



GREG ANDERSON

Did Canada Kill Fast Track?

INTRODUCTION

A Date That Will Live in Infamy?

For music fans, April 10 may be remembered as the day in 1970 Paul McCartney announced his departure from the Beatles. However, for students of U.S. trade policy April 10 may come to be known as the day in 2008 half a century of U.S. trade policy making was turned on its head. On that day, Speaker of the U.S. House of Representatives Nancy Pelosi and the House Democratic leadership approved a change to House rules governing the legislative timetable by which trade agreements negotiated by the president had to be brought to a vote. The trade agreement in question was the U.S.-Colombia Trade Promotion Agreement, completed in November 2006 but, because of the rule change, suspended in legislative limbo for five years before finally being brought to the floor of the House for a vote in October 2011.¹ According to the White House, the April 2008 congressional action was nothing short of a stick in the eye of a key U.S. ally in Latin America. Worse yet, the White House had worked with Congress at every stage of the negotiations to satisfy concerns on a range of issues, including those on labor and the environment. In defending the House rule change, Speaker Pelosi asserted that Congress was merely exercising its constitutional responsibilities over trade policy.

For most of the postwar period, setting U.S. trade policy has involved a bargain between the executive and legislative branches of government aimed at reconciling the constitutional division of powers covering the role of trade policy in foreign affairs with profound implications for U.S. trading partners around the world. In practice, the bargain struck has meant the delegation of constitutional authority to “regulate Commerce with foreign Nations” from Congress to the president. Since 1974 and the creation of so-called *fast track* authority, that basic delegation has consistently involved three basic features: (1) in-depth consultation between the White House and Congress, (2) a ninety-day legislative timetable to bring agreements to a vote, and (3) a congressional promise that deals will not be amended. Since its creation, fast track has been renewed just five times (1979, 1984, 1988, 1991, and 2002) but become a key element in the conduct of U.S. trade policy and U.S. foreign policy more broadly.

1. H.R. 3078, October 12, 2011. House vote in favor of the U.S.-Colombia FTA was 262–167. Senate approval on the same day was 66–33.

Blame It on Canada?

A sanguine view of the April 2008 House rule change casts the Colombia agreement as having been caught up in a normal cycle of election-year politicking, a deteriorating U.S. economy, and a trade policy environment in which “international” and “trade” had become dirty words. The Colombia Free Trade Agreement (FTA) was approved in October 2011 under new rules but only after significant postnegotiation modifications to the agreement were made, fundamentally upending each of the three basic features of fast track noted above that have helped manage U.S. trade policy.

Moreover, Colombia is a mere symptom of the longer-term erosion in the consensus over the direction of U.S. trade policy and the way it is generated. The April 2008 breakdown of the U.S. constitutional bargain that generated fast track may come to represent the final nail in the coffin of fast track as a foundational institution in American trade policymaking. In fact, the first handful of nails in the fast track coffin were put in place by the first comprehensive bilateral trade agreement ever considered under fast track: the 1988 Canada-U.S. Free Trade Agreement (CUFTA).

American negotiations with Canada and Colombia are remarkably similar in terms of the political and economic contexts in which they took place. The three years of Canada-U.S. talks (1985–88) took place during a particularly acrimonious period of trade policymaking in the United States. Divided government, anemic economic performance, and fears of foreign competition were as salient then as they were in 2008. Yet, what really ties these two negotiations together is that they may be bookends in a history of an important U.S. trade policy institution: fast track.

Separated by twenty years, the Canada negotiations were the first significant test of fast track procedures after they were created, and Colombia may have been the last. Neither Canada nor the CUFTA actually “killed” fast track since it was renewed three more times after the agreement came into force. However, fast track in its design was supposed to help manage constitutional tensions in the context of the shift toward nontariff measures as the substance of discussion in the global trade regime. In this, the Canada talks were fast track’s first major test. It was, as this article argues, a test that marks the beginning of the end for fast track. More importantly, the demise of fast track also marks a change in the manner by which U.S. trade policy is conducted. Until April 10, 2008, the basic delegation of congressional authority over trade had significantly augmented the range of foreign policy tools available to successive presidents throughout the postwar period. The demise of fast track is reflective of a long period of acrimonious interbranch conflict over trade policy-setting domestically with significant implications for American economic diplomacy in an increasingly multipolar global economy.

