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Derailing the Fast-Track for International Trade Agreements

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DERAILING THE FAST-TRACK FOR INTERNATIONAL TRADE AGREEMENTS

*Edmund W. Sim**

I. INTRODUCTION 472
II. BACKGROUND 475
III. POTENTIAL OPPONENTS OF INTERNATIONAL TRADE AGREEMENTS 481
- A. *Textiles* 482
- B. *Agriculture* 484
  1. Commodities with Price Supports and Import Quotas 485
  2. Border State Agricultural Interests 485
  3. Progressive Farm Groups 485
- C. *Environmental and Consumer Groups* 486
- D. *Labor* 488
- E. *Manufacturers* 489
- F. *Maritime* 490
- G. *Aviation* 491
- H. *Religious and Human Rights Interests* 492

IV. THE TRADE AGREEMENTS ACT OF 1992 493
- A. *Pre-Notification* 493
  1. Congressional Input 493
     - a. Extension of Fast-Track Authority 493
     - b. Free Trade Agreement Review by Congressional Committee 497
     - c. Congressional Participation in Trade Negotiations 498
  2. Private Industry Input 499
- B. *Notification of Congress* 499
- C. *Non-Markups and Non-Conferences* 500
- D. *Conclusion of Agreement and Formal Submission to Congress* 502
- E. *Committee and Floor Consideration* 503

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V. METHODS FOR MODIFYING THE FAST-TRACK 506
A. *Separate Resolution* 507
B. *Formal Termination or "Reverse Fast-Track"* 511
C. *Unanimous Consent* 515
D. *New Legislation* 516
E. *Suspension of the Rules* 517
F. *Ignore the Rules* 517
VI. ALTERNATIVES TO FAST-TRACK 518
VII. CONCLUSION 521

I. INTRODUCTION

Frustrated by the weak Articles of Confederation, yet with no desire to recreate the monarchy of their former British masters, the Founding Fathers designed a constitutional system to restrict and empower future United States leaders. The United States Constitution established a tripartite system of government with authority shared jointly by the President, the Congress and the Judiciary. Through his constitutional powers to recognize ambassadors, command the armed forces and negotiate treaties, the President has become the United States' representative to foreign nations.[1] However, although the President may negotiate international agreements, the Constitution authorizes only the Congress to implement legislation affecting international commerce.[2]

The Constitution, therefore, forces the Executive and Legislative branches to engage in a balancing of power. Together, they have achieved dramatic progress in international trade. Yet their failures to cooperate also dot the history of international commerce. The great post-World War II hope for global trade, the International Trade Organization (ITO), suffered a lingering death in the halls of a Congress unwilling to approve its charter.[3] Nearly twenty years later, a Congress feeling ignored effectively negated an anti-dumping code unilaterally accepted by the President under his foreign relations authority.[4] Other trade agreements fell prey to Congressional amendments that limited their vitality. These intramural conflicts eroded

1. U.S. CONST. art. II, §§ 2-3.
2. U.S. CONST. art. I, § 8, cl. 3.
3. S. LENWAY, THE POLITICS OF U.S. INTERNATIONAL TRADE: PROTECTION, EXPANSION & ESCAPE 70-72 (1985).
4. R. PASTOR, CONGRESS AND THE POLITICS OF U.S. FOREIGN ECONOMIC POLICY 1929-1976 121-22 (1980).

the President's ability to engage in international trade negotiations, as foreign governments became skeptical of his ability to implement bargains reached at the negotiating table.

Caught between the requirement for some level of Congressional participation and the need to reassure trading partners, the President and Congress agreed in the Trade Act of 1974 to the Fast-Track procedure.[5] By submitting legislation implementing trade agreements to Congress, but under legislative rules that expedited consideration and prohibited amendments, the President sought to ease both international and domestic political restraints. Through Fast-Track, Congress passed implementing legislation for the General Agreement on Tariffs and Trade (GATT) Tokyo Round negotiations by wide margins. Satisfied, Congress incorporated the procedure into subsequent trade laws.[6] Fast-Track also survived the constitutional attack of *Immigration & Naturalization Service v. Chadha.* Since it is merely a procedure for expedited legislative consideration authorized by Congress's Article I right to determine the rules of its proceedings, Fast-Track shares none of the flaws that doomed the legislative veto in *Chadha.*[7] Many statutes now employ versions of Fast-Track[8] and some authors propose its extension to venues such as arms control treaties and foreign arms sales.[9]

Not surprisingly then, opponents of proposed trade agreements have made Fast-Track their main target, as they understand that "derailment" of Fast-Track would force the President to use the traditional legislative procedures that foreign governments fear. When

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5. Trade and Tariff Act of 1974, Pub. L. No. 93-618, §§ 102, 151, 88 Stat. 1978 (codified at 19 U.S.C. §§ 2112, 2191 (1988)) [hereinafter Trade Act of 1974].

6. R. JEROME, U.S. SENATE DECISIONMAKING: THE TRADE AGREEMENTS ACT OF 1979 7 (1990).

7. Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919 (1983). Its embodiment in statute also provides for passage by both Houses of Congress and presentation to the President for his signature.

8. *See, e.g.*, Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, § 602, 100 Stat. 1086, 1112-14 (Fast-Track provisions codified at 22 U.S.C. § 5112 (1988)) (allowing for joint resolution authorizing Presidential sanctions against South Africa or opposing Presidential decision to revoke them); Continuing Appropriations for Fiscal Year 1987, Pub. L. Nos. 99-500, 99-591, § 101(k), 100 Stat. 1783, 1783-304 to -305, 100 Stat. 3341, 3341-304 to -305 (1986) (allowing for joint resolution disapproving aid for Nicaraguan *contras*); for a more complete listing of statutes employing expedited procedures, see *Manual and Rules of the House of Representatives*, H.R. DOC. NO. 279, 99th Cong., 2d Sess. § 1013 (1986) [hereinafter *House Manual*].

9. *See* Note, *Congress and Arms Sales: Tapping the Potential of the Fast-Track Guarantee Procedure*, 97 YALE L.J. 1439 (1988); Note, *Reinterpreting Advice and Consent: A Congressional Fast-Track for Arms Control Treaties*, 98 YALE L.J. 885 (1989).

the GATT Uruguay Round of trade negotiations bogged down and the United States-Mexico-Canada Free Trade Agreement, or North American Free Trade Agreement (NAFTA), became more than an economist's pipe dream, the Bush Administration was forced to seek an extension of Fast-Track authority for both sets of negotiations. The Administration had to fight tooth and nail to prevent its opponents from passing disapproval resolutions that would have negated the automatic extension of authority mandated by the 1988 Omnibus Trade Act. However, an inspired effort by the President repelled these efforts and he received the two-year extension of Fast-Track authority.

Despite this important political victory, though, the Bush Administration has not yet won the war for the Uruguay Round and NAFTA. For the Fast-Track has one Achilles' Heel that remains vulnerable even after the seemingly clear victory of May 1991. Congress enacted Fast-Track under its unilateral constitutional authority to determine the "Rules of its Proceedings." Hence, either House of Congress may modify or eliminate the Fast-Track without having to present such changes before the President for his approval.[10] This may occur at *any* time before, during or after the trade negotiations. Even the mere threat of Fast-Track revocation can convince negotiators to refrain from certain trade issues. Congressmen have used this loophole to shield pet industries from past trade agreements. Congressmen have also demonstrated their willingness to derail Fast-Track-type procedures in other contexts. Thus, even after President Bush's impressive legislative victory, Congress can still strike back and effectively kill the Uruguay Round and/or NAFTA.

This article will focus on how the Fast-Track procedure will operate for the Uruguay Round and NAFTA and how their enemies can "derail" the Fast-Track. First, I will briefly review the historical events leading to adoption of the Fast-Track procedure. Second, I will discuss which interest groups might challenge the Uruguay Round and/or NAFTA even after the Fast-Track extension. Third, I will track a hypothetical Trade Agreements Act of 1992 (or the North American Free Trade Agreement Implementing Act) through the Fast-Track process and note potential deficiencies in the process. Fourth, I will examine the various methods by which their opponents and their Congressional allies might seek to achieve their goals by modifying or retracting the Fast-Track procedure. Fifth, I will discuss the alternatives available to the President if the Fast-Track derails.

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10. U.S. CONST. art. I, § 5, cl. 2.

No procedural strengths can save weak agreements and procedural weaknesses alone cannot defeat strong agreements. Rather, I believe that the Fast-Track's "weakness" will force the Administration to negotiate realistic and substantive agreements that will attract support. The possible "derailing" of the Fast-Track is merely a natural expression of the same inter-branch tensions embodied in the Constitution. With a strong political consensus behind them, no one flaw in the Fast-Track will overcome the Uruguay Round or NAFTA.

II. BACKGROUND

Before 1934, Congress freely exercised its constitutional powers over international trade. Trade policy, based almost entirely on Congressionally controlled tariffs, "ranged from primitive to non-existent," with the President limited to ministerial tasks.[11] This first policymaking scheme ended when Congress, embarrassed by the Smoot-Hawley Tariff debacle, delegated authority to the President allowing him to enter into tariff-cutting agreements.[12] In the Reciprocal Trade Agreements Act and its successors, Congress maintained a role in trade policy through "sunset" provisions that ended Presidential negotiating authority after brief periods.[13] Through this second scheme, Congress managed to insulate itself from the protectionist forces it believed responsible for Smoot-Hawley.[14]

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11. S. COHEN, THE MAKING OF UNITED STATES INTERNATIONAL ECONOMIC POLICY 7 (1977).

12. R. BALDWIN & A. KRUEGER, THE STRUCTURE AND EVOLUTION OF RECENT U.S. TRADE POLICY 8 (1984).

13. Koh, *Congressional Controls on Presidential Trade Policymaking After* I.N.S. v. Chadha, 18 N.Y.U.J. INT'L L. & POL. 1195 (1986). *See, e.g.*, Act of June 12, 1934, 48 Stat. 943 (codified at 19 U.S.C. § 1351 (1988)); *as amended by*, Joint Resolution of Apr. 12, 1940, 54 Stat. 107 (three-year extension); Joint Resolution of June 7, 1943, 57 Stat. 125 (two-year extension); Act of June 26, 1948, 62 Stat. 1053 (one-year extension); Act of Sept. 26, 1949, 63 Stat. 697 (three-year extension); Act of June 15, 1951, 65 Stat. 72 (two-year extension); Act of Aug. 7, 1953, 67 Stat. 472 (one-year extension); Act of July 1, 1954, 68 Stat. 360 (one-year extension); Act of June 21, 1955, 69 Stat. 162 (three-year extension); Act of Aug. 20, 1958, Pub. L. No. 85-686, 72 Stat. 672 (four-year extension); Act of Oct. 11, 1962, Pub. L. No. 87-794, 76 Stat. 872 (five-year extension). As the next paragraphs describe, Congress allowed this last five-year extension of authority to expire. The Trade Act of 1974, *supra* note 5, § 101, re-established tariff negotiating authority until 1980, when it lapsed again. Such authority was not re-established until the Omnibus Trade and Competitiveness Act of 1988, which extended authority until 1993. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1102, 102 Stat. 1107 (codified at 19 U.S.C. § 2903 (1988)) [hereinafter Omnibus Trade Act].

14. I. DESTLER, AMERICAN TRADE POLITICS: SYSTEM UNDER STRESS 33 (1986).

So long as tariffs remained the main concern of trade liberalization, this scheme functioned smoothly. Congress could set specific limits on the scope of negotiations and trade policy remained within a small universe of experienced Congressional and Executive decisionmakers.[15] But the growing emphasis on eliminating non-tariff barriers (NTB's) posed unique problems for Congress. Regulating NTB's seemed to fall outside its Article I powers to "lay and collect Taxes, Duties, Imposts and Excises."[16] Fearing that the President might negotiate an NTB agreement and attempt to implement it by himself under his foreign affairs powers, Congress in the 1960s authorized him to negotiate trade agreements but also required him to bring them back for subsequent approval.[17] Its fears were realized when President Johnson accepted the 1967 Anti-Dumping Code, negotiated during the GATT Kennedy Round negotiations, under his foreign policy authority.[18] Congress managed to negate the Code by making it subsidiary to existing United States law. It expressed further indignation by refusing to repeal the American Selling Price of customs valuation system, which was negotiated away without Congressional approval during the Kennedy Round.[19] Congress refused to delegate any advance negotiating authority until 1974.

Placating both Congressional fears and international reluctance to negotiate with a President without implementing authority became a top priority. Use of the traditional treaty or legislative processes would expose a trade agreement to delays and amendments that would kill or neutralize the implementing bill. A quick review of how the traditional United States legislative process generally operates should illustrate some of these dangers.

As the Constitution requires that legislation "for raising Revenue shall originate in the House of Representatives,"[20] and as almost every trade bill involves tariffs, which generate revenue in the usual case, a trade bill originates in the House. The Speaker of the House refers the bill to the Ways and Means Committee, which has jurisdiction over tax and tariff legislation — and therefore trade legislation. After conducting hearings, the committee conducts "markup" sessions in

15. *Id.*
16. U.S. CONST. art. I, § 8, cl. 1.
17. Koh, *supra* note 13, at 1198.
18. *Id.*
19. *Id. See* Renegotiations Amendment Act of 1968, Pub. L. No. 90-364, § 201, 82 Stat. 1345, 1347.
20. U.S. CONST. art. I, § 7, cl. 1.

which it may redraft the bill on a line-by-line basis. If the committee then votes to "report out the bill," it is scheduled for consideration by the full House and a legislative report (in theory reflecting the legislative history) is prepared, along with any dissenting view. At that point, the House Rules Committee must decide on the "rule," a resolution setting terms of floor debate for the bill. A "closed" rule prohibits amendments to the bill; conversely, an "open" rule permits the offering of amendments. The full House then debates and votes on the bill. After House approval, the bill is sent to the Senate and referred to the Senate Finance Committee, the counterpart to the House Ways and Means Committee, which conducts its own hearings and markups and reports on the bill. Then, the full Senate may debate, add amendments and vote on the bill. The Senate has looser procedures that allow for nongermane amendments and for unlimited debate — that is, "filibusters" — that can stall legislation indefinitely. After Senate approval, any conflicts between the House of Representatives and the Senate are resolved in a conference committee made up of representatives from all of the committees that considered the bill. The Houses each vote on the conference committee's revisions (and the accompanying report of the Conference Committee) and then the President may sign the bill.[21]

The above description may appear to be simple. However, at every point during congressional consideration, members may invoke delaying and destructive tactics, such as stalling the bill or adding amendments that would offend trading partners. To avoid going through this lengthy and risky process, the Office of the Special Trade Representative (STR, later the United States Trade Representatives, or USTR) suggested giving Congress a "veto" over an NTB agreement in the proposed Trade Reform Act of 1973.[22] Under this proposal, 90 days before concluding an agreement, the President would notify Congress that he intended to use the veto procedure.[23] The Administration would then consult with the appropriate House and Senate committees. After concluding the agreement, the President would submit the agreement and executive orders implementing the agreement to Congress; if neither House rejected the proposals by majority vote, the agreement would become part of United States law.[24]

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21. J. JACKSON & W. DAVEY, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 148-49 (1986).

