests that Congress desired to maintain an enhanced level of scrutiny and control over trade agreements for free trade area negotiations.

Third, OTCA 1988 applied further notification requirements at the point when the President would sign any nontariff trade agreement. At that point, the President was to submit specified supporting documentation to Congress, including:

- the text of the agreement;
- a statement of the administrative action to be taken to carry it out;
- a draft implementing bill; and
- a statement of how the agreement advanced statutory negotiating objectives.

Especially the last of these requirements (like that listed second in connection with the more general 90-day notification) would help enable Congress to judge how well its purposes in according the trade agreement negotiating authority were being served.

Procedural Disapproval Resolutions

Rulemaking provisions of OTCA 1988 also embodied a process by which Congress could in effect rescind the trade agreement negotiating authority at any time during a period for which it might be authorized. If each chamber separately adopted a "procedural disapproval resolution" within any period of 60 days of session,[37] the trade fast track procedures would cease to apply to any subsequent 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 required by statute. The text of a procedural disapproval resolution must include a statement that "the President has failed or refused to consult with Congress on trade negotiations and trade agreements in accordance with" the statute.[38]

---

[35](...continued)
(Washington: Congressional Quarterly, 1989), pp. 222-223, 226-227.

[36]OTCA 1988, Section 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, Section 1103(e) (19 U.S.C. 2903) and Section 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.

[37]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 1988, Section 1103(e) (19 U.S.C. 2903).

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

A procedural disapproval resolution was to be a simple resolution reported from the revenue committee in the respective chamber and, in the House, from the Committee on Rules as well. In the House, the resolution first had to be submitted by the chairman or ranking minority member of one of these two committees. In the Senate, the Committee on Finance was to report it as an original measure.[39] The resolution was to be considered under the expedited procedure of Section 152, the same as for an extension disapproval resolution.[40]

By requiring action in both houses, this mechanism precluded situations in which 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 principle 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 establishing a free trade area, OTCA 1988 also afforded Congress an additional means for revoking the fast track authority. Whereas a procedural disapproval resolution would terminate the trade promotion authority altogether, this mechanism applied only against a specific negotiation. It worked in conjunction with the special additional notification to the revenue committees, described earlier, that was required for negotiations on a free trade area. Within 60 days of session after this special notification, the House Committee on Ways and Means and the Senate Committee on Finance were each authorized to disapprove the negotiation of the free trade area agreement. If either panel did so, the implementing bill could not be considered under fast track procedures. This mechanism thus placed full discretion for this form of disapproval with each revenue committee, acting alone.

Restrictions on Objectives and Contents

The substantive requirements laid down by OTCA 1988 for trade agreements included ones that directly restricted the contents of either (1) the trade agreements eligible for expedited implementation, or (2) the implementing legislation itself. Some restrictions on the contents of an implementing bill were enacted as provisions of the trade fast track procedure itself, in Section 151 of the Trade Act of 1974. Restrictions on the contents of a trade agreement itself, by contrast, were generally enacted as conditions on the President's trade promotion authority.

Substantive restrictions on the trade promotion authority operate in advance of negotiations, to regulate the kind of nontariff trade agreement that might be negotiated under that authority. Substantive restrictions on implementing legislation, on the other hand, come into effect after negotiations are concluded. They presumably affect negotiations retrospectively, by encouraging the President to proceed from the outset in a way that will permit the agreement to qualify for expedited implementation. In these different ways, nevertheless, both kinds of

---

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

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

restriction allowed Congress to exercise influence over the substance of trade agreements before negotiations were concluded.

The chief means by which OTCA 1988 restricted the substance of the trade agreement negotiating authority was by establishing statements of the objectives that a nontariff trade agreement could pursue. Some of these related to the structure of trade generally, agriculture, services, intellectual property, and high technology, as well as the protection of worker rights.[41]

In addition, Section 151(b) of the Trade Act restricts any implementing bill by requiring it to include only (1) provisions approving a covered trade agreement and the President's statement of administrative action proposed to implement it, together with (2) any amendments to existing law that are "necessary or appropriate" to implement the agreement. Finally, Section 151(c) also requires the implementing bill to be introduced in the manner described in the section on the expedited procedure for trade.

OTCA 1988 provided no separate statutory mechanisms for enforcing these substantive requirements. Instead, they might be enforced through the use by each house of its constitutional power to determine its own rules. These means of enforcement are discussed in the following section.