The first part of this article will recount the origins of fast track. Part two will focus on the Canada-U.S. free trade negotiations and how the issues addressed

within them challenged fast track's ability to manage them and mark the start of fast track's demise. The third section will examine how the Canada talks informed changes to U.S. trade policymaking, and fast track in particular, as they flowed into the North American Free Trade Agreement (NAFTA). And finally, this article will look narrowly at three specific nontariff issues on the U.S. trade agenda as a means of further assessing the deterioration of fast track as a functional mechanism in the management of U.S. trade policy.

The substantive focus of this article concerns the traditional interbranch conflict arising from the constitutional division of powers over foreign affairs found in most textbooks. But this particular interbranch struggle is about a political institution (fast track), specifically designed to manage and arbitrate this conflict over U.S. trade policy in the midst of an increasingly integrated, interdependent, and open global economy: a global economy that America no longer overwhelmingly dominates and increasingly involves difficult policy trade-offs. However, fast track also had important implications for American diplomacy as it continued to confer authority and leadership of the global economy to the president. However, through fast track, we are also seeing the deterioration of the broad postwar consensus on the merits of trade liberalization that generated the need for fast track in the first place.

DELEGATION DEBATES AND THE BIRTH OF FAST TRACK

The U.S. Constitution is both explicit and intentionally vague in delineating the separation of powers among the three branches of government. In thwarting the concentration of power, the Constitution also sets the stage for significant interbranch conflict over a variety of policy areas, including foreign economic policy. Article 1, Section 8, assigns Congress exclusive jurisdiction over all foreign commerce, including tariff levies on such commerce. At the same time, Article 2, Section 2, confers upon the president several key foreign policy powers such as his authority as commander in chief of the armed forces as well as the power to negotiate treaties. Therein rests the challenge in conducting U.S. trade policy: two separate branches of government, each with a constitutional claim of jurisdiction over international affairs. The historic difficulty of the treaty ratification process in the U.S. Senate has led to the increased use of executive-legislative agreements (more commonly termed executive agreements) specifically to avoid the formal ratification process.² But even here there are challenges for the conduct of foreign affairs since while treaties automatically become law, executive agreements do not, often requiring extensive legislation to change U.S. law. In other words, where trade policy is concerned, the president may be the nation's chief negotiator, but Congress ultimately has its say. Fast track is a uniquely U.S. solution to a problem between branches of

2. Hal S. Shapiro, *Fast Track: A Legal, Historical, and Political Analysis* (Ardsey, NY, 2006), 45-46.

government in international affairs that is not unique to the United States.³ Fast track is a political device that, in the U.S. setting, binds the executive and legislative branches to a course of action in the conduct of trade policy.⁴

In part, fast track as an institution of U.S. trade policy is a component part of a larger domestic debate over control of aspects of U.S. foreign policy. From well before the Declaration of Independence until the end of the Kennedy Round of General Agreement on Tariffs and Trade (GATT) negotiations in 1967, tariff rates have historically been one of the most important economic and political issues before American legislators.⁵ Tariffs on goods imported into the United States were the single most important source of federal revenue, contributing nearly 90 percent of all revenue as late as 1861.⁶

Throughout the late nineteenth century, lawmakers and members of the executive branch fiercely contested the proper means of managing foreign commerce. Throughout most of this period, and well into the twentieth century, Congress cautiously guarded its constitutional authority over tariff policy. While agents of the executive branch frequently took the lead in the various reciprocity treaties that were concluded during the nineteenth century, all were considered treaties and, as required by the Constitution, were brought before the Senate for final ascent into law. However, in 1890, Secretary of State James Blaine, eager to strengthen the position of the president's negotiating teams and improve U.S. access to foreign markets, proposed a radical departure from the standard practice of exclusive congressional control. Rather than Congress effectively maintaining a final veto over concluded reciprocity treaties when brought before the Senate, Blaine proposed that Congress give the president discretionary authority to conduct negotiations and effect agreements without subsequent congressional approval. Blaine's delegation request found its way into the McKinley Tariff of 1890, which then set off a firestorm of criticism that found its way to the Supreme Court (*Field v. Clark*, 143 U.S. 649, 1892). There, the Court ruled that such a sweeping delegation of authority was constitutional because the president's actions were simply an execution of an act of Congress.⁷