22. Wolff, *The U.S. Trade Mandate*, 16 VA. J. INT'L L. 505, 514 (1976).

23. H.R. 6767, § 103(c), 93rd Cong., 1st Sess. (1973).

24. *Id.*

The House of Representatives approved the veto procedure.[25] However, the Senate Finance Committee balked at the concept. Senator Herman Talmadge, worried that the veto process would mean major changes in agricultural policy without the input of his Senate Agriculture Committee, insisted that NTB agreements be implemented through "normal" legislation.[26] The rest of the Committee followed his lead.

But compromise was possible. Nixon Administration officials convinced Talmadge that their prime motive for the veto was not to usurp legislative power, but simply to let trading partners know "whether a deal was a deal in a short period of time" and in substantially the same form as had been negotiated.[27]

Acting upon a staff memorandum,[28] the Finance Committee adopted what would become known as the "Fast-Track" procedure for international trade agreements, as follows:

> 1. The President would notify Congress of his intent to enter a trade agreement 90 legislative days before concluding negotiations. During that 90-day period Congress could advise the President as to whether the President should seek re-negotiation or modification of any part of the agreement.
> 2. At or after the end of the 90-day period, the President would conclude negotiations and submit a formal implementing bill to Congress. This bill would be nonamendable.
> 3. Congress would have a 60 legislative day maximum period in each House to consider the bill. If a committee failed to report the bill to the floor by then, an automatic discharge would release it to the floor.
> 4. Floor debate would be limited to 20 hours in each house. After passage, the President would sign the bill, making it part of the U.S. law.[29]

This compromise allayed congressional and Presidential concerns; Congress authorized the President to engage in NTB agreements subject to congressional approval through the Fast-Track.[30]

25. I. DESTLER, MAKING FOREIGN ECONOMIC POLICY 157 (1980).

26. Destler & Graham, *United States Congress and the Tokyo Round: Lessons of a Success Story*, 3 WORLD ECON. 53, 56 (1980).

27. Marks & Malmgren, *Negotiating Nontariff Distortions to Trade*, 7 L. & POL'Y IN INT'L BUS. 327, 339 (1975).

28. Memorandum from Senate Finance Committee staff to Senator Herman Talmadge (June 5, 1974) (reprinted in M. GLENNON, T. FRANCK & R. CASSIDY, IV UNITED STATES FOREIGN RELATIONS LAW: DOCUMENTS AND SOURCES 64-65 (1984)).

29. Trade Act of 1974, *supra* note 5, §§ 102, 151.

30. *Id.* § 102; *as amended*, Trade Agreements Act of 1979, Pub. L. No. 96-39, § 1101 93 Stat. 144, 307 (codified at 19 U.S.C. § 2504 (1988)); Omnibus Trade Act, *supra* note 13, § 1102(b).

With its negotiating authority clarified, the Administration focused its energies on the GATT Tokyo Round negotiations. During the talks, Congress and the President worked together to fill in gaps in Fast-Track. STR shared classified documents with Congressmen and their aides, and congressional delegations frequently visited Geneva.[31] "Congress had considerable influence on various aspects of United States policy in the Tokyo Round," noted one staffer.[32]

Congress strengthened its hand in the process through informal consultations, or "non-markups," suggested by the Senate Finance Committee staff.[33] After President Carter notified Congress of his intention to enter into the Tokyo Round agreements, he submitted to Congress detailed draft proposals for implementing legislation. Staffers translated them into a format resembling legislation; yet as mere proposals, they did not have the formal status of legislation.[34] The Finance and Ways and Means Committees held hearings[35] and closed-door conferences with the Administration.[36] Other committees (agriculture, commerce, etc.) had input through representatives to the non-markups, as in the House, or through their own non-markups, as in the Senate.[37] After the "non-markups", the committees resolved their differences through joint "non-conference" meetings of committee representatives.[38] The President then submitted formal implementing legislation to Congress incorporating a few new changes but substantially resembling the end results of the non-markups,[39] triggering the Fast-Track.[40] Congress passed the implementing bill by wide margins.[41] Hence, before the start of Fast-Track, the Tokyo Round proposals

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31. Cassidy, *Negotiating About Negotiations: The Geneva Multilateral Trade Talks*, in THE TETHERED PRESIDENCY 264, 271-72 (T. Franck ed. 1981).

32. Interview with Robert Cassidy, former Senate Finance Committee Counsel, in J. TWIGGS, THE TOKYO ROUND OF MULTILATERAL TRADE NEGOTIATIONS 113 (1987).

33. Cassidy, *supra* note 31. The original staff memorandum is reprinted in M. GLENNON, T. FRANCK & R. CASSIDY, *supra* note 28, at 176-77.

34. Cassidy, *supra* note 31, at 276.

35. *Id.*

36. *Id.* at 276.

37. J. TWIGGS, *supra* note 32, at 61-62.

38. I. DESTLER, *supra* note 14, at 67.

39. Changes to "set-aside" preference programs for minority businesses and a compromise on the material injury test for anti dumping petitions were settled in the non-markup process. G. WINHAM, INTERNATIONAL TRADE AND THE TOKYO ROUND NEGOTIATION 311 (1986).

40. I. DESTLER, *supra* note 14, at 67.

41. The bill passed in the House by a 395 to 7 margin, and in the Senate by a 90 to 4 margin. Many of the opponents were from the Wisconsin delegation, who were displeased with modifications of the cheese import quotas. *Id.*

did not have the status of formally proposed legislation, but the Administration and Congress treated them as such throughout the non-markup and non-conference process.

All involved seemed pleased with the Fast-Track, which had taken only 34 legislative days of Congressional action.[42] Congress was able once again to insulate itself some what from protectionist forces (except for committee report language and other skirmishes with the textile industry to be discussed later); the closed-door non-markups better reduced their influence and early political investment in the Tokyo Round reduced Congressional incentives to amend the agreements.[43] The President was able to respond quickly and credibly to American trading partners. This pleasure led to the extension of Fast-Track authority in subsequent legislation.[44] Congress also expanded the scope of Fast-Track to free trade agreements (FTA's) in the Trade and Tariff Act of 1984.[45] The United States-Israel FTA implementing was passed under substantially the same Fast-Track procedure as in 1979.[46] But for FTA's with countries other than Israel, Congress mandated that the President notify the Finance and Ways and Means Committees 60 legislative days before giving the statutorily required 90-day notice of his intent to enter into an agreement. If neither committee disapproved of the negotiations by majority vote before the end of the 60-day period, the FTA implementing legislation would receive Fast-Track consideration.[47]

By the beginning of the Uruguay Round in 1986, the policymaking environment had changed. During the Tokyo Round, STR had worried more about a broad coalition of unhappy industries that would mobilize Congressional opposition on the floor vote rather than the opposition of a single industry.[48] But by the Uruguay Round, industries had discovered that they could regain leverage in the legislative process by obtaining or threatening the revocation or modification of Fast-Track authority. Hence the mere threat of revocation or modification became a useful weapon.

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42. Koh, *supra* note 13, at 1203.

43. I. DESTLER, *supra* note 14, at 67.

44. Trade Agreements Act of 1979, *supra* note 30, § 3(c).

45. Trade Act of 1974, *supra* note 5, §§ 401-06.

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

47. Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 401(a), 98 Stat. 2948 (codified at 19 U.S.C. § 2112(b)(4)(A) (1988)).

48. I. DESTLER, *supra* note 14, at 67.

Industries and their allies used this weapon well during the negotiation of the United States-Canada FTA. Consultations had begun in mid-1986 with the Finance and Ways and Means Committees after President Reagan's formal notification of his intent to begin negotiations with Canada.[49] Just before the 60-day period of consultations was to end, a majority of the Finance Committee threatened to disapprove the FTA talks.[50] The Administration managed to gain committee approval only after it promised to work closely with the committee.[51]

In 1987, the maritime industry managed to exempt itself from the scope of the United States-Canada FTA. Prodded by maritime lobbyists, large majorities of both the House Rules Committee and the Senate Committee on Rules and Administration sent letters and passed resolutions threatening to withdraw Fast-Track authority for any aspect of the FTA dealing with the maritime industry.[52] Negotiators agreed to drop maritime provisions from the draft submitted to Congress.[53] Other industries, such as the uranium industry,[54] introduced similar measures with the aim of gaining comparable leverage.

Finally, the 1991 fight to extend Fast-Track authority for an additional two years may have been one of the most intense international trade battle in recent times. Labor, religious, environmental, human rights, consumer, textile and agricultural interests all attempted to block the extension of Fast-Track for the delayed Uruguay Round and NAFTA. The Bush Administration defeated this coalition by making pledges to increase their input in the trade negotiations. But by opposing extension, environmental groups and others for the first time managed to inject themselves directly into international trade policymaking.

III. Potential Opponents of International Trade Agreements

Special interests have learned how to use Congressional procedure to achieve their substantive goals. Yet these same special interests may still have incentives to fight the Uruguay Round and NAFTA.

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49. Koh, *The Legal Markets of International Trade: A Perspective on the Proposed United States-Canada Free Trade Agreement*, 12 Yale J. Int'l L. 193, 211 (1987).

50. *Id.*

51. The committee split on the motion to disapprove. Koh, *supra* note 13, at 1215-16.

52. Moran, *Well-Heeled Shipping Lobby Sails to Victory*, Legal Times, Jan. 11, 1988, at 1.

53. *Maritime Provisions of U.S.-Canada Free Trade Pact Jettisoned During Final Work on Accord*, 4 Int'l Trade Rep. (BNA) 1522 (1987) [hereinafter *Maritime Provisions*].

54. Lindeman, *Congressmen Want Trade Pact Answers; Rules Committee May Allow Amendments*, Nuclear Fuel, Nov. 30, 1987, at 3.

The Uruguay Round marks the debut of the aviation industry as a potential opponent of the multilateral GATT talks. In addition, some familiar industries are planning their anti-Uruguay Round strategies: agriculture, textiles, heavy industry and maritime. Religious, human rights, labor, consumer and environmental groups oppose NAFTA. All have contemplated using the threat of modifying or withdrawing the Fast-Track as a "weapon" to remove themselves from the scope of the trade agreements or to prevent them from interfering with their policy goals. Individually, each interest group would be a formidable legislative foe, as each has cultivated strong bases of Congressional support. More ominously for the Uruguay Round and NAFTA, signs of their cooperation became evident early on. In late 1990, their allies supported S. Res. 342, which would have revoked Fast-Track authority for the Uruguay Round. At least thirty-six Senators co-sponsored the resolution.[55] A few months later, many interest groups coalesced in an unsuccessful attempt to defeat extension of Fast-Track authority[56] and/or to allow Congressional amendment of any NAFTA agreement.[57]

In this section, I will examine each interest group's motives for opposing the Uruguay Round and/or NAFTA, as well as their past and present attempts to achieve their goals by threatening the Fast-Track.

A. *Textiles*

With one of every eight industrial jobs held by a textile worker and textile operations in most Congressional districts, the textile industry holds significant political clout in Washington.[58] Since the New Deal, its lobbyists have successfully protected it from foreign competition.[59] Textile interests gained waivers from the GATT via the Multi-Fiber Arrangement (MFA).[60] The MFA manages an elaborate system

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55. *Sen. Conrad to Offer Symbolic Legislation to Protest Current State of GATT Talks*, 203 Daily Rep. for Executives (BNA) at A-8 (Oct. 19, 1990) [hereinafter *Symbolic Legislation*].

56. H.R. Res. 101, 102d Cong., 1st Sess. (1991); S. Res. 78, 102d Cong., 1st Sess. (1991).

57. S. Res. 109, 102d Cong., 1st Sess. (1991); S. Con. Res. 30, 102d Cong., 1st Sess. (1991); H.R. Res. 149, 102d Cong., 1st Sess. (1991). Senator Don Riegle, the sponsor of S. Res. 109, has vowed to bring the measure to the Senate floor during the 102d Congress. Senate Majority Leader George Mitchell has expressed his intent to bring S. Res. 109 to the floor. *Sen. Riegle Opens Bid for Senate Support in Amending U.S.-Mexico Trade Agreement*, 8 Int'l Trade Rep. (BNA) 900 (1991).

58. S. LENWAY, *supra* note 3, at 93.

59. *Id.*

60. J. JACKSON & W. DAVEY, *supra* note 21, at 639.

of import quotas, guaranteeing that lesser developed countries have restricted access for their textile exports and protecting industrialized nations' textile industries from foreign competition.

Realizing that United States negotiators might offer textile reform as a bargaining chip in GATT negotiations (primarily because their exceptions from tariff cuts left them with the highest tariffs), textile interests have used various political and legal moves to shield themselves. First, they attempted but failed to pass legislation exempting themselves from the Tokyo Round.[61] They achieved greater success by exploiting another loophole. President Carter had asked Congress to extend the Treasury Secretary's authority to exempt items from countervailing duties.[62] Other contracting parties viewed this extension as a sign of American support for the Tokyo Round; refusal to extend the waiver authority could have doomed the talks.[63] Textile lobbyists threw their weight against the extension, stalling it in the Ways and Means Committee until their interests were protected.[64] This forced President Carter to compromise with the textiles industry.[65]

Since then, the textile industry has attempted to limit textile imports to an even greater extent than the MFA, most recently through new legislation in 1986 and 1988. But it failed each time to muster enough votes to override President Reagan's vetoes.[66] Bush Administration efforts to phase out the MFA in the Uruguay Round did not please textile interests either.[67] Worried that "textiles will be the sacrificial lamb in the [Uruguay Round] negotiation,"[68] sympathetic legislators introduced a 1990 bill that resembled the earlier textile bills.[69] The Senate passed the bill by an apparently veto-proof 62-38 vote, and the House, 271-149.[70] President Bush vetoed the bill and strongly lobbied against an override, arguing that the bill threatened

61. S. 2920, 95th Cong., 2d Sess. (1978).
62. *See* R. JEROME, *supra* note 6, at 24.
63. S. LENWAY, *supra* note 3, at 109.
64. *Id.* at 118.
65. J. TWIGGS, *supra* note 32, at 57.
66. H.R. 1562, 99th Cong., 2d Sess. (1986); H.R. 1154, 100th Cong., 2d Sess. (1988).
67. *U.S. Proposal for Phasing Out Textiles MFA Criticized as Restrictive by Other Members*, 7 Int'l Trade Rep. (BNA) 185 (1990).
68. Rood, States News Service, Sept. 12, 1990 (available on NEXIS) (Remarks of Rep. Marilyn Lloyd).
69. H.R. 4328, 101st Cong., 2nd Sess. (1990).
70. 136 CONG. REC. S9823 (daily ed. July 17, 1990); 136 CONG. REC. H7755 (daily ed. Sept. 19, 1990).

the Uruguay Round.[71] The House failed to override the veto with a 275-152 vote.[72]

Embittered textile lobbyists threatened to "do whatever is necessary" to seek other solutions, "including turning again to Congress."[73] Initially, most of the industry signed onto the anti-Fast-Track extension coalition in an effort to keep the Uruguay Round — and any negotiated end to the MFA — from fully reviving.[74] But the textile coalition began to splinter as some companies (primarily apparel producers) reasoned that relocation of unskilled textile jobs to Mexico under NAFTA might provide substantial benefits.[75] These defections may have weakened the textile lobby sufficiently for the Bush Administration to defeat the disapproval resolutions. Nevertheless, the textile lobby remains a potent foe of the trade agreements.