Using the Rulemaking Power to Enforce Limits on Trade Promotion Authority

Rulemaking Authority of Congress

Even though Congress limited the scope of the trade promotion authority by imposing these substantive restrictions and informational requirements, it might still conclude that the terms of a specific nontariff trade agreement did not appropriately reflect its intent. The statutory expedited procedure might require Congress to consider the implementing bill under constraints on its discretion that it would find inappropriate for that specific situation. Congress, however, possesses several means of avoiding a dilemma of this kind. By these means it would be able to override the statutory expedited procedure and recover its normal legislative prerogatives for consideration of legislation implementing trade agreements.

The key to all of these mechanisms is that, although the expedited procedure for trade is prescribed in statute, its provisions operate as procedural rules of the House or Senate. Under the Constitution, each house possesses full authority to determine its own internal rules,[42] including the power to alter or supersede these rules by its own action. This constitutional rulemaking authority permits each house to adopt and amend its rules by a simple resolution (a measure acted on only by the house to which it applies).

---

[41]OTCA 1988, Section 1101 (19 U.S.C. 2901).

[42]Article I, Section 5, Clause 2. In *Constitution Annotated*, pp.123-125.

Expedited procedures, however, including the one for trade agreements, are enacted in law, which, under the Constitution, requires the joint action of both houses and the President. As a practical matter, expedited procedures may often need to be established in this way, because they affect the prerogatives of all three institutions, and each may be willing to accept the effects only as part of an overall accommodation among all. Nevertheless, expedited procedures regulate proceedings in each house (on the measures they apply to) in just the same way as do the general rules of each. To enact these procedures in statute therefore seems to give authority over rules of each house to the President and the other house, neither of whom has any constitutional claim to this authority.

To resolve this difficulty, when a law contains provisions that operate as congressional rules, it typically also includes a declaration that these provisions are enacted "as an exercise of the rulemaking power" of each house. 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."[43] These declarations affirm the authority of each house to treat rulemaking provisions in the same way as other rules, and alter them by its own sole action, even though they were established by statute.[44] Provisions enacted under declarations like these are sometimes called "rulemaking provisions" of statute.

Forms of Control Through the Rulemaking Authority

Congress possesses several ways of invoking its general rulemaking authority to change, suspend, or determine the applicability of the rulemaking provisions of statute that make up the expedited procedure for trade agreements. One has already been discussed: the establishment of additional expedited procedures, as in Section 152 of the Trade Act of 1974, which governs the consideration of extension disapproval resolutions and procedural disapproval resolutions. These mechanisms permitted Congress to adjust the availability of the trade agreement negotiating authority to reflect its judgment of how the authority was being used.

---

[43]Specific language quoted is that of Section 151(a) of the Trade Act of 1974 (19 U.S.C. 2191), covering Sections 151-153 of that Act (19 U.S.C. 2191-2193). Similar language in Section 1103(d) of OTCA 1988 covers Sections 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.

[44]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 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.

Each house may also supersede or override the rulemaking provisions of law that make up the expedited procedure for trade agreements by use of its general constitutional rulemaking authority in several other ways. The following sections discuss some of these additional forms in which Congress exercises its rulemaking powers, including:

- making procedural decisions about whether the procedures established by rulemaking provisions of law apply in a specific situation, or to a specific measure;

- considering an implementing bill, though qualified for consideration under the Section 151 rulemaking provisions, under procedures different from those specified by the rulemaking provisions;

- determining to act, not on an implementing bill qualified for consideration under the Section 151 rulemaking provisions, but instead on some other legislation that would have the effect of implementing the same trade agreement; or

- adopting general changes in those rulemaking provisions of law through subsequent action by resolution or subsequent rulemaking statute.

Determining Application of Rules

The authority of each house over its own rules fundamentally includes the power not only to establish and alter rules, but also the ability to determine in what situations the rules apply. Congress could use this ability as a means to enforce some of the restrictions it places on the trade promotion authority. Under OTCA 1988, for example, the President might have negotiated a nontariff trade agreement for which he neither gave the required 90 days notice of signing nor submitted the required supporting documentation along with the implementing bill. If any Member moved that the chamber consider a bill to implement this trade agreement, another Member might raise a point of order that Section 151 makes the motion privileged only on measures for which the required notification and documentation are provided. If the chair sustained this point of order, the measure in question could not be considered under the expedited procedures, on the grounds that Section 151 did not qualify it for such consideration.