Although the McKinley Tariff of 1890 was in effect only four years before its repeal by Congress in 1894, the Supreme Court's decision established a precedent for the use of executive agreements that would dramatically alter American

3. *Ibid.*, 92–104.

4. Harold Koh, "The Fast Track and United States Trade Policy," *Brooklyn Journal of International Law* 18, no.1 (1992): 159.

5. Robert A. Pastor, *Congress and the Politics of U.S. Foreign Economic Policy* (Berkeley, CA, 1980), 69. During the Civil War, Congress had to turn to other sources of revenue, such as federal land sales, in order to continue the conflict. As a result, the tariff contributed less than 40 percent of federal revenue by 1864. Throughout the remainder of the nineteenth and twentieth centuries, the tariff never again accounted for more than 57 percent (1890) of federal revenue and by 1992 only contributed 1.6 percent. Source: Alfred E. Eckes, *Opening America's Market* (Chapel Hill, NC, 1995), 46.

6. Eckes, *Opening America's Market*, 73.

7. *Ibid.*, 70–74.

trade policy during the later half of the twentieth century. Forty years after the McKinley Tariff, another secretary of state, Cordell Hull, would win congressional approval for a more open-ended grant of legislative authority, the Reciprocal Trade Agreements Act of 1934 (RTAA).⁸ The impetus for the RTAA was the lethal cocktail of competitive “beggar-thy-neighbor” policies brought on by the onset of the Great Depression that contributed to significant declines in global trade flows, reduced economic activity in many countries, and paved the way for the rise of fascism and World War II.⁹ The infamous Smoot-Hawley tariff bill of 1930 is still widely cited as one of the most protectionist pieces of legislation in American history and widely thought to have exacerbated the Great Depression.¹⁰ As trade flows broke down, Secretary Hull persuaded President Roosevelt to ask Congress for the authority to negotiate tariff reductions in an effort to restimulate global economic activity and act as a hedge against the future rise of extremism.¹¹

However, issues of international security, economic prosperity, and interdependence were not the only matters of concern addressed by the RTAA program; so too was the structure of the American foreign economic policy process. Whereas for most of the nineteenth and early twentieth centuries Congress, had guarded its constitutional authority over foreign commerce, the RTAA for the first time gave the executive branch explicit, statutory authority to negotiate with foreign countries to slash tariff rates by up to 50 percent for a period of five years without returning such agreements to Congress for approval.

8. The McKinley Tariff of 1890 was not the last important delegation of congressional authority prior to the RTAA. Technically speaking, delegation continued in the application of “scientific adjustments” to the tariff, often referred to as the flexible tariff, in which authority to investigate and recommend tariff rate adjustments to the president was delegated to the quasi-independent and judicial U.S. Tariff Commission. The provision for a flexible tariff to be determined by the Tariff Commission was included in both the Fordney-McCumber Tariff Act of 1922 and the Smoot-Hawley Act of 1930. The flexible tariff was one of the main reasons that President Hoover supported the Smoot-Hawley bill. Hoover eventually won some discretionary authority over Tariff Commission recommendations, but as the severity of the Depression took hold, Hoover’s ability to use the flexible provision to reduce tariff rates became politically untenable. J. Richard Snyder, “Hoover and the Hawley-Smoot Tariff: A View of Executive Leadership,” *Annals of Iowa* 41 (1973): 1173–89; see also Eckes, *Opening America’s Market*, 88–90.

9. See for example, Pastor, *Congress and the Politics*, 77–93; Eckes, *Opening America’s Market*, 140–77.

10. Alfred Eckes in *Opening America’s Market*, disputes this claim, but it has nevertheless become accepted wisdom. In fact, Smoot-Hawley remains the premier example used by proponents of free trade for why Congress should continue delegating responsibility for international trade to the president.