B. *Agriculture*

The United States set up price supports and import quotas for agricultural goods during the Great Depression, and farm interests have steadfastly defended them ever since. In 1955, the GATT contracting parties exempted the United States agricultural program from GATT obligations and did so for other countries as well.[76] The Tokyo Round achieved modest success in liberalizing agricultural trade in the Subsidies Code and in side agreements.[77]

The term "agriculture" encompasses avocados to zucchini; hence, agricultural interests do not operate as a monolith in international trade issues. For example, grain and oilseed exporters might agree to trade off domestic farm programs for greater foreign market access. These interests supported the extension of Fast-Track authority in 1991, especially as failure to extend it would have eliminated agricul-

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71. *House Sustains Textile Bill Veto, GATT Opponents Contemplate Other Options*, 198 Daily Rep. for Executives (BNA) at A-5 (Oct. 12, 1990) [hereinafter *Textile Bill Veto*].

72. 136 CONG. REC. H9340 (daily ed. Oct. 10, 1990).

73. *Textile Bill Veto*, *supra* note 71.

74. Auerbach, *Trade Lobbyists Gear Up for Battle; Farm, Textile and Labor Groups Oppose Goals of Bush, Big Business*, Wash. Post, Mar. 2, 1991, at A8.

75. Auerbach, *Splitting Protectionist Seams; Mexican Trade Pact Unravels the Once-Durable Textile Lobby*, Wash. Post, May 12, 1991, at H1. Others fear that NAFTA could allow low cost textile products and raw materials from Asia to reach the U.S. market. They urge the Bush Administration to adopt struct rules of origin for textiles in NAFTA. *Textile Trade Groups Call for Strict Rules of Origin in NAFTA*, 8 Int'l Trade Rep. (BNA) 1578 (1991).

76. GATT, *Waiver Granted to the United States in Connection with Import Restrictions Imposed Under Section 22 of the United States Adjustment Act, as Amended*, 3 BISD Supp. 32 (1955) (reprinted in J. JACKSON & W. DAVEY, *supra* note 21, at 957).

77. *Id.* at 962.

tural safeguards triggered by any breakdown of the Uruguay Round negotiations.[78] However, some groups appear to be implacable opponents of the Uruguay Round and NAFTA.

1. Commodities with Price Supports and Import Quotas

Unable to achieve total elimination of import quotas and price supports, United States negotiators proposed in the Uruguay Round that the contracting parties replace these NTB's with fixed tariffs.[79] Over time, the parties could progressively reduce these barriers. This proposal threatens United States commodity support programs that allow import quotas on peanuts, cotton, meat, dairy products and certain sugar-containing products.[80] With that in mind, some of these agricultural interests lobbied against the Fast-Track extension.[81] These interests may continue to fight any Uruguay Round agricultural agreement that effects any change in the price support programs without significant gains for them.

2. Border State Agricultural Interests

Other agricultural interests, particularly the California and Florida fruit and vegetable growers, feared NAFTA and worked to stop the Fast-Track extension. Most feared increased competition from Mexican fruit and vegetable producers.[82] These farm interests will also be heard from in the future.

3. Progressive Farm Groups

Liberal farm organizations claiming to represent the "family farmer" are also likely to oppose any Uruguay Round agricultural reforms.

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78. According to the terms of the Budget Reconciliation Act of 1990, failure by the Administration to conclude a Uruguay Round agricultural agreement by June 30, 1993 would force the Secretary of Agriculture to consider and implement measures that would waive minimum levels for acreage limitation programs, increase the level of export promotion programs and loosen repayment schedules for price supports. Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 1302, 104 Stat. 1388. However, the statute also would release the Secretary of Agriculture from this obligation if Congressional termination of Fast-Track authority were to cause the end of the Uruguay Round. *Id.* at § 1302(f).

79. Farnsworth, *U.S. Offers New Plan on Trade*, N.Y. Times, July 13, 1989, at D1.

80. *Id.*

81. Rosenbaum, *Trade Issues Enter Crucial Political Phase*, N.Y. Times, Apr. 9, 1991, at D1; Auerbach, *supra* note 74.

82. *Id.* For example, the tomatoe, citrus and artichoke producers are very sensitive to imports. *De la Gorga to Work on Bill to help Mexico with Environment*, 8 Int'l Rep. (BNA) 1572 (1991).

Groups such as the National Farmers' Union and the National Family Farm Coalition believe that support programs stabilize commodity prices and thus protect family farmers, as "[i]t feels safer to have Uncle Sam guarantee you certain prices."[83] Despite evidence that gains from increased farm exports could offset losses from domestic programs, supporters of the "small farmer" claim that GATT liberalization would only help major commodity processors and shippers, and not small farmers.[84]

C. *Environmental and Consumer Groups*

Environmental and consumer interest groups entered the United States international trade policymaking arena for the first time during the Fast-Track extension struggle. Many "green" activists worried about both the Uruguay Round and NAFTA.

In the Uruguay Round, the Bush Administration proposed to harmonize sanitary and phylosanitary measures, as such laws often operate as NTB's to agricultural trade.[85] To harmonize United States regulations with those set by the Codex Alimentarius (the food safety arm of the United Nations), new federal environmental, food safety and consumer standards would have to be revised and to pre-empt existing state regulations.[86] This led to conflict with environmental (Greenpeace, Sierra Club) and consumer groups (National Toxics Campaign, Public Citizen). They complained that the Codex Alimentarius is "heavily influenced by the largest chemical and food companies," and as such, its regulations remain lax.[87] Hence, the Bush Administration approach would allow GATT parties to challenge United States regulations that were more rigorous than the weak Codex standards as NTB's.[88] They also asserted that states should be allowed to keep stricter environmental standards than the federal government.

Environmental and consumer groups attacked the Uruguay Round on several fronts. First, sympathetic Senators wrote USTR Carla

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83. Kramer, *G-7 Offering U.S. Farmers Little Despite Call for Cuts in Subsidies*, Investor's Daily, July 13, 1990, at 22.

84. *Texas Farm Commissioner Hightower Blasts U.S. Farm Stance at GATT, Calls for Hearings*, 7 Int'l Trade Rep. (BNA) 1162 (1990).

85. Schacht, *Key to GATT Accord is Agriculture, Yeutter Contends*, S.F. Chronicle, Apr. 21, 1990, at B2.

86. *Misunderstanding Is Basis of Measure Tying GATT Pact to Environmental Issues, Katz Says*, 7 Int'l Trade Rep. (BNA) 915 (1990) [hereinafter *Misunderstanding*].

87. Burrows & Durbin, *Fast-Track: Trading Away Food-Safety and Environmental Rules*, Seattle Times, Apr. 24, 1991, at A7.

88. *Id.*

Hills and expressed their concerns that the Administration was attempting to prevent states from implementing their own health regulations.[89] Second, House members introduced resolutions urging disapproval of the Round if Uruguay Round agreements required the United States to scale back existing regulations and give up authority to impose more stringent laws in the future.[90] Third, environmental allies introduced legislation threatening trade sanctions unless other United States trading partners raised their environmental standards (and therefore the Codex Alimentarius standards) to American levels.[91] Finally, many environmental and consumer groups supported the efforts to pass the Fast-Track extension disapproval resolutions.[92]

NAFTA frightened these groups even more than the Uruguay Round. Many feared that United States companies would move to Mexico under NAFTA, exacerbating economic development and concomitant pollution south of the border. Mexican enterprises with easier access to United States markets might step up their activities in pollution-generating industries, heighten mining and timbering operations and increase their use of pesticides and erosion-conducive crop practices.[93] Consumer groups also worried that NAFTA would allow formerly barred pesticide-laden products from Mexico to enter the United States market.[94]

Thus, NAFTA and the Uruguay Round motivated environmental and consumer groups to oppose extension of Fast-Track. This worried Congressional leaders enough to urge President Bush to address these groups' concerns.[95] The President responded with pledges to cooperate with the Mexican government on environmental issues and to maintain the level of health and safety standards for imports.[96] These reassur-

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89. *Tougher State Pesticide Rules Acceptable If Scientifically Based, USTR Hills Says*, 7 Int'l Trade Rep. (BNA) 1364 (1990).

90. Rep. James Scheuer introduced a resolution calling for disapproval of the Uruguay Round in such an eventuality. H.R. Conf. Res. 336, 101st Cong., 2d Sess. (1990). Rep. Al Swift introduced a second resolution calling on the U.S. to introduce "mechanisms" under the GATT to "level" comparative disadvantages between nations that impose environmental regulations on their industries and the U.S. H.R. Res. 371, 101st Cong., 2d Sess. (1990). *See Misunderstanding*, *supra* note 86, at 915.

91. S. 984, 102d Cong., 1st Sess. (1991).

92. *Fast-Track Process for Trade Agreement Threatens Environmental Laws, Groups Warn*, 8 Int'l Trade Rep. (BNA) 698 (1991) [hereinafter *Environmental Laws*].

93. Stokes, *Greens Talk Trade*, 23 NAT'L J. 862 (1991).

94. *Environmental Laws*, *supra* note 92.

95. *Two Key Lawmakers Request 'Action Plan' from President Bush on Mexico Trade Talks*, 8 Int'l Trade Rep. (BNA) 377 (1991).

96. Yang & Gugliotta, *Bush Seeks to Allay Hill Fears on Free Trade Pact*, Wash. Post, May 2, 1991, at A27.

ances convinced some environmental groups (for example, the National Wildlife Federation) to support extension of Fast-Track, much to the dismay of others in the "green" movement.[97] Nevertheless, these interests have made their presence felt and will seek to revoke or modify Fast-Track if the Bush Administration does not deliver on its promises.[98]

D. *Labor*

In any political debate surrounding international trade agreements, organized labor interests usually follow the lead of their related industries. For example, sensing that increased imports would threaten their jobs, textile unions supported the textile bills.[99] In addition, labor unions have expressed fear that American attempts to reform the GATT dispute resolution process might make it as speedy as unilateral action by the United States Unions worried that American negotiators would then agree to some limits to actions under section 301 as part of the bargain.[100]

NAFTA, however, set off alarms within the whole of organized labor. The American Federation of Labor-Congress of Industrial Organizations (AFL-CIO), America's umbrella labor organization, blasted NAFTA and Fast-Track extension for the trade agreement early on as an "economic and social disaster."[101] Labor interests feared NAFTA would encourage United States industries to relocate to Mexico to benefit from much lower labor wages and lax enforcement of worker

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97. Lee, *"Fast Track" Sprint: Frenzied Lobbying on a Treaty Not Yet Written*, Wash. Post, May 23, 1991, at A21.

98. Indeed, the environmental movement has been active on several fronts. Public Citizen, the Sierra Club and Friends of the Earth have sued the USTR, claiming that it has failed to comply with federal requirements mandating an environmental impact statement before any government action. *USTR Sued Over Lack of Environmental Impact Statements for GATT and NAFTA Negotiations*, 8 Int'l Trade Rep. (BHA) 1177 (1991). Others have urged Congress to pass resolutions calling for rejection of NAFTA if Mexico does not beef up its environmental protection efforts. *Congress Urged to Pass Resolutions on Environmental Issues in the NAFTA*, 8 Int'l Trade Rep. (BHA) 1547 (1991). Rep. Ron Wyden led seventy-four Congressmen who signed a letter to President Bush insisting that environmental messages be sent to Congress before it begins any consideration of NAFTA. *Swing Supporters of NAFTA Urge Agreement on Environmental Protection*, 8 Int'l Trade Rep. (BNA) 1621 (1991).

99. Passell, *Apparel Makers' Last Stand*, N.Y. Times, Sept. 26, 1990, at D2.

100. Stokes, *GATT Going*, 22 NAT'L J. 1150 (1990).

101. *AFL-CIO Official Blasts Proposed FTA in Testimony Before Senate Finance Committee*, 8 Int'l Trade Rep. (BNA) 232 (1991) [hereinafter *AFL-CIO*].

safety laws. An exodus of industries would mean lost jobs for union members.[102] Thus, the AFL-CIO led the efforts to stop extension of Fast-Track and may fight on to the bitter end.

E. *Manufacturers*

Traditional manufacturing interests have always had a strong interest in anti-dumping and countervailing duty import relief laws. These laws give United States manufacturers "protection" from "unfair" trade practices; United States industries have been loathe to give up procedural and substantive advantages in these laws and have exerted political muscle to defend them. In 1968, Congress passed legislation that superseded President Johnson's acceptance of the Kennedy Round Anti-Dumping Code. To avoid such difficulties, the Carter Administration carefully co-opted and avoided industry concerns about the Tokyo Round subsidies and anti-dumping codes. For example, Congress agreed to compromise on the definition of "material injury."[103] The committees also barred lobbists from the non-markups, including opponents of the codes' requirement of expedited import relief law administration rendering them unable to affect the implementing legislation.[104]

Anti-dumping code revisions attracted some attention during the Uruguay Round. Steel, textile and semiconductor companies charged that other industries, such as retailers, computer and farm equipment manufacturers and some car makers, sought language in the code to dilute United States anti-dumping laws. These industries responded that they were merely attempting to stem the growing use of foreign anti-dumping laws as NTB's.[105] Concerned that negotiators would accept weakening of United States antidumping counter-vailing duty law, 16 members from the House caucuses for the steel, coal, auto parts, textiles, bearing, semiconductor and high tech industries formed a coalition to resist any revisions, even if it were to come to a floor

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102. Bradsher, *3-Star Comment on 'Fast Track' Plan*, N.Y. Times, Apr. 25, (1991, at D5. Thus, many have argued the Administration to incorporate worker adjustment programs into NAFTA. *DOL Urged to Come Up with Plan to Address Dislocation Caused by Trade Post with Mexico*, 8 Int'l Trade Rep. (BNA) 1184 (1991); *DOL Official Pledges Effort to Help Workers Dislocated by Mexican Trade Pact*, 8 Int'l Trade Rep. (BNA) 1477 (1991).

103. J. TWIGGS, *supra* note 32, at 71.

104. *Id.* at 73.

105. *Antidumping Negotiations Capture Attention of U.S. Business Community, Causing Dissension*, 6 Int'l Trade Rep (BNA) 1496 (1989).

fight during Fast-Track.[106] Their opposition could doom the Uruguay Round in Congress.

Others have become concerned that NAFTA will allow companies from Japan and other nations to set up "screwdriver" plants in Mexico. Screwdriver plants assemble component parts manufactured overseas, thus allowing the company to circumvent trade restrictions.[107] Failure to protect against such measures will only stir up more opposition to NAFTA.