Although the expedited procedure for trade does not explicitly establish any point of order of this kind, raising it would presumably be in order as an exercise of the general power of each house over its own rules. Action of this sort would likely also be effective in enforcing the limitations established by Congress on the trade promotion authority. The President would probably be unable to implement the agreement through administrative action, for OTCA 1988 provided that any nontariff trade agreement for which the submission requirements were not met could not enter into force (that is, take effect).[45]

---

[45]OTCA 1988, Section1103(a) (19 U.S.C. 2903).

In principle, this way of applying the rulemaking power might also enable the chamber to enforce the statutory requirements of the trade promotion authority, which are not themselves rulemaking provisions. Leaders of one of the revenue committees, for example, might wish not to consider a specified implementing bill under the expedited procedures, because the trade agreement in question did not advance objectives specified for the trade promotion authority. In cases of this kind, however, the only way in which the chair could rule on whether an implementing bill met the requirements of the rulemaking provisions of Section 151 would be by making determinations about whether the agreement itself met the conditions placed on the trade promotion authority. Because the provisions defining these objectives are not rulemaking provisions, these determinations would have to rest on substantive information about trade policy to which the chair would lack authoritative access.

For this reason, points of order of this kind would in practice not likely be raised on the floor, at least in the House of Representatives. Instead, in advance of considering the implementing bill, the House would likely adopt a special rule waiving the point of order. By doing so, the House would preserve the qualification of the bill for expedited consideration. Alternatively, the House might adopt a special rule providing that the bill be considered under procedures other than fast track. This action would prevent expedited consideration of the bill, just as would sustaining the point of order. These options permit each chamber to reach the same alternative outcomes as would the point of order, but convert the choice between outcomes from a procedural decision to a political one.

Altering Procedure for Individual Measures

It is also well established that the rulemaking power extends to actions by which either house authorizes exceptions to its rules (including rulemaking provisions of statute), or otherwise alters the application of rules to specific cases. For this reason, although the Trade Act made the expedited procedure for trade agreements available for the implementing bills it covers, it could not compel either house to consider these bills under this procedure. Pursuant to its constitutional rulemaking authority, either house could have suspended or denied the application to a specific implementing bill either of the expedited procedure as a whole, or of individual features of that expedited procedure. It could do so while still retaining in force the existing expedited procedure for trade generally.

The Senate most commonly exercises this form of authority over its rules through action by unanimous consent. The House also may take such action by unanimous consent, but more commonly does so by adopting a "special rule," a device that has no Senate counterpart.[46]

The Senate often adopts unanimous consent agreements establishing comprehensive terms for considering a specified measure. These terms then altogether supersede those of the general rules, to the extent of any conflict. If

---

[46]In principle, either house could take action of this kind also by means of a motion to suspend the rules. The Senate, however, rarely makes use of this motion, and the House would probably be unlikely to do so for these purposes.

unanimous consent could be obtained for the purpose, the Senate could decide to take up an implementing bill, not pursuant to Section 151 at all, but instead under whatever other terms the unanimous consent agreement provided. By unanimous consent, the Senate could also set aside specified individual features of the expedited procedure. It could, for example, take up an implementing bill by unanimous consent rather than by the privileged motion provided in the statute. It could also extend or reduce the time available for debate on the measure or on specified motions or other questions, permit the offering of a motion that Section 151 precludes, etc.

Probably the only feature of the expedited procedure that the Senate could not alter by unanimous consent is the prohibition on amendments. The chair could entertain no such request for unanimous consent, because Section 151 prohibits action to supersede the prohibition on amendment. The Senate might still permit amendments by tacit unanimous consent: if no Senator were to raise a point of order to enforce this (or any other) requirement of the expedited procedure, the Senate could consider the measure while ignoring that requirement. Also, if the Senate took up an implementing bill pursuant to a comprehensive unanimous consent agreement rather than under the expedited procedure, the prohibition on amendment contained in that expedited procedure presumably would not apply.