11. In his memoirs Hull recalled “Toward 1916 I embraced the philosophy I carried throughout my twelve years as Secretary of State, into the Trade Agreements, into numerous speeches and statements addressed to this country and to the world. From then on, to me unhampered trade dovetailed with peace; high tariffs, trade barriers, and unfair economic competition, with war.” See Cordell Hull, *The Memoirs of Cordell Hull*, 2 vols. (New York, 1948), 1: 211.

On August 24, 1934, the first bilateral trade agreement under the RTAA was concluded with Cuba, marking the beginning of an unprecedented reign by the executive branch as the preeminent entity in the conduct of American foreign economic policy.¹² In doing so, the RTAA also fundamentally reoriented U.S. trade policy away from narrow protectionism and toward embedding liberalism as the fundamental orientation in U.S. trade policy.¹³ In the hands of 535 members of Congress, trade policy is alternately parochial, driven by specific sectoral or regional interests, oriented around the near term electoral fortunes of individual members, or all of the above.¹⁴ Hence, Smoot-Hawley's destructive, pork barrel upward revision of nearly 60,000 tariff lines in 1930. In the hands of the president, whose constituency and outlook is national, trade policy became a powerful component of the executive branch's foreign policy tool chest.¹⁵ While the RTAA went considerable distance toward revising America's trade policy institutions, there were only so many tariffs that could be reciprocally negotiated downward.

The RTAA program proved to be a successful formula for management of tariff negotiations with bilateral partners and several rounds of multilateral negotiations under the GATT. The basic delegation of tariff negotiation authority to the president served to further embed liberalism as the default orientation in U.S. trade policy. However, the RTAA's success eventually contributed to its declining utility as an institution in U.S. trade policymaking. Successive rounds of multilateral GATT negotiations had significantly reduced the impact of tariffs on international trade. In fact, by the mid-1960s, numerical tariffs applied at borders and ports of entry were giving way to a range of nontariff barriers (NTBs) as the most significant impediments to international trade.¹⁶ Reduced impediments to global flows of capital were in turn fostering increasing degrees of economic openness and interdependence among states. The same neoclassical economic theory that makes such strong conclusions regarding the merits of openness implicitly acknowledges there will be adjustment costs as uncompetitive parts of the domestic economy are exposed to the competitive pressures of an increasingly globalized economy.¹⁷ Following John Ruggie's well-known framework, "embedding" liberalism as a default policy position has politically

12. See Eckes, *Opening America's Market*, 144.

13. John G. Ruggie, "International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order," *International Organization* 36, no. 2 (Spring 1982): 379-415.

14. The early seminal work on logrolling on trade legislation in Congress remains E. E. Schattschneider, *Politics, Pressures, and the Tariff: A Study of Free Enterprise in Pressure Politics, as Shown in the 1929-30 Revision of the Tariff* (New York, 1935).

15. See Stephan Haggard, "The Institutional Foundations of Hegemony: Explaining the Reciprocal Trade Agreements Act of 1934," *International Organization* 42, no. 1 (Winter 1988): 91-119.

16. Source: WTO. The post-Tokyo Round average tariff levied on industrial products fell to 4.7 percent.

17. One of the better analyses of these challenges remains Dani Rodrik, *Has Globalization Gone Too Far?* (Washington, DC, 1997).

required the state to bear some of the adjustment costs as a form of social “compromise” over an apparently contradictory strategy that promotes the broadly based benefits of openness but generates concentrated adjustment costs.¹⁸

By the 1960s, part of the challenge confronting the RTAA program was that its success generated political sensitivities for internationally uncompetitive parts of the U.S. economy as they were exposed to the effects of increased openness. As tariffs fell, NTBs became the principle subject of negotiation. Whereas the simplicity and objectivity of numerical tariff rates makes negotiating them down relatively straight forward, most NTBs involve a range of domestic regulatory and governance issues that have an indirect, but significant, impact on international trade. Reducing the trade effects of these barriers also entails alterations to domestic law, inherently pitting the liberalization of trade internationally against domestic policy sovereignty and the preservation of the “compromise.”¹⁹