F. *Maritime*

The heavily protected transportation industries have fought their inclusion in trade negotiations. The Jones Act, which requires that only American-built, American-owned and American-staffed ships may carry cargo between American ports, has protected maritime interests from foreign competition on intra-American trade routes since 1920.[108] Maritime lobbyists insist that this protection is necessary to maintain a viable shipping industry for national security emergencies.

Maritime lobbyists have always been politically ingenious, cutting across party and labor-management divisions to get support. Although draft versions of the United States-Canada FTA did not explicitly challenge the Jones Act, they did include language that would have granted Canada national treatment if Congress were to expand protection for the maritime industry. Maritime interests also worried that an annual review provision would open up the Jones Act to legislative revision.[109] Maritime lobbyists realized that threatening full or partial revocation of Fast-Track authority for the FTA would be a useful tool. With the support from two thirds of the House and 57 Senators, they convinced the Senate Rules and Administration Committee to offer a resolution depriving Fast-Track authority for any maritime sections of the FTA.[110] An open letter signed by 12 of the 13 House Rules Committee members threatened a partial withdrawal unless the maritime industry's demands were met.[111] Under pressure, Canada withdrew its maritime proposals.[112]

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106. *Caucus Coalition Voices Opposition to Dumping Law Changes in GATT Talks*, 7 Int'l Trade Rep. (BNA) 1057 (1990).

107. *NAFTA Rules of Origin to Prevent Screwdriver Plants, Official Says*, 8 Int'l Trade Rep. (BNA) 1012 (1991); *Gephardt, Other House Democrats Outline Parameters for NAFTA and GATT Agreements*, 8 Int'l Trade Rep. (BNA) 1590 (1991).

108. Jones Act of 1920, Pub. L. No. 66-261, 41 Stat. 999 (codified at 46 U.S.C. § 883 (1988)).

109. *Maritime Provisions*, *supra* note 53.

110. S. Res. 188, 100th Cong., 1st Sess. (1987).

111. *Maritime Provisions in FTA Could Harm Both U.S. and Canadian Industry, Labor Leader Says*, 4 Int'l Trade Rep. (BNA) 1328 (1987).

112. Moran, *supra* note 52.

The maritime industry repeated its tactics when faced with inclusion in the Uruguay Round. Citing national security concerns, 10 of the 13 House Rules Committee members signed a letter reminding USTR Hills of their power to amend the Fast-Track, stating that "[i]f United States maritime promotional programs and laws, existing today or in the future, are not removed from the negotiations and excluded from any Agreement, we shall seek a change in the rules in order to permit amendments."[113] Subsequently, the USTR suggested that the maritime industry be excluded from the scope of services negotiations.[114]

G. *Aviation*

The airline industry also opposed its inclusion in the Uruguay Round. Currently, rates and routes for transnational air flights are negotiated on a bilateral basis. Dissatisfied with this arrangement, negotiators contemplated including airlines in the Uruguay Round. The USTR initially argued that the bilateral approach stifled growth in aviation: markets were generally opened to competition only as much as the most protectionist country would allow. Further, the deregulated United States airline industry had grown beyond the bilateral system's capacity.[115]

Airline lobbyists fought back tenaciously, as national treatment under a Uruguay Round agreement would threaten domestic preference laws.[116] Thirty-seven of fifty members of the House Committee on Public Works and Transportation signed a letter to USTR Hills asking her to withdraw aviation from the Round.[117] Some 179 House members co-sponsored a resolution calling for withdrawal.[118] The Bush Administration also asked that aviation be placed outside the scope of the services negotiations.[119]

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113. Letter from the House Rules Committee to United States Trade Representative Carla Hills (June 29, 1990).

114. Dullforce, *U.S. Raises Hurdle in Way of Pact on Services*, Financial Times, July 18, 1990, at 3; *U.S. Shifts GATT Stance, Urges Exclusion of Aviation, Maritime Services from Pact*, 205 Daily Rep. for Executives (BNA) at A-6 (Oct. 23, 1990).

115. Poling, *Shane Blasts Int'l Air Route Process as 'World's Most Regulated': Urges Acceptance of Trade Agreement That Includes Transportation*, Travel Weekly, Feb. 15, 1990, at 10.

116. *Whether International Airline Services Should Be Included in the General Agreement on Tariffs and Trade: Hearing Before the Subcomm. on Aviation of the House Comm. on Pub. Works and Transp.*, 101st Cong., 1st Sess., 61-66 (1989) (testimony of James Landry, Vice President of the Air Transportation Association of America).

117. *Id.* at 103.

118. H.R. Conf. Res. 280, 101st Cong., 2d Sess. (1990).

119. *See supra* note 114.

H. *Religious and Human Rights Interests*

Religious and human rights interests became intensely involved in international trade policymaking for the first time in the Fast-Track extension fight. Church groups worried that workers and small farmers on both sides of the United States-Mexico border would bear the brunt of NAFTA.[120] Others had concerns about working conditions in Mexican factories and lack of political freedoms.[121] These groups also supported the disapproval of Fast-Track extension. Yet they also made plans to continue to work on international trade issues even after the extension passed.[122]

Finally, there remains the possibility that an unexpected interest group might feel threatened by the trade agreements and initiate efforts to stop them. During negotiation of the United States-Canada FTA, the uranium industry feared increased access for Canadian uranium. As a bargaining tactic, sympathetic Senators introduced a resolution that would have withdrawn Fast-Track consideration for any aspect of the FTA affecting the uranium industry.[123] Beyond referring the resolution to the Finance Committee for consideration, the Senate took no further action. But this incident does illustrate how, with the support of a few members, any domestic industry or industries can attempt to exploit Fast-Track's weaknesses to defend its interests.

The Fast-Track extension battle of May 1991 demonstrated how quickly a coalition can form to defeat trade agreements. Labor, environmental, consumer, agricultural, religious and human rights interests had come together under a common banner, the "Coalition for Mobilization on Development, Trade, Labor and the Environment." Despite some defections in the environmental camp, this seemingly mismatched collection of interests worked well together, falling only twenty votes short in the House of Representatives of preventing the extension of Fast-Track.[124] These forces, as well as the other interests who await the results of the Uruguay Round and NAFTA, will surely not refrain from attacking Fast-Track again if those trade agreements are not to their liking.

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120. Levinson, *Guess Who's Mad About Trade*, Newsweek, Apr. 22, 1991, at 50.

121. Bradsher, *supra* note 102; *Also in the News*, 8 Int'l Trade Rep. (BNA) 1452 (1991).

122. Levinson, *supra* 120.

123. S. Res. 341, 100th Cong., 1st Sess. (1987).

124. The House voted 231-192 against the resolution disapproving of Fast-Track extension. 137 CONG. REC. H3588 (daily ed. May 23, 1991). The Senate voted 59-36 to defeat its disapproval resolution. 137 CONG. REC. S6829 (daily ed. May 24, 1991).

IV. The Trade Agreements Act of 1992

Any "derailment" of Fast-Track would indicate American reluctance to implement the Uruguay Round or NAFTA and trigger a stampede by trading partners. Therefore, President Bush will actively defend it from attack. But even if Fast-Track were to remain in place, could Uruguay Round and NAFTA opponents exploit defects in the Fast-Track implementation process? As the textile industry's use of the countervailing duty waiver extension during the Tokyo Round illustrated, domestic interests manage to find procedural opportunities and use them for leverage. Could such openings exist in the Uruguay Round or NAFTA? Can opponents stall the Fast-Track and create a situation where a disapproval resolution would more easily pass? In this section, I will trace how a hypothetical Trade Agreements Act of 1992 (or NAFTA Implementing Act) would make its way through the Fast-Track legislative maze, pointing out where weak spots might exist.

A. *Pre-Notification*

1. Congressional Input

a. Extension of Fast-Track Authority

Extending Fast-Track authority for an additional two years presented Uruguay Round and NAFTA opponents with the biggest weakness to exploit. So important had Fast-Track become that the entire Uruguay Round's timetable revolved around the initial expiration of Fast-Track authority on June 1, 1991. As the USTR insisted on sufficient time before the Fast-Track deadline for introducing legislation (March 1, 1991) to build political support in Congress, GATT negotiators scheduled the final ministerial meeting for December 1990. But as early as April 1990, negotiators feared that the Round would miss the deadline. Most dismissed those fears as counterproductive and pessimistic, reducing the pressure on negotiators to make progress: "We would lose momentum everywhere if we let the talks spill into 1991," said then-United States Agriculture Secretary Clayton Yeutter.[125] But as negotiations stalled, GATT negotiators began to voice fears that the talks would go beyond the scheduled ministerial meeting in December. In addition, some felt that extending the Round would be wise strategically. More time would increase the chances of substantive reform, decrease the possibility that Congress would face

125. *Yeutter Says Uruguay Round Negotiations Should Not Be Extended Beyond December*, 7 Int'l Trade Rep. (BNA) 511 (1990).

the passage of major trade legislation during a short but politically volatile recession and heighten pressure on the European Community [EC] nations during their 1992 consolidation.[126] Besides, the GATT parties had extended the Tokyo Round talks for about a year, although those negotiations faced no statutory time limits.

Yet even after EC obstinateness in agricultural subsidies effectively broke down the December 1990 ministerial meeting, the USTR remained reluctant to ask for Fast-Track extension.[127] Although this may have been a negotiating ploy, events forced the Bush Administration to request an extension of Fast-Track. In January, the GATT negotiators had made enough progress to justify continuing the Uruguay Round, but they could not complete their work before the initial Fast-Track deadline of March 1, 1991.[128] The Mexican government had also stepped up pressure to negotiate an FTA with the United States; the Canadian government, with its own FTA with the United States, demanded to be part of the United States-Mexico talks.[129] So, in a calculated political move to bolster the chances of Fast-Track extension for both sets of talks, the Administration decided to request extension for the Uruguay Round and NAFTA under one vote, feeling that some legislators would not be willing to sacrifice both trade negotiations by voting against the extension.

Under the 1988 Omnibus Trade Act, the President submitted on the March 1, 1991 deadline a request for an extension of Fast-Track authority until June 1, 1993.[130] The 1988 act required several formal acts by the President and Congress for extension. First, the President had to submit a written report containing a request for extension. That report contained a description of trade agreements contemplated under an extension of authority, a tentative schedule of agreements, a description of negotiating progress and a statement explaining why the negotiations required an extension.[131] Second, the President had to inform beforehand the Advisory Committee for Trade Policy and Negotiations (ACTN) of his request for extension. The ACTN delivered to Congress on the March 1, 1991 deadline a report incorporating its views on the progress achieved and on whether extension should

126. Stokes, *Trade Talks' Final Act*, 22 NAT'L J. 2344 (1990).

127. *Request of Fast-Track Extension for Uruguay Round Is Unlikely, Williams Says*, 17 Daily Rep. for Executives (BNA) at A-10 (Jan. 25, 1991).

128. *Dunkel Said to Have Achieved Agreement on Extending Uruguay Round Negotiations*, 8 Int'l Trade Rep. (BNA) 232 (1991).

129. Stokes, *supra* note 93.

130. 137 CONG. REC. S2615 (daily ed. 1991); 137 CONG. REC. H1330 (daily ed. 1991).

131. The foreword to this report is reprinted in 8 Int'l Trade Rep. (BNA) 368 (1991).

be granted. Only the 2 labor union representatives of the 44-member ACTN voted against extension of Fast-Track.[132] Third, neither House must have adopted the extension disapproval resolution specified in the statute before June 1, 1991.[133]

This statutory extension disapproval process resembled the formal termination procedure established by the 1988 Omnibus Trade Act: (1) any member of either House could introduce the disapproval resolution specified in the statute, (2) resolutions had to go through the Senate Finance Committee or both the House Ways and Means and Rules Committees by May 15, 1991, and (3) a majority vote in either House had to approve of the resolution before June 1, 1991.[134] It was this part of the extension process that created the most intense debate in the halls of Congress.

Immediately after President Bush indicated that he would seek an extension of Fast-Track authority, interest groups began organizing to support a disapproval resolution. Most of the textile lobby, fearing an end to the MFA, wanted to stop the Uruguay Round.[135] Labor unions feared a flight of jobs to Mexico under NAFTA.[136] Environmentalists and consumer groups were concerned that NAFTA would heighten pollution in Mexico and allow toxic foods to enter the United States market.[137] Religious groups worried about working conditions on both sides of the border.[138]

Congressional allies acted quickly as well. Senator Ernest Hollings, the textile industry's champion during the Tokyo Round, introduced a disapproval resolution in the Senate;[139] Representative Byron Dorgan did the same in the House.[140] Faced with growing support for these resolutions, Senate Finance Committee Chairman Lloyd Bentsen and House Ways and Means Committee Chairman Dan Rostenkowski, both Fast-Track supporters (especially as the process enhances their committees' roles in the implementation process), called upon President Bush to provide Congress an "action plan" for dealing with labor and

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132. *President, As Expected, Requests Extension of 'Fast-Track' Trade Authority Until 1993*, 8 Int'l Trade Rep. (BNA) 340 (1991).

133. Omnibus Trade Act, *supra* note 13, § 1103(b).

134. *Id.*

135. *U.S. Textile Industry Prepares to Fight Extension of 'Fast Track' for GATT Accord*, 40 Daily Rep. for Executives (BNA) at A-9 (Feb. 28, 1991).

136. *AFL-CIO*, *supra* note 101.

137. Stokes, *supra* note 93.

138. Levinson, *supra* note 120.

139. S. Res. 78, 102d Cong., 1st Sess. (1991).

140. H.R. Res. 101, 102d Cong., 1st Sess. (1991).

environmental issues in NAFTA.[141] Three weeks later, House Majority Leader Richard Gephardt also asked for reassurances from the Bush Administration on labor and environmental issues. On May 2, 1991, President Bush responded to the legislators and promised to create sufficient worker adjustment assistance programs, to heighten cooperation with Mexico on environmental issues and to maintain strict United States environmental standards.[142] With qualified support from Rep. Gephardt[143] and some of the environmental groups,[144] the disapproval resolutions were defeated by wide margins in the committees (Ways and Means, 27 to 9; Finance, 15 to 3)[145] and in the Houses (House, 231-192; Senate, 59-36).[146]

The 1988 Omnibus Trade Act required the disapproval resolutions to go through the Senate Finance or the House Rules and House Ways and Means Committees. But those intent on attacking Fast-Track could have attempted to pass a resolution modifying or eliminating the Fast-Track altogether. This resolution could have bypassed these committees and gone through the rules committees in either House. This would have triggered a jurisdictional battle among the committees and within the Congressional leadership as to which committee, the rules committees or the committees with substantive jurisdiction over international trade, had jurisdiction. As it happened, resolutions that would have done just that — by decoupling extension of Fast-Track authority for NAFTA from the Uruguay Round[147] or by granting Fast-Track extension for both agreements but allowing Congressional amendments in the areas of labor, environmental, dispute resolution, adjustment assistance and rules of origin areas[148] — were referred to the House Rules and Ways and Means Committees and the Senate Finance Committee. This avoided that potential political conflict.