In the House, special rules, which are resolutions setting terms for the consideration of a specified measure, are reported by the Committee on Rules and adopted by simple majority vote. The House normally limits debate on a special rule to one hour, and precludes its amendment, by ordering the previous question. By use of this device, the House could at any time determine to take up an implementing bill, and consider it under terms providing whatever latitude for its debate and amendment the Committee on Rules finds appropriate and a majority is willing to accept. In principle, the House also might set aside individual provisions of the expedited procedure (except the prohibition on amendment) by unanimous consent, but in practice, it would less likely be able to obtain unanimous consent for such a purpose.

Typically, the House could be expected to take up an implementing bill pursuant to a special rule rather than under the expedited procedure. By affording consideration of the bill under a special rule, instead of pursuant to the privileged motion to proceed, the leadership would retain its normal control of the floor agenda. The House would also avoid having to have the chair determine substantive questions about whether the trade agreement met the requirements of the trade promotion authority through nominally procedural decisions about the eligibility of the implementing bill for consideration under Section 151.

Considering Alternative Measures under General Rules

The constitutional rulemaking power also permits each house always to recover its effective freedom of choice in legislation by circumventing the expedited procedure altogether. Several means exist for each house to exercise this capacity. First, although Section 151 protects the motion to consider an implementing bill, it does not require any Member to offer this motion, and cannot require either house to adopt it. To this extent, Congress retains its usual discretion not to act.

Second, the availability of the statutory expedited procedure for implementing bills cannot prevent either house from considering some other measure that might deal with the same subjects. After the President has submitted a draft implementing bill, or even before then, the revenue committee in either chamber could report a measure dealing with the same matters, but containing different provisions. This chamber could take up, amend, and pass this alternative, instead of acting on the implementing bill prescribed by the Trade Act. The House would most likely take this kind of action pursuant to a special rule, which probably would also provide 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 expedited procedure, the first house could ask for a conference on the differences between the original bill and its own, and the conference could report a new version of the bill, which both chambers might accept. Despite the intent of the expedited procedure, this way of using the congressional rulemaking power could result in the President's being 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 enacted an implementing bill without amendment, pursuant to the expedited procedures, the action would not vitiate the authority of Congress to enact subsequent legislation amending, or altering the terms of, that law. Congress could use this authority to enact subsequent amendments to the implementing legislation. By this means, Congress could act in accordance with the expedited procedure, yet also continue to exercise its full legislative discretion on the subjects covered.

The President could, of course, attempt to prevent the subsequent enactment by veto. Also, 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 an expedited procedure 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 ultimate, inalienable means whereby Congress is able to avoid being constrained by the alternatives to which an expedited procedure statute attempts to restrict it.

General Changes in Rules

Finally, either house may at any time use its rulemaking authority explicitly to repeal or alter any of the rulemaking provisions defining the expedited procedure for trade agreements (or the procedure for extension and procedural disapproval resolutions). For example, either house could alter the procedures established by Section 151 so as to permit amendments to be offered to implementing bills.

Normally, either chamber alters provisions of its rules, including rulemaking provisions of statute, by simple resolution. 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 on the resolution to one hour, and preclude amendment, by ordering the previous question. The Committee on Rules normally operates in cooperation with the leadership of the majority party, and can usually secure the support of that party for the previous question. As a result, 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 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 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. For this reason, although procedure is generally more flexible in the Senate than in the House, the Senate may be less readily able than the House to alter a rule that it has once established.

Each house could apply its rulemaking authority in this way to the provisions making up the expedited procedure for trade, which are rulemaking provisions, but not to change the provisions defining the trade promotion authority, which are not. Neither house, in other words, could use its power over its own rules to make unilateral changes in provisions of law that define the scope of the negotiating authority.

Yet either house might achieve the same result indirectly, by changing the provisions of Section 151 that determine whether an implementing bill qualifies for expedited consideration. This section specifies some requirements for an implementing bill directly, and incorporates others by reference to the conditions defining the negotiating authority. Accordingly, if either house of Congress wished to narrow or broaden the range of legislation to which the expedited procedure would apply, it could rewrite these provisions of Section 151 to alter the conditions under which a bill would qualify for this procedure. It might, for example, amend Section 151 to provide that a bill to implement a trade agreement fostering certain objectives was not an "implementing bill" within the meaning of the expedited procedure, even though the trade promotion authority continued to specify these objectives as ones that nontariff trade agreements could pursue.