Entering the 1960s, U.S. trade policy institutions were, in fact, confronting a set of challenges that were as much domestic as they were international as the United States sought a way forward in an integrated global economy increasingly fraught with the trade-offs associated with increased openness and interdependence.²⁰ Moreover, they are challenges that have endured, in many ways transcending the ebb and flow of political power in Congress or the White House. With traditional tariff barriers, Congress, under the 1934 RTAA, could preset limits on allowable reductions in U.S. tariff rates (say, up to 50 percent over five years). Agreements concluded by the executive under these rules could be simply proclaimed without sending them again to Capitol Hill.²¹ However, there was no system of preauthorization where NTBs were concerned and, therefore, no way to ensure that concluded agreements would become part of U.S. law.²² One of the first such NTBs American negotiators grappled with was the American Selling Price (ASP) set of customs valuations.²³

18. Ruggie, “International Regimes, Transactions, and Change,” 393–98. It is worth noting the body of Cold War U.S. economic history that posits narrow domestic economic interests were frequently sacrificed in pursuit of broader foreign policy objectives, leading to growing domestic pressures to maintain the “compromise” described by Ruggie. The refrain “fair trade” as it emerged in the 1960s was one effort to simultaneously praise the merits of openness and mollify protectionist pressures. See Thomas W. Zeiler, *American Trade and Power in the 1960s* (New York, 1992), 18–21. See generally Thomas W. Zeiler, *Free Trade Free World: The Advent of the GATT* (Chapel Hill, 1999); Robert A. Pollard, *Economic Security and the Origins of the Cold War, 1945–50* (Ithaca, NY, 1985); Alfred Eckes, *Opening America’s Market* (Chapel Hill, NC, 1995).

19. Dani Rodrik, “How Far Will Economic Globalization Go?” *Journal of Economic Perspectives* 14, no. 1 (Winter 2000): 177–86.

20. Thomas W. Zeiler, *American Trade and Power in the 1960s* (New York, 1992), 21–46.

21. I. M. Destler, *American Trade Politics*, 3rd ed. (Washington, DC: Institute for International Economics, 2005), 71.

22. Koh, “Fast Track,” 147; Shapiro, *Fast Track*, 54–55.

23. Under this method, customs valuation was computed by multiplying the tariff rate not by the price of the imported product, as was standard practice, but by the price (usually a higher

When Congress discovered that the administration was in the midst of negotiations over the ASP, legislators strenuously objected that the executive had no authority to negotiate away domestic laws. While the ASP negotiations eventually succeeded, negotiators failed to win congressional approval because the terms of the agreement fell outside the limits of statutory tariff reduction authority.

To prevent Congress from effectively vetoing future trade agreements, or making post hoc changes divergent from the president's policy preferences, the Nixon administration in 1973 proposed several changes to the way authority from Congress was delegated to the executive that enhanced cooperation over trade policy between the two branches before and after the negotiations, and continued to give the president an important set foreign policy tools. Fast track did this via:

1. Specification of negotiating objectives in areas beyond tariff reduction (NTBs);
2. A series of procedural requirements for consultation with Congress and private stakeholders. Created private sector advisory committees;²⁴ and
3. Specification of time limits for authority, advance notice of intent to negotiate, and rules for submission of concluded agreements.

All in exchange for:

4. A procedural commitment by Congress to have the president's implementing legislation entered to both Houses at the same time (under same legislative time table) resulting in a vote within sixty days (ninety if legislation involves revenue) with *no amendments allowed*.

Congressional willingness to stay out of the negotiations was predicated on the institution of extensive consultative mechanisms between the White House and Capitol Hill. The most important of these evolved informally in drafting implementing legislation—so called nonmarkups—which ensured the two branches were of a similar mind.²⁵ However, once submitted, Congress could not amend the agreement and had sixty days in which to submit the agreement to an up or down vote; in other words, no amendments allowed.²⁶ Unlike the RTAA program, the 1974 Trade Act and the “fast track authority” therein, for the first time required Congress to take a final look at proposed agreements and pass judgment.