Alternatives to statutory extension under the Omnibus Trade Act did exist for the Bush Administration in early 1991. The Administra-

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141. *Two Key Lawmakers Request 'Action Plan' from President Bush on Mexico Trade Talks*, 8 Int'l Trade Rep. (BNA) 377 (1991).

142. Yang & Gugliotta, *supra* note 96.

143. *Gephardt Says He Will Support Fast-Track But Reserve Right to Amend Mexico Pact*, 91 Daily Rep. for Executives (BNA) at A-29 (May 10, 1991).

144. Lee, *supra* note 97.

145. Bradsher, *Senate and House Back Free-Trade Talks with Mexico*, N.Y. Times, May 15, 1991, at A1, col. 1.

146. 137 CONG. REC. H3588 (daily ed. May 23, 1991); 137 CONG. REC. S6829 (daily ed. May 24, 1991).

147. H.R. Res. 149, 102d Cong., 1st Sess. (1991).

148. S. Con. Res. 30, 102d Cong., 1st Sess. (1991); S. Res. 109, 102d Cong. (1991).

tion could have proposed implementing legislation for the Uruguay Round that would have included an extension of Fast-Track authority. Passage of the implementing legislation would have given the President the authority needed to resolve loose ends of the Uruguay Round and to negotiate NAFTA. Similar legislation in the Tokyo Round granted the President an extension of Fast-Track authority for unresolved minor matters.[149] But this would have forced the President to risk approval of Fast-Track authority for NAFTA along with the substantive aspects of the Uruguay Round. It would have also required a quicker resolution of the Uruguay Round, an impossibility in early 1991. Alternatively, the President could have requested additional Fast-Track authority in new legislation, which itself would have been subject to Congressional amendments and delaying tactics. In retrospect, however, none of these options would have proven as successful as the decision to link the extension of Fast-Track authority for both agreements.

In any event, President Bush won a major legislative victory in the Fast-Track extension. But the struggle for the Uruguay Round and NAFTA has only begun.

b. Free Trade Agreement Review by Congressional Committees

FTAs like NAFTA face an additional hurdle in the Fast-Track process. By the terms of the 1988 Omnibus Trade Act, the President must notify the House Ways and Means Committee and the Senate Finance Committee 60 legislative days before negotiations begin on an FTA.[150] If neither committee passes a disapproval resolution before the end of the 60-day period, the talks may continue and any resulting agreement will receive Fast-Track authority.[151] Normally, this would have given both committees great leverage in the shaping of NAFTA. For example, after President Reagan notified the committees of his intent to negotiate the United States-Canada FTA, a majority of the Finance Committee threatened to diaspprove the FTA talks.[152] Only after reassurances of increased consultations with the committee did it approve the FTA talks — but by the slimmest of margins, as the committee split on the motion to disapprove.[153] However, this opportunity failed to materialize when President Bush made the required

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149. Trade Agreements Act of 1979, *supra* note 30, § 3.
150. Omnibus Trade Act, *supra* note 13, § 1102.
151. *Id.* § 1103.
152. Koh, *supra* note 49, at 211.
153. *Id.*

notification for NAFTA on September 25, 1990.[154] Although the 60-day legislative period extended into the 102d Congress, the Congressional leadership did not start the legislative clock over with the changeover, which it could have done.[155] The period's expiration in 1991 became rather moot with both the Ways and Means and the Finance Committees' solid vote against the Fast-Track disapproval resolution.

c. Congressional Participation in Trade Negotiations

Congressmen have traditionally participated in GATT negotiating rounds. The Trade Act of 1974 expanded this role by requiring the STR to consult with Congressional advisers selected by the Speaker of the House and the President pro temp of the Senate — upon the recommendation of the Chairmen of the Finance and Ways and Means Committees.[156] This provides Congress a direct channel to the USTR and forces the USTR to account for Congressional politics. However, the current membership of the advisory groups does not truly represent the balance of power in Congress. Advisers from the Senate include the entire membership of the Finance Committee — but only two from the Rules and Administration Committee (who also happen to be Finance Committee members).[157] House advisers come from the Ways and Means Committee[158] and the Energy and Commerce Committee.[159] No members of the Rules Committee serve as advisers. The Rules Committees' lack of direct formal access to the negotiators could distort the trade negotiations; these pressures may push forward disapproval resolutions.

The Trade Act also allows Congressmen to authorize their staff to receive information on the GATT talks. During the Tokyo Round, staff members monitored the talks in Washington and Geneva, serving as a conduit between Congress and the Administration.[160] Friction

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154. The letter of notification sent to Senate Finance Committee Chairman Lloyd Bentsen is reprinted in 136 CONG. REC. S14378 (daily ed. Oct. 2, 1990).

155. *President Sends Formal Request to Congress to Begin Free Trade Negotiations with Mexico*, 7 Int'l Trade Rep. (BNA) 1499 (1990).

156. Trade Act of 1974, *supra* note 5, § 161.

157. 135 CONG. REC. H508 (daily ed. Mar. 2, 1989).

158. 135 CONG. REC. H375 (daily ed. Feb. 23, 1989).

159. 136 CONG. REC. H13274 (daily ed. Oct. 27, 1990).

160. J. JACKSON, J.V. LOUIS & M. MATSUSHITA, IMPLEMENTING THE TOKYO ROUND: NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMICS 153 (1984). Realizing the impact of access, both supporters and opponents of the trade agreements have organized monitoring and liaison groups. *Rep. Kaptur Pushes House Effort to Monitor NAFTA*, 8 Int'l Trade Rep. (BNA) 936 (1991); *Also in the News*, 8 Int'l Trade Rep. (BNA) 1162 (1991).

between these Congressional representatives — especially from the more sympathetic trade policy committees — and the Administration would be a harbinger of trouble.

2. Private Industry Input

The Trade Act of 1974 also created a complex system of advisory committees for trade negotiations. Administration officials and Congressmen wary of repeating the mistakes of the Kennedy Round agreed to set up three layers of advisory committees: (1) the ACTN for input on overall policy; (2) general policy advisory committees for industry, labor and agriculture; and (3) sectoral policy committees for narrower interests.[161] At the conclusion of negotiations and no later than the 90-day notice of Presidential intent to enter into an international trade agreement (March 1, 1993 being the last possible date), the ACTN and the relevant general and sectoral policy committees will meet and provide a report to the President, the Congress and the USTR analyzing whether the Uruguay Round or NAFTA achieves the negotiating objectives set forth by the 1988 Omnibus Trade Act.[162]

Negative evaluations by the committees would hurt trade agreements, giving Congress reasons to withdraw Fast-Track or vote down the agreements. However, lobbying the committee members would not reap sufficient or immediate political benefits. Most members have had experience in previous governmental advisory committees. Therefore, their reports will likely contain "wait and see" language, as they did in the Tokyo Round.[163] Indeed, the Industry Policy Advisory Committee generally endorsed the Uruguay Round but warned that excessive trade-offs could preclude Congressional approval.[164] This ambiguity allows both the government to portray the reports as supportive and private sector members to denounce the trade agreement if their aims are not achieved.

B. *Notification of Congress*

No later than March 1, 1993, which is at least 90 calendar days before the last possible date (June 1, 1993) for entering into an agreement under the Fast-Track, the President must formally notify both

161. Trade Act of 1974, *supra* note 5, § 161.

162. *Id.* § 135(e).

163. J. TWIGGS, *supra* note 32, at 42.

164. *IPAC Report Endorses U.S. Uruguay Round Positions But Warns Against Trade-offs*, 7 Int'l Trade Rep. (BNA) 1442 (1990).

the House and Senate of his intention to enter into the agreement and promptly thereafter publish notice of such intention in the Federal Register. This event begins the Fast-Track process.

C. *Non-Markups and Non-Conferences*

During this 90-day period, the 1988 Omnibus Trade Act mandates that the President consult with both the Ways and Means and Finance Committees, as well as with every other committee with jurisdiction over aspects of the trade agreement. The scope of consultation should include the nature of the agreement, how and to what extent the agreement would achieve the goals of the Omnibus Trade Act and all matters relating to implementation of the agreement, including whether two or more agreements should be implemented in a single bill.[165]

The consultation procedure has grown to resemble the normal legislative process. Realizing that the statutory consultation period represented the last realistic chance of affecting the end result of the Tokyo Round negotiations, the trade policy committees and the Carter Administration agreed to an unofficial procedure. The committees held closed executive sessions on a regular basis to review progress in Geneva. As soon as possible, the Administration submitted detailed proposals to the committees that resembled draft legislation but did not have official status as such. The committees then engaged in "non-markup" sessions, scrutinizing the proposals line-by-line and passing committee resolutions consisting of recommendations for the implementing legislation. These resolutions informed the Administration of what the committees considered to be acceptable implementing legislation.[166] Hence the resolutions effectively allowed the committees to make the same changes in the proposals legislation as they would have in the normal markup process with formal legislation.

The Finance and Ways and Means Committees accommodated the jurisdictional interests of other committees in different ways. Ways and Means convinced other House committees to waive their jurisdictional claims, while allowing members of the relevant committees to participate in the non-markup sessions affecting their jurisdictions. Finance passed entire titles to other Senate committees (Agriculture and Commerce) for their own non-markups and adopted their recommendations as its own.[167] After passing recommendatory resolutions,

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165. Omnibus Trade Act, *supra* note 13, § 1102(d).
166. M. GLENNON, T. FRANCK & R. CASSIDY, *supra* note 28, at 176-77.
167. I. DESTLER, *supra* note 14, at 68-69.

Finance and Ways and Means members (and members of other relevant committees) met in a "non-conference" to work out differences between the committees.[168] The non-conference agreement became the foundation for the Administration's final bargaining position in Geneva and for the implementing legislation.

Precisely because the non-markup process represents the last opportunity to affect the Uruguay Round or NAFTA before it officially goes through the Fast-Track, it is the most vulnerable pressure point. A large number of committees may assert concurrent jurisdiction over the trade agreements. Both cover a broad scope of trade areas; the services negotiations alone could affect several committee jurisdictions. Granted, the Finance and Ways and Means Committees will attempt to restrict the number of committees with concurrent jurisdiction; diluted jurisdiction cuts into their influence over trade policymaking. But as trade policy becomes a more potent political issue, more committees will desire to be part of the process. For example, almost 200 legislators in 17 subconferences — representing virtually every committee of Congress — participated in drafting the 1988 Omnibus Trade Act[169] and 12 committees conducted non-markups during the implementation of the United States-Canada FTA.[170] Conceiveably, almost every committee in both Houses could seek to participate in non-markups on the Uruguay Round or NAFTA.

A large number of committees could mean trouble for trade agreements. Obviously, the involvement of more committees means more paperwork, longer negotiations and difficulties for the Congressional leadership. It also allows committees that do not have institutional ties to the Administration's trade policymaking entities to participate, straining Executive-Legislative relations. Domestic interests who would normally have weak influence in the Finance and Ways and Means Committees could go through other committees and have more direct impact.

A larger number of committees also increases the risk that confidential information relating to the trade agreements will leak during the non-markups and the non-conferences. During the Tokyo Round,

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168. R. JEROME, *supra* note 6, at 35.

169. Birenbaum, *The Omnibus Trade Act of 1988: Trade Law Dialectics*, 11 U. PA. J. INT'L BUS. L. 653 (1988); White, *Negotiating and the Congressional Conference Process: A Case Study of the Export Administration Act and the Omnibus Trade Bill*, 13 N.C.J. INT'L L. & COMM. REG. 333, 342 (1988).

170. 1 *United States — Canada Free Trade Agreement: A Legislative History of the United States-Canada Free Trade Agreement Implementation Act of 1988, Pub. L. 100-499* xxi-xxii (B. Reams & M. Nelson eds. 1990).

the trade policy committees kept the non-markups closed to the public, reducing the number of legislators and lobbyists who could influence the process. Press releases reported major decisions of the committees.[171] The trade policy committees, not wishing to antagonize the Administration, managed to maintain confidentiality during the Tokyo Round and will wish to do so during the Uruguay Round and NAFTA. But other committees, populated with more members sympathetic to opponents of the trade agreements and with weaker relationships with the USTR, may feel less obliged to maintain confidentiality.

Finally, a larger number of committees increases the probability that the Fast-Track process could stall amid inter-committee chaos. Uruguay Round and NAFTA opponents could stir up dissent among the committees by having their Congressional allies force committees into polarized positions. This represents the most dangerous possibility, for the Fast-Track procedure has no provision for extending the 90-day consultation period. If the committees cannot coalesce around the proposed agreement, the Administration would face two unappetizing alternatives: (1) concluding an international trade agreement without clear indications that Congress will accept what the Administration will bring back to Washington (assuming that other contracting parties will sign onto an agreement in such dubious political conditions) or (2) stopping the Fast-Track process and starting all over again at a later date, which may be a risky proposition. Cognizant of these risks, the chairmen and ranking members of the Senate Finance, Banking, Commerce, Agriculture, Judiciary and Governmental Affairs committees have already formed a caucus to prevent conflict among the committees.[172] Nevertheless, rebellious Congressmen could disrupt the Uruguay Round or NAFTA talks.

D. *Conclusion of Agreement and Formal Submission to Congress*

By the end of the 90-day period and before June 1, 1993, the President must conclude negotiations and enter into the trade agreement. After entering into the agreement, the President must submit to both Houses a copy of the final legal text of the agreement, together with draft implementing legislation, a statement of administrative action proposed to implement the agreement and a statement demonstrating that the agreement furthers the goals of the Omnibus Trade Act.[173] The bills must contain provisions approving the agreement, the

171. I. DESTLER, *supra* note 14, at 66.
172. *Also in the News*, 7 Int'l Trade Rep. (BNA) 1493 (1990).
173. Omnibus Trade Act, *supra* note 13, § 1103(a)(1).

statement of proposed administrative action and provisions amending existing statutes or creating new statutory authorities that are necessary or appropriate to implement the agreement.

However, the President has no statutory time limit for submitting draft implementing legislation to Congress after concluding negotiations. Although the statute provides for consultations before concluding negotiations, it does not require that this process end and the formal consideration of the implementing bill begin upon entering into the agreement. And in practice, 90 calendar days have not been sufficient to finalize the implementation bill except during the United States-Israel FTA talks, where the authorizing legislation resolved most issues. The Tokyo Round required an additional nine weeks to complete the draft bill because of the breadth and complexity of the issues, completion of negotiations on some minor technical issues and Congressional schedules. Because negotiators could not complete their talks with Canada and additional issues appeared during the ninety-day period, the Reagan Administration did not submit the implementing bill for the United States-Canada FTA until 6.5 months after the agreement was signed.[174] The Uruguay Round and NAFTA being of similar complexity, we can expect a substantial time gap between the President's signing of the agreement and the introduction of the implementing bill.

Upon Presidential submission of the implementing bill, the majority and minority leaders of both Houses (or their designates) shall introduce the bill. If the bill contains revenue measures, it must originate in the House of Representatives with later consideration by the Senate. Otherwise, the bill may originate in both Houses. Introduction triggers the maximum 60 legislative day period for completion of Congressional action, with an additional 30 legislative days for revenue measures. The Presiding Officers of each House shall refer the bill to the committees with appropriate jurisdiction.[175] These should be the same committees that participated in the non-markups and non-conferences of the ninety-day consultation period. Amendments are prohibited during the rest of Fast-Track.[176]

E. *Committee and Floor Consideration*

The committees have 45 days to report the implementing bill to the floor. If they have not reported the bill to the floor, the com-

174. Information supplied by USTR Public Affairs Office, Washington, D.C. (Aug. 10, 1990) [hereinafter USTR Information].

175. Trade Act of 1974, *supra* note 5, § 151(c).

176. *Id.* § 151(d).

mittees are automatically discharged from further consideration of the bill. Then the bill is placed on the appropriate calendar for floor consideration.[177]

The implementing bill shall be called up under a nondebateable, highly privileged motion to proceed to consideration. Majority and minority sides each shall have ten hours of debate on the floor. No motion to suspend the restrictions on amendments may be offered nor may the Presiding Officer of either House entertain a unanimous consent request to suspend those prohibitions. However, the procedure does allow unanimous consent to limit time for debate, as occurred during the United States-Canada FTA implementing process.[178] An up-or-down floor vote must take place fifteen legislative days after the bill reaches the floor; hence the maximum period of consideration for a non-revenue bill is 60 legislative days.[179]

If the bill contains revenue provisions, the Senate committees may receive 15 extra days after receiving a House-approved bill. This is intended to allow the Senate adequate time to react to the House bill. The Senate must conduct an up-or-down floor vote within fifteen days after the committees have reported the bill or have been discharged from consideration. Thus, the Senate would have up to 90 days if the implementing bill contains revenue measures and if the House waits until day 60 to send the bill to the Senate.[180] This need not occur. The House could send the bill to the other chamber before day sixty, or the Senate committees could finish consideration of the House bill before its official reference to the Senate.

During floor consideration, members of either House may attempt to bring up points of order — motions suggesting that the present action to be taken is contrary to the rules, practices and precedents of either House.[181] Such motions are often used to delay or defeat legislation and have concerned trade policymakers. For example, during the Uruguay Round, negotiators considered reviving the International Trade Organization concept. Hypothetically, if implementing legislation containing an ITO were to reach the House or Senate floor, a member could try to make a point of order against the bill and argue

177. *Id.* § 151(e)(1).

178. 134 CONG. REC. H6196 (daily ed. Aug. 3, 1988) (statement of Rep. Foley); 134 CONG. REC. S12404 (daily ed. Sept. 13, 1988) (statement of Sen. Byrd).

179. *Id.* § 151(e)-(g).

180. *Id.* § 151(e)(2).

181. Riddick, *Senate Procedure: Precedents and Practices*, S. DOC. NO. 21, 93rd Cong., 1st Sess., 596 (1973).

that the ITO exceeded the scope of Fast-Track authority. No precedent seems to govern what would occur if that were proven. In the House, the presiding officer would decide the matter; the appeal would be nondebateable and would go to an immediate vote.[182] No appeal of a presiding officer's ruling has successfully achieved a majority of House members since 1927. "[A]n appeal today is considered as a personal insult to the Speaker."[183] Although the presiding officer of the Senate has similar powers, the Senate has successfully appealed his or her rulings more frequently.[184] Debate on the point of order would be limited to one hour.[185] In any event, it would be highly unlikely that any element of the implementing legislation that alarming to members would go by undetected during the unofficial consultations, during the advisory committee reports and during the 90 days of non-markup and non-conference meetings. In other words, if the item were sufficiently outside the scope of Fast-Track for the presiding officers to rule it in violation of the House and Senate rules or for a majority of either House to believe it so, the matter would have come up long before the actual start of the Fast-Track process.[186] In any event, the statutory mandates for floor consideration would prevent any attempt to use points of order to stall the implementing bill after the Fast-Track has begun.

In practice, the Fast-Track process has required much less time than ninety legislative days because the committee and floor action take the form of an up-or-down vote. Congressional action from formal submission of the bill until final passage took five calendar weeks in the Tokyo Round, six calendar weeks for the United States-Israel FTA and seven calendar weeks for the United States-Canada FTA.

After both Houses pass the bill, the President signs the implementing bill and it becomes part of United States law. Then he may formally "ratify" the agreement under international law.

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182. Trade Act of 1974, *supra* note 5, § 151(f)(4).

183. C. TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE: A REFERENCE, RESEARCH AND LEGISLATIVE GUIDE 24 (1989).

184. *Id.* at 503.

185. Trade Act of 1974, *supra* note 5, § 151(e)(3).

186. A similar question was brought by Rep. John LaFalce. He asked the General Accounting Office (GOA) whether the 1988 Onmibus Trade Act envisioned a "regional free trade agreement." *LaFalce Suggests Fast-Track Procedures Were Not Intended for Application to NAFTA*, 8 Int'l Trade Rep. (BNA) 1181 (1991). Although a GAO determination would be useful, final resolution would require a political decision by the congressional leadership.

Despite potential problems in the Fast-Track, such as the consultation process and the extension procedure, the Fast-Track itself becomes invulnerable after its initiation. Hence the real political battle for Uruguay Round and NAFTA opponents is before Fast-Track even starts: by modifying or eliminating the Fast-Track procedure altogether, they can effectively end the talks. In the next section I shall describe how international trade agreement opponents could "derail" the Fast-Track.

V. METHODS FOR MODIFYING THE FAST-TRACK

How will Congressional opposition manifest itself during the Uruguay Round or NAFTA implementation? What procedural steps could Congressmen undertake to threaten or to achieve revocation or modification of the Fast-Track? As Article I, clause 5 of the Constitution states that "[e]ach house may determine the Rules of its Proceedings," Congress retains complete discretion over its own rules, including the Fast-Track.[187]

Is that so? The House Rules Committee itself has had doubts as to whether the Houses have this unlimited power to change the Fast-Track's statutory procedures, as the inclusion of House rules in a statute might waive the House's unilateral right to amend them:

> To the extent that the House chooses to enact any rule into law, it places itself in the constitutionally unacceptable position of requiring the consent of the other body and of the President to directly modify or repeal that rule. . . . [T]he committee believes that unnecessary doubts are invited by proposing rules in statutory form.[188]

Nevertheless, the House and Senate have always recognized the right of either House to modify procedural rules set in statutory form.[189] Indeed, the Trade Act of 1974 explicitly stated that Fast-Track had not impaired "the constitutional right of either House to change the 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."[190] This ability to change the procedures remains the Achilles' Heel of the Fast-Track process.

187. USTR Information, *supra* note 174.

188. H.R. REP. NO. 257, 98th Cong., 1st Sess., 5 (1983).

189. Riddick, *supra* note 181, at 775; Deschler, *Deschler's Precedents of the United States House of Representatives*, H.R. DOC. NO. 661, 94th Cong., 2d Sess., ch. 5, § 5 (1977).

190. Trade Act of 1974, *supra* note 5, § 151 (a)(2).

The following section takes a detailed look at how existing Congressional rules allow for changes in the Fast-Track procedure, which methods range from the sublime to the ridiculous: (A) modify them by passage of a separate rules resolution, (B) formally terminate them under procedures set by the 1988 Omnibus Trade Act, known as "reverse Fast-Track," (C) modify them by unanimous consent, (D) modify them by passage of new legislation, (E) suspend them or (F) ignore them altogether.[191]

A. *Separate Resolution*

The Houses of Congress frequently use resolutions to amend their rules and procedure. Requiring only a majority in either chamber, House and Senate resolutions have force only in the House passing them.[192] But that is sufficient for the internal "housekeeping" matters of either House, i.e., enough to override the Fast-Track procedural rules, despite their embodiment in statute.

The rules of the House of Representatives specifically state that the Committee on Rules has jurisdiction over all House rules except rules of ethical conduct.[193] Thus, the Rules Committee may consider and report a resolution to change the rules in any way permitted by the Constitution, whether permanently or temporarily. The committee may also propose and report its own rules changes. Reports of the Rules Committee on rule-change resolutions are "privileged": they receive priority consideration on the House floor. Furthermore, House members may not amend such a resolution unless the member in charge (usually the Rules Committee Chairman) yields or the "previous question is voted down" (a motion to cut off debate and force an

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191. Nickels, *Trade Agreement Legislation on a Fast-Track*, 11 CRS Review, May-June 1990, at 11.

A brief review of Congressional rules and procedure would be helpful at this point. Thomas Jefferson's *Manual of Parliamentary Procedure* has served as the foundation for Congressional procedure since the early days of the Republic. Over the years, precedents, resolutions, statutes and other ad hoc decisions have encrusted Jefferson's simple rules with a myriad of complex rules. Thus, while the "rules" of either House could be compiled in a slim volume, only the unabridged compilation of statutes, resolutions, rules and precedents — kept only in the parliamentarians' offices in the House and Senate — have any binding effect in either House. *Ruling Congress* 8 (T. Siff & A. Weil eds. 1975). This handicap should not affect my discussion of the Fast-Track, however, as it relies on basic elements of Congressional procedure. But because of this limitation on my research, I cannot claim that this article is completely exhaustive.

192. Dove, *Enactment of a Law: Procedural Steps in the Legislative Process*, S. DOC. NO. 20, 97th Cong., 1st Sess., 2 (1982).

193. Deschler, *supra* note 189, ch.5, § 5; *see also* House Rule X(1)(a)(1) (reprinted in House Manual, *supra* note 8, § 686(a)).

immediate vote has been defeated).[194] With the support of a simple majority, a resolution becomes effective, prevailing over conflicting rules.[195]

Conceivably, the House Rules Committee could propose a resolution modifying the current rules of the House on a "permanent" basis (at least for that particular Congress, as we shall see later) before the Uruguay Round or NAFTA even reaches Congress. The Rules Committee, however, could also wait until just before the trade agreement implementing legislation reaches the floor of the House. Recall that the Rules Committee may report resolutions, or "rules", that set the terms of floor debate. Such rules, after approval by a majority of House members, also modify the House rules, at least as pertaining to that particular bill. The House used this method to supersede procedures for expedited approval and disapproval of aid to the Nicaraguan *contras*.[196] In 1986, during House consideration of a resolution to approve additional assistance, Representative Trent Lott objected that the resolution had not been introduced within three days of the President's request for aid, as statute required. House Speaker "Tip" O'Neill ruled that the "rule" reported by the Rules Committee and approved by the full House governed debate, and not the statute: "The House is not operating under that statute, and that statute does acknowledge that the House has the constitutional right to change the procedure at any time under its rulemaking authority. The Committee on Rules and the House have changed the procedure. . . ."[197] In 1987, House Speaker Jim Wright "derailed" similar *contra* aid legislation by allowing a privileged "rule" from the Rules Committee to reach the floor before introduction of a disapproval resolution that had "highly privileged" status under the statute. After a majority vote approved the rule, it, and not the statute, controlled floor debate.[198]

Thus the House Rules Committee maintains great leverage over House procedure. Past Administrations have not ignored trade pressures in the House Rules Committee; the United States removed the maritime industry from the scope of the United States-Canada FTA and the Uruguay Round because of Rules Committee threats to revoke Fast-Track authority. How receptive would the Rules Committee be

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194. Deschler, *supra* note 189, ch. 5, § 5.

195. *Id.* ch. 5, § 6.1.

196. Continuing Appropriations for Fiscal Year 1985, Pub. L. No. 98-473, § 8066(a), 98 Stat. 1837, 2199; Continuing Appropriations for Fiscal Year 1987, Pub. L. No. 99-500, §§ 206-216, 100 Stat. 1783, 1783-352, 1783-359.

197. 132 CONG. REC. H1848 (daily ed. Apr. 16, 1986).

198. 133 CONG. REC. H1189-90 (daily ed. Mar. 11, 1987).

to efforts from other Uruguay Round or NAFTA opponents? A brief look at the membership shows that they might be more sympathetic than the Ways and Means Committee. Some 8 of 13 committee members voted for the resolution disapproving the Fast-Track extension.[199] Many of its members also have ties to the textile industry (11 cosponsored the 1990 textile bill; five are members of the Textile or Footwear caucuses).

Committee differences could dictate whether Fast-Track opponents would use this traditional procedure, which requires only Rules Committee approval, or the "formal" procedure dictated by the 1988 Omnibus Trade Act, which requires support of both the Rules and Ways and Means committees. Ways and Means might be less receptive to changes in the Fast-Track. For example, during the Fast-Track extension battle, some Ways and Means Committee members suggested that the committee should bottle up the disapproval resolution and keep it from reaching the floor of the House.[200] In addition, not only did a smaller percentage of its members vote for the disapproval resolution (10 of 36, or 28%, as compared to 8 of 13 Rules Committee members, or 62%), a smaller percentage voted for the 1990 textile bill (15 of 36, or 42%; 11 of 13 Rules Committee members voted for the bill, or 85%). Ways and Means purposely has a geographically representative membership, whereas composition of the Rules Committee is skewed heavily for Democratic majority control and is less representative.[201] And of course, a procedural resolution going through only the Rules Committee would require fewer votes in that particular committee to reach the House floor.

Most resolutions modifying procedure in the Senate would be referred to the Senate Committee on Rules and Administration for consideration. The Committee may also propose and report permanent or temporary changes to Senate rules on its own authority. Committee approval sends the resolution to the floor, where a majority vote incorporates it into Senate rules.

Like its House counterpart, the Rules and Administration Committee has also influenced trade policy through its control of procedure. But is this committee as sympathetic to the Uruguay Round or NAFTA opponents as the House Rules Committee? Comparison of the Finance and Rules and Administration Committees should illus-

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199. 137 CONG. REC. H3588 (daily ed. May 23, 1991).

200. Rosenbaum, *supra* note 81.

201. W. OLESZAK, CONGRESSIONAL PROCEDURE AND THE POLICY PROCESS 114 (2d ed. 1984).

trate that, again, the procedural committee might be more supportive of a Fast-Track modification. This makes the traditional Senate rules amendment by resolution — which would go through Rules and Administration — more attractive than formal termination procedures that require Finance Committee support.

At first glance, neither committee appears to be more or less inclined to oppose the Uruguay Round or NAFTA. Both have wide geographic diversity among their members and a more even split among party lines. Each has a few members who co-sponsored the 1990 Conrad Fast-Track resolution. But 7 of 16 Rules and Administration Committee members voted for or co-sponsored the Fast-Track disapproval resolution (44%), as compared to only 3 of 20 Finance Committee members (25%). And the textile industry should have more of an opening with the Rules and Administration Committee, where 14 of 16 members (88%) co-sponsored or voted for the 1990 textile bill, than with the Finance Committee, where only 12 of 21 members (57%) co-sponsored or voted for the bill. Rules and Administration Committee support may be more intense than that of the Finance Committee: 11 of the 14 pro-textile members were co-sponsors, as compared to 8 of 12 in the Finance Committee. Furthermore, both the Senate Democratic and Republican Leaders co-sponsored the textile bill.

Because of the peculiar time frames of the Uruguay Round and NAFTA, another method for amending the Fast-Track might exist, although not entirely likely. On January 3, 1993, the House of Representatives for the 103d Congress meets for the first time. Congressional precedents dictate that each Congress must adopt its own rules of procedure for the next two years.[202] This principle applies only to the House, which elects the entirety of its members every two years; since the Senate is a continuing body, its rules remain standing from Congress to Congress. Although most Congresses adopt the rules of the preceding Congress, amendments are allowed.

At the beginning of the meeting, the members are sworn in and they elect their officers. Then the former Chairman of the Rules Committee, or if he refuses, the Majority Leader, will offer a resolution adopting the rules of the 102d Congress. This resolution may also incorporate amendments. Members may not propose amendments to this resolution without consent of the sponsoring member. If the presolution is voted down, they may then propose their own resolutions. A majority vote approves the resolution.[203]

202. Deschler, *supra* note 189, ch. 1, § 10.

203. *Id.* ch. 1, §§ 10.1-.10.

This first meeting represents an opportunity for Uruguay Round and NAFTA opponents, if these agreements become delayed after January 1993. Congressional opponents could introduce Fast-Track amendments through the Rules Committee Chairman. Or, if he or she were not agreeable, they could muster a majority to defeat the original resolution and then introduce amendments. Although such actions would directly challenge the Congressional leadership, this option would allow for direct attack on the Fast-Track without having to go through the committees or the leadership. Disaster in the Uruguay Round or NAFTA could mobilize a majority in the House for action in January 1993.

Thus, passage of a procedural resolution in either House would effectively derail Fast-Track. Uruguay Round and NAFTA opponents, especially the textile industry, would also prefer this procedure over the more rigorous "reverse Fast-Track" procedures of the 1988 Omnibus Trade Act. The makeup of the Rules Committees may give the textile industry substantial power to avoid going through the more hostile Ways and Means and Finance Committees and to pass procedural resolutions, excluding it from the trade agreements. Other opponents, such as labor, agricultural and environmental groups and defenders of the status quo in import relief laws could join together and/or with the textile forces in any effort to pass a resolution. Indeed, in the immediate aftermath of the Fast-Track extension, these forces have pressed on with resolutions that will do just that, by withdrawing Fast-Track for all or part of NAFTA.[204] But do the statutory "reverse Fast-Track" provisions supersede these traditional Congressional procedures? Unfortunately, as the next subsection illustrates, politics, and not logical reasoning, may resolve this question.

B. *Formal Termination or "Reverse Fast-Track"*

For the first time, the 1988 Omnibus Trade Act provided for formal termination of the Fast-Track procedures. In the House of Representatives, the disapproval resolution specified in the statute must be introduced by one of the following: the Chairman or Ranking (minority) Member of the Ways and Means Committee or the Chairman or Ranking Member of the Rules Committee. The resolution would be jointly referred to the Ways and Means and the Rules Committees. Both committees must favorably report the resolution for it to reach the

204. H.R. Res. 149, 102d Cong., 1st Sess. (1991); S. Res. 109, 102d Cong., 1st Sess. (1991); S. Con. Res. 30, 102d Cong., 1st Sess. (1991).

House floor. In the Senate, the resolution must originate in the Finance Committee.[205] The resolution would receive expedited consideration under the Trade Act of 1974 (maximum twenty hours for debate, unamendable, not reconsiderable).[206] Finally, each House must separately agree to the procedural disapproval resolutions specified by the statute within a 60-day period.

Compromise between the Reagan Administration and Congress during the passage of the 1988 Omnibus Trade Act resulted in this "reverse Fast-Track". The Reagan-supported bill requested Fast-Track trade negotiating authority for ten years.[207] The House trade bill would have given the President three years of authority and an automatic extension for an additional two years if neither the Ways and Means or Finance Committees disapproved within 60 days.[208] The Senate bill originally would have granted the President Fast-Track authority only if the USTR were to submit detailed trade policy statements to Congress and the legislature approved the statements.[209] After pressure from the Administration, the Finance Committee dropped the trade policy statement provisions and incorporated the "reverse Fast-Track" procedure to give Congress a punitive measure if "at any time the Administration fails to consult regularly with the Congress."[210] Notably, the Senate-approved bill would have given original jurisdiction for formal termination only to the Finance and Ways and Means Committees. Perhaps recognizing the overlapping jurisdiction of the House Rules Committee, the conference committee included that committee in the reverse Fast-Track process.[211] But it did not include the Senate Rules and Administration Committee, perhaps reflecting its relative lack of stature compared to the House Rules Committee.

In any event, the reverse Fast-Track requires much more effort than the traditional procedural resolution. Uruguay Round or NAFTA opponents would have to receive the (1) support of one of the Chairmen or Ranking Members of the House Rules or the Ways and Means Committees, (2) support of both the Rules and the Ways and Means Committees, (3) support of the Senate Finance Committee, and (4) majority votes by both Houses, and accomplish this within 60 days.

205. Omnibus Trade Act, *supra* note 13, §§ 1103(c)(1)(A)-(E).
206. Trade Act of 1974, *supra* note 5, §§ 152(d)-(e).
207. S. 636, 100th Cong., 1st Sess. (1987).
208. H.R. 3, 100th Cong., 1st Sess. (1987).
209. S. 490, 100th Cong., 1st Sess. (1987).
210. S. REP. NO. 71, 100th Cong., 1st Sess., 8 (1987).
211. H. CONF. REP. 576, 100th Cong., 2d Sess., 535 (1988).

In addition, the statute prescribes that the procedural resolution provide for blanket withdrawal of Fast-Track authority for all trade agreements.[212] It does not allow for a selective withdrawal (i.e., for textiles only or for the Uruguay Round only) of authority. By comparison, the traditional procedural resolution only requires the support of (1) either the House Rules or Senate Rules and Administration Committee and (2) a majority vote in either the House or Senate, respectively. Such resolutions, as evidenced by past proposals on behalf of the maritime and uranium industries, can also withdraw authority on a limited basis for specific industries and agreements.[213]

Obviously then, trade agreement opponents would prefer to avoid the formal termination process and use the traditional procedural resolution. They would cite language in the 1988 Omnibus Trade Act that the Fast-Track — and the formal termination procedure — are

> an exercise of the rulemaking power of the House of Representatives and the Senate, respectively, and . . . [they retain] the constitutional right of either House to change the rules (so far as relating to the procedures of that House) at any time, in the same manner, and to the same extent as any other rule of that House.[214]

A move to exercise this traditional method would spark a great jurisdiction fight between the committees as to whether a disapproval resolution should be referred to the rules committees or to the trade (Finance and Ways and Means) committees. For example, Finance Committee Chairman Lloyd Bentsen stated he would have attempted to claim jurisdiction over Senate Resolution 342, the 1990 Fast-Track withdrawal resolution, so that his committee could stall consideration and effectively kill it.[215] This may reflect the Finance Committee's reluctance to lose jurisdiction over international trade agreements to the Rules and Administration Committee rather than its full support of the Uruguay Round talks. In contrast, the House Ways and Means Committee, which shares the Finance Committee's sentiments against revoking or modifying Fast-Track, probably would not wage a jurisdictional battle with the House Rules Committee, which has a much more influential role in the House than the Senate Rules and Administration Committee has in the Senate. However, if the Ways and Means Com-

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212. Omnibus Trade Act, *supra* note 13, § 1102(5)(c)(1)(E).
213. S. Res. 288 & S. Res. 341, 100th Cong., 1st Sess. (1987).
214. Omnibus Trade Act, *supra* note 13, §§ 1103 (d)(1)-(2).

mittee had indeed attempted to bottle up the Fast-Track extension disapproval resolution, as some had suggested, a political battle might have resulted.[216]

Committees frequently engage in such jurisdictional conflicts. The Speaker of the House and the presiding officer of the Senate have the formal responsibility of resolving jurisdictional disputes and referring bills to committees.[217] In practice, the House and Senate parliamentarians initially control where bills go through their recommendations. If a conflict between committees arises, the Parliamentarian ordinarily will resolve the matter by referring the bill to the committee which has jurisdiction over the "primary emphasis" of the legislation.[218] In controversial matters, however, the parliamentarians will defer to the political judgment of the House and Senate leadership.[219]

No matter who has the final decision in the matter, precedents, public laws and jurisdictional mandates (and politics) dictate the outcome. If the question is whether a disapproval resolution under the terms of the statute should originate in the rules committees or in the trade policy committees, the answer is obvious. The Omnibus Trade Act states that such resolutions must go through the Finance, Rules, and Ways and Means Committees, and in the manner specified in the statute. However, if the question revolves around where a disapproval resolution modifying the statute itself should go, then the answer is ambiguous. Deschler's Precedents, the primary unofficial reference for the House of Representatives, states that the House Rules Committee "has general jurisdiction over statutory provisions changing the procedures of the House for consideration of resolutions or bills disapproving or approving proposed action by the executive branch or by other governmental activities."[220] The Senate Rules and Administration Committee specifically has jurisdiction over "Congressional organization relative to rules of procedures."[221] On the other hand, precedent does support the Senate Finance Committee's assertion of jurisdiction over Fast-Track disapproval resolutions. The Senate leadership referred Senate Resolution 341, a resolution exempting the uranium industry from the United States-Canada FTA, to the

215. *Symbolic Legislation*, *supra* note 55.

216. Rosenbaum, *supra* note 81.

217. Senate Rule XXVII, *Senate Manual*, S. Doc. No. 1, 100th Cong., 1st Sess., § 17.1 (1987); House Rule XXII, *House Manual*, *supra* note 8, § 408.

218. F. CUMMINGS, CAPITOL HILL MANUAL 36-37 (1976).

219. *Ruling Congress*, *supra* note 191, at 54-55.

220. Deschler, *supra* note 189, ch. 17, § 52.

221. Senate Rule XXV(n)(2), *Senate Manual*, *supra* note 217, § 25(n).

Finance Committee — despite its procedural nature.[222] During the Fast-Track extension battle, the House and Senate leadership similarly referred House and Senate resolutions that would have decoupled NAFTA from the Uruguay Round[223] or allowed NAFTA amendments to in certain areas (environmental, labor, dispute resolution, etc.)[224] to the House Ways and Means and House Rules Committees and the Senate Finance Committee. Nevertheless, the potential for political conflict remains.

Thus, a "turf fight" between the committees over procedural resolution could boil down to a political decision by the Congressional leadership, who can (1) refer it to only one committee; (2) jointly refer it to more than one committee; (3) sequentially refer it to one committee, then to another, and so on; or (4) split referral of various parts of the resolution to different committees.[225] Although the full House and Senate may appeal a referral, such appeals rarely take place.[226]

The above discussion becomes irrelevant if either of the rules committees exercises its authority to self-generate rule change resolutions and send them to the floor. For example, the Senate Rules and Administration Committee self-initiated an original resolution exempting the maritime industry from Fast-Track consideration during the United States-Canada FTA that reached the Senate floor, but was not debated.[227] If Uruguay Round or NAFTA opponents have their way, both rules committees, started with members sympathetic to their causes, might engage in such tactics.

C. *Unanimous Consent*

Amendment by unanimous consent represents the most common and convenient method for changing Congressional procedures. The Standing Rules of the Senate expressly state that "[a]ny rule may be suspended without notice by the unanimous consent of the Senate,"[228]

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222. S. Res. 341, 100th Cong., 1st Sess. (1987); 133 CONG. REC. S17, 762 (daily ed. Dec. 10, 1987).

223. H.R. Res. 149, 102d Cong., 1st Sess. (1991).

224. S. Res. 109, 102d Cong., 1st Sess. (1991); S. Con. Res. 30, 102d Cong., 1st Sess. (1991).

225. Senate Rule XVII, *Senate Manual, supra* note 217, § 17; House Rule X, *House Manual, supra* note 8, § 700. Senate rules do not allow for joint referral.

226. House members generally cannot appeal referral decisions to the entire membership except in rare instances of erroneous referral. A majority vote by the Senate can override a referral on appeal. W. OLESZAK, *supra* note 201, at 76.

227. S. Res. 288, 100th Cong., 1st Sess. (1987).

228. Senate Rule XL, *Senate Manual, supra* note 217, § 5.

and House rules also allow for a similar procedure.[229] Through unanimous consent agreements, almost any legislative action may be achieved.

Two types of unanimous consent agreements exist: simple and complex. Any legislator may request "simple" agreements on the floor, usually for routine business or minor items.[230] "Complex" agreements set the guidelines for floor consideration of major bills, including time limits and germaneness requirements for amendments. After negotiations among party leaders and key legislators, the agreement is introduced before debate commences.[231] Congress has used this method the few times it has modified the Fast-Track. During consideration of the United States-Canada FTA implementation bill, both Houses agreed by unanimous consent to reduce the statutory 20 hours of debate to 3 hours in the House and 7.5 hours in the Senate.[232]

Assuming that they would not have the support of the House and Senate leadership for a complex agreement, Uruguay Round or NAFTA opponents could seek to use a simple unanimous consent agreement. Of course, a single objection defeats the request for unanimous consent. Fast-Track opponents would therefore have to choose their battles carefully. First, they might attempt to clear the motion with the entire legislative body. Although theoretically possible, this would be impractical. Second, they might push a unanimous consent agreement through when few Senators or Representatives are on the floor. In a deserted chamber, members understand that the risk of offending others is negligible and that, with luck, a unanimous consent request might actually pass.[233] But this is also unlikely. Such situations occur infrequently, and other members have considered such behavior "brazen and discourteous."[234]

D. *New Legislation*

Conceivably, Uruguay Round or NAFTA opponents unable to get procedural resolutions through the relevant committees under the traditional Congressional method or the formal termination mechanism could amend the statutory Fast-Track rules through new legislation.

229. Deschler, *supra* note 189, ch. 5, § 5.2 (1977).

230. W. OLESZAK, *supra* note 201, at 156.

231. *Id.* at 157.

232. 134 CONG. REC. H6196 (daily ed. Aug. 3, 1988) (statement of Rep. Foley); 134 CONG. REC. S12, 404 (daily ed. Sept. 13, 1988) (statement of Sen. Byrd).

233. *Ruling Congress*, *supra* note 191, at 140.

234. *Id.* at 141.

For example, Senators unrestricted by germaneness requirements could attach procedural changes to "veto-proof" legislation. If the amendment survived the conference committee's scrutiny and obtained the President's signature, the legislation would supersede the 1974 and 1988 trade acts. However, this would require an unlikely turn of events: that the conference committee would adopt the provision, that both Houses would pass the legislation with majority votes and that President Bush would not veto an obvious attempt to derail the Uruguay Round or NAFTA. This approach, therefore, would inevitably require two-thirds majorities in both Houses to override the veto. This, too, is not an easy comparison.

E. *Suspension of the Rules*

Senate Rule V allows the Senate to suspend any of its rules if two thirds of the members present — assuming a quorum exists — agree.[235] Those proposing a suspension must give a day's notice in writing to the legislative body. Senators frequently use this procedure to waive, but not amend, Senate rules that forbid amendments to appropriations bills (House rules also contain provisions for suspending the rules, but they restrict, rather than permit, amendments and so are not suitable methods to defeat Fast-Track).[236] This approach would not permanently change the Fast-Track and could be instigated from the floor without committee approval. However, suspension of the rules is not terribly attractive. Fear of permanently affecting the appropriations rules encourages Senators to suspend them; permanently changing them would distort the carefully constructed procedure for annual budget legislation. Senators will not have similar concerns for trade agreement legislation. And in any event, gathering a simple majority to support a procedural resolution represents an easier task than suspension of the rules by a two-thirds majority.

F. *Ignore the Rules*

Despite the Congressional attention paid to procedure in the Fast-Track, Congress has often outright ignored its own rules. As one expert has described it:

> While the federal courts follow written Federal Rules of Civil Procedure, the Senate and House often honor their own written rules only in the breach. The Senate and House

235. *Senate Manual, supra* note 217, § 5.
236. Riddick, *supra* note 181.

> have not followed their formal scheduling rules, which read like tracts from a bygone era, for decades. In both chambers, extraordinary deviations from ordinary procedure are common: major bills that zip through in minutes without debate, greased by special arrangements; Senate filibusters disorganizing the chamber's operation; unrelated riders jammed onto omnibus bills; strained bill drafting and other pressures used to circumvent committee jurisdictional rules; and a host of other extraordinary practices.[237]

Congress could just as well ignore the Fast-Track altogether. However, the Fast-Track represents a substantial political commitment that neither House could abandon without receiving attacks from domestic and foreign critics. In addition, ignoring the rules would trigger parliamentary points of order from the floor. At that point, the presiding officer must either enforce the rules or allow for action that would "ratify" the failure to follow procedure. Only if Congress passed or voted down legislation over these objections would the blatant refusal to honor procedure effectively negate the Fast-Track. Thus, other methods appear to be more "legitimate" than flaunting the rules.

VI. Alternatives to Fast-Track

Formal disapproval under the Omnibus Trade Act or modification or elimination of Fast-Track via a resolution would effectively "derail" international trade agreements. The President then would face several unappealing alternatives.

First, the President could resubmit the agreement and implementing legislation for Congressional approval under standard unexpedited procedures. Congress has been able to pass trade legislation quickly. For example, the Johnson Administration negotiated the United States-Canada Automotive Products Agreement without consulting Congress beforehand. The President submitted the agreement for Congressional approval two months after the Administration had reached an agreement and implementation went smoothly.[238] However, that was a bilateral agreement concerning a narrow area of trade. Democrats controlled both the Executive and Legislative Branches, and

237. C. Tiefer, *supra* note 183, at 2-3.

238. Koh, *supra* note 13, at 1200 n.27. *See also* Agreement Concerning Automotive Products, Jan. 16-Mar. 9, 1965, United States-Canada, 17 U.S.T. 1372, T.I.A.S. No. 6093 (entered into force Sept. 16, 1966); Automotive Products Trade Act of 1965, Pub. L. No. 89-283, 79 Stat. 1016 (currently codified at 19 U.S.C. §§ 2001-33 (1988)).

President Johnson was at the height of his political mastery of Congress. By contrast, the Uruguay Round and NAFTA encompass a wide range of goods and services and President Bush faces an increasingly hostile Congress prepared to do battle in anticipation of the 1992 Presidential elections. Quick passage would not be very likely.

Also, implementing legialation open to amendment and subject to committee delay and Senate filibusters might not resemble any agreement reached at the bargaining table. Implementing legislation would be subject to Public House Committee hearings and markup amendments. The House Rules Committee could bring it onto the floor under an "open" rule that would allow amendments. Amendments unacceptable to other contracting parties could also be added in the Senate Finance Committee, on the Senate floor or in the conference committee.[239] Trading partners would thus be reluctant to sign onto an agreement subject to potentially wide-ranging amendments or might even back out altogether.

Second, the President could resubmit the international trade agreement to Congress, but request that it be given ad hoc Fast-Track consideration. Although the bill would receive the same conventional treatment described above, the Congressional leadership could grant the bill the same expedited consideration and immunity from amendments that the Fast-Track mandates.

Several House actions would be required. Preventing committees from stalling the legislation might necessitate use of the "discharge" procedure, which releases legislation from committee consideration. But that would require a majority of House members and would subject the bill, absent special rules, to the general rules of the House.[240] The House Rules Committee could, under its authority to structure House floor debate through "rules,"[241] grant the trade agreement a "closed" rule to govern debate on the implementing legislation. Closed rules forbid floor amendments except those offered by the reporting committee(s).[242] Such rules must receive the support of the Rules Committee and are subject to amendment or defeat on the House floor.[243] Alternatively, Presidential allies could seek suspension of the House rules, which would limit debate to forty minutes and bar floor amendments.[244] Suspension would require a favorable report by a com-

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239. Koh, *supra* note 49, at 217 n.86.
240. House Rule XXVII(4), *House Manual, supra* note 8, § 908.
241. *House Manual, supra* note 8, § 686(b).
242. W. OLESZAK, *supra* note 201, at 111; L. Deschler, *supra* note 189, ch. 21, § 16.
243. *See* Deschler, *supra* note 189, ch. 21, § 16.
244. House Rule XXVII, *House Manual, supra* note 8, § 902.

mittee, approval by the Speaker and a two-thirds majority of the House, which vote would also pass the bill.[245] But suspension does allow for amendments as part of the motion supported by the reporting committee.[246] In any event, the two-thirds majority requirement has prevented more frequent use of this procedure.[247]

The Senate, with its more flexible structure, could institute its own ad hoc Fast-Track procedures through a unanimous consent agreement agreed to by the Democratic and Republican leadership.[248] Although most Senators will follow their leaders, a single objection on the Senate floor will negate the agreement. Thus, to recreate the Fast-Track through ad hoc measures, the President would have to come to terms with the House Rules Committee, the Senate leadership and perhaps even the entirety of Congress. At the very least, the Administration would have to make major trade concessions to reconstitute Fast-Track.

Third, the President could avoid placing the agreement before the House and submit the international agreement to the Senate as a treaty for its "Advice and Consent."[249] In common parlance, the Senate would "ratify" the treaty; in reality, the Senate, with a two-thirds vote, would give its consent to the treaty. But it could add conditions to its consent through "reservations." Senators could make unacceptable reservations or stall the treaty with filibusters. Also, the Senate's reputation for considering treaties is notorious. The current importance of the GATT resulted from the Senate's lengthy debate of, and eventual failure to even vote on, the ITO charter.[250] Finally, the House of Representatives would violently object to any language in the Uruguay Round or NAFTA treaty that would affect revenue measures; all bills for raising revenue must originate in the House. Although the treaty could include revenue measures, these measures would not be "self-executing" — effective in domestic United States law — and additional implementing legislation passed with the consent of the House would be necessary.[251] These drawbacks, when added to the need for the support of a two-thirds Senate majority, effectively prevent use of the treaty route.

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245. C. TIEFER, *supra* note 183, at 297-303.
246. *Id.* at 306.
247. W. OLESZAK, *supra* note 201, at 101-03.
248. *Id.* at 156-57.
249. U.S. CONST. art. II, § 2, cl. 1.
250. J. JACKSON & W. DAVEY, *supra* note 21, at 294-95.
251. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 111, 801 (1986).

Fourth, and perhaps the riskiest, the President could accept the agreement on behalf of the United States as an executive agreement on his own constitutional authority. The President accepted the Kennedy Round Anti-Dumping Code in this manner. This would probably trigger a constitutional confrontation. Congress would likely argue that the President lacks the intrinsic constitutional authority to accept any part of the agreement calling for the elimination or modification of tariff barriers, which actions probably fall within Congress's exclusive constitutional authority to "lay and collect Taxes, Duties, Imposts and Excises."[252] Congress could also argue that the Omnibus Trade Act has pre-empted presidential action, thus obliging the President to comply with its terms.[253] The President could counter that his inherent constitutional powers for the conduct of foreign relations empower him to accept the Uruguay Round or NAFTA, despite the detailed delineations of authority under the Omnibus Trade Act.[254]

If the President persisted, though, Congress would still have recourse. Perhaps Congress could not avail itself of judicial relief because of the ripeness doctrine, political question doctrine and, if members of Congress brought suit, the doctrine of Congressional standing.[255] Nevertheless, Congress could undo the President's actions by passing subsequent legislation that would "trump" the executive agreement through the later-in-time rule.[256] In any event, any attempt by the President to accept a trade agreement under his own authority during the 1992 Presidential election season could prove dangerous.

VII. CONCLUSION

The Fast-Track represents a simple answer to a complex problem: meshing the demands of international negotiations with the constitutional separation of powers. United States constitutional structure forces Congress and the President to cooperate in the regulation of international commerce. Congress had been able to work with the President by delegating authority to him while simultaneously imposing temporal and quantitative limits on his tariff cutting authority. However, as international trade barriers fell, negotiators turned their

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252. *Id.* at 218 n.88; *see also* U.S. CONST. art. I, § 8, cl. 1.

253. *See, e.g.*, Consumers Union v. Kissinger, 506 F.2d 136, 146 (D.C. Cir. 1974) (Leventhal, J., dissenting) (arguing that detailed Congressional statute pre-empted President from entering into voluntary export restraint agreements with Japanese steel producers).

254. Koh, *supra* note 13, at 1218 n.79.

255. *Id.*

256. Whitney v. Robertson, 124 U.S. 190 (1888).

attention to the more troublesome NTB's; Congress could not similarly limit Presidential negotiating authority in this area. This natural shift in emphasis created the need for the Fast-Track, which gave the President sufficient authority to negotiate and retained Congress's prerogative to approve of his agreements.

For the last 12 years, Fast-Track has served American international economic policymaking. Congress implemented the Tokyo Round and FTA's with Canada and Israel with few difficulties because of the Fast-Track. Presidential trade negotiating credibility has also increased greatly.

Yet ironically, the same pressures that created the Fast-Track may have begun to affect the Fast-Track itself. Negotiators now focus their attention on the stubborn industries that had avoided substantive reforms in earlier trade agreements. But these interests will not go down without a fight. Under pressure, these opponents have discovered a new weapon to stop the Fast-Track juggernaut: Congress's unilateral constitutional authority to change the Fast-Track.

In this article, I have described various methods to "derail" the Fast-Track. Yet so long as the President cooperates with the Congressional leadership, few of these methods have any realistic chance of success. Unanimous consent, suspension of the rules, new legislation and outright ignoring the rules require the support of the House and Senate leadership. Indeed, even the formal termination process set up by the Omnibus Trade Act necessitates involvement by the congressional leadership. Only with the approval of the leadership can Uruguay Round and NAFTA opponents gain the support of the House Rules and Ways and Means Committees, the Senate Finance Committee and both Houses within a 60-day period.

However, Uruguay Round and NAFTA opponents can bypass the leadership and the formal termination process by gaining the support of the House Rules Committee or the Senate Rules and Administration Committee. Introduction of a disapproval resolution by either of these committees and its approval by the corresponding House "derails" the Fast-Track in that House and effectively stops trade negotiations. Comprised of members sympathetic to their interests, international trade agreement opponents need only to convince a few legislators on these committees to accomplish their goals.

Could the President suggest changes in Congressional rules that would eliminate this procedural loophole? Unlikely. The procedural resolution process has engrained itself into Congress's operations. Congress would refuse to disarm itself unilaterally of a right based on the Constitution.

One desiring to increase the efficiency of the process could make several suggestions for reform. Theoretically, the President and Congress could take steps to discourage the rules committees from derailing the Fast-Track. First, future legislation should retain the reverse Fast-Track. But the formal termination process could also include the Senate Rules and Administration Committee. This would co-opt that committee from taking unilateral action against a trade agreement, much as the current legislation does with the House Rules Committee. Second, Congress could designate members of both rules committees as advisers to trade negotiations. Then they could use direct channels to the President's negotiators, rather than the public gestures of letter writing and disapproval resolutions. Third, the trade policy making and rules committees could have more overlap. For example, the Senate Finance Committee could include more Rules and Administration Committee members among its ranks. Although foreign representatives might wonder why legislators with rules and administrative portfolios actively participate in trade talks, the above measures would go a long way to insuring against attacks on the Fast-Track. However, Congress and its committees will be loathe to give up tools such as letter writing and jurisdiction to the Senate Rules and Administration Committee. And Congress may have little incentive to cooperate with the President.

Returning to the realm or theory one could suggest reforms for Fast-Track itself. The number of committees involved in the process has become unmanageable. House and Senate committee chairmen have made efforts to cooperate before the Uruguay Round and NAFTA, but no amount of planning can prevent chaos among the committees. This potential for disorder has resulted from Congress's following the wrong precedents of the Tokyo Round. In the United States-Canada FTA implementation process, Congress adopted the Senate Finance Committee's approach of allowing other committees to conduct their own non-markups. This may lead to the spectacle of some fifteen to twenty committees conducting simultaneous proceedings on implementing bills. Rather, Congress should adopt the House Ways and Means Committee's approach: other committees should waive their jurisdictional claims in exchange for the right to participate in the non-markup and non-conference meetings. This would mean that two "supra-committees" would conduct the non-markup process, albeit with a larger number of participants. Congress has been able to handle conference committee proceedings involving large numbers without suffering too much from news leaks and institutional strains. Again, however, political reality may prevent any changes. Commit-

tees have enjoyed their increasing important role in international trade policy making to yield authority back to the Finance Ways and Means Committees.

One might also seek reform of the Fast-Track extension process. However, that process, if not the entire Fast-Track itself, represents part of the fundamental bargain between the Congress and the Presidency. No statutory provision can completely streamline a process designed to be messy and inefficient. Struggling over the privilege to implement trade agreements under the Fast-Track is precisely what the drafters of the Constitution envisioned in the separation of powers.

The Fast-Track alone cannot sustain a flimsy international trade pact, and neither can the Fast-Track's vulnerabilities destroy a strong trade agreement. Nor can the suggested reforms eliminate Fast-Track's major flaw and change a Congressional system deeply rooted in the Constitution itself. Yet this "flaw" does serve useful purposes. It gives Presidential negotiators leverage with other parties; they can claim that failure to achieve progress will trigger measures to derail Fast-Track. It also forces the President to bring back trade concessions substantive enough to deserve Fast-Track approval.

This all traces back to the Constitution's separation of powers. The President seeks trade reforms that bring increased commerce from abroad and the Congress protects the interests of the people back home. Again, this reflects the Founding Fathers' wise decision to spread Federal power among the three branches. It has worked for over 200 years. Whether it works in an increasingly complex world will depend on the strength and courage of its leaders.