Fast track satisfies four distinct policy ends, which, according to Harold Koh, are primarily domestic. First, it eliminated the potential for Congress to

price) of the U.S. product with which the import competed. This method usually resulted in a much higher effective rate of protection for domestic industry.

24. The president's Advisory Committee on Trade Policy and Negotiation (ACTPN) remains in existence and is designed facilitate private sector input to negotiating objectives.

25. I. M. Destler, *Renewing Fast-Track Legislation* (Washington, DC, 1997), 10–13.

26. Pastor, *Congress and the Politics*, 142; Destler, *American Trade Politics*, 71–73.

delay consideration of a trade agreement simply because it is controversial. Second, fast track helps manage narrow domestic interest group pressures on Congress by deflecting them to the president and his broader national constituency. Third, Congress gets a final veto on the negotiated agreement and implementing legislation that acts as a check on the limits of authority delegated to the president. And fourth, fast track significantly bolsters U.S. negotiating credibility with trading partners that had been badly damaged by the ASP episode.²⁷

Fast track helped manage domestic imperatives but with major implications for the conduct of foreign affairs. As part of managing domestic interest groups, the 1974 legislation created private sector advisory groups with whom the president was required to consult regarding trade negotiating objectives and, along with nonmarkups, were designed to bring an extra degree of transparency and input to the entire process.²⁸ Fast track quickly became an essential mechanism for managing divided constitutional authority over trade policy. Under parliamentary systems, for example, negotiators are most often given negotiating authority directly from the head of state.²⁹ The division of authority in the United States, by design, complicates these lines of authority. Fast track provides American negotiators a middle ground position whereby negotiators can negotiate on behalf of the entire country and assure foreigners that the 535 members of the U.S. House and Senate will not amend agreements after the fact.³⁰ Indeed, successive administrations since 1974 have repeatedly argued that fast track is essential for the United States to entice countries to the bargaining table with their best offers in hand, free of the fear that parochial interests in Congress would later try to attach amendments to the agreement.³¹

27. Koh, "Fast Track," 144, 148; Destler, *Renewing Fast Track*, 29–35.

28. See 19 U.S.C. § 2155(b)(1).

29. See Shapiro, *Fast Track*, 92–104. Michael Hart and colleagues offer a view of foreign frustrations over the American division of powers and contrasts them with parliamentary systems in Michael Hart, Bill Dymond, and Colin Robertson, *Decision at Midnight: Inside the Canada-U.S. Free Trade Negotiations* (Vancouver, 1994), 41–42.

30. President Clinton made this exact claim in transmitting his fast track renewal proposal to Congress in 1997 saying "Our trading partners will only negotiate with one America—not first with an American President and next with an American Congress." Quoted in Shapiro, 288. See also Destler, *American Trade Politics*, 73. He argues that fast track offers a middle ground position wherein the administration could make promises to countries that would not be amended but could never guarantee Congress would not reject them.

31. See Prepared Statement of Carla A. Hills, in U.S. Congress, Senate, Committee on Finance, *Extension of Fast Track Legislative Procedures, Hearing before the Committee on Finance*, 102nd Congress, 1st session, March 14, 1991, 36; Testimony of Secretary of Agriculture Edward R. Madigan and USTR Carla A. Hills, in U.S. Congress, House, Committee on Agriculture, *Proposed United States-Mexico Free Trade Agreement and Fast Track Authority, Hearing before the Committee on Agriculture*, 102nd Congress, 1st session, April 24, 1991, 33 and 46; USTR Carla A. Hills Testimony in, U.S. Congress, House, Committee on Agriculture, *Review of Fast Track Extension Request Submitted by the Administration, Hearing before the Committee on Agriculture*, 102nd Congress, 1st session, March 13, 1991, 16–18; President Bush,

Fast track procedures were designed to help complete the Tokyo Round of the GATT as the multilateral negotiations took on the rising importance of NTBs for the first time. Unfortunately, the results of the Tokyo Round were mixed where NTBs were concerned, resulting in a series of voluntary “codes” rather than binding commitments.³² Hence, the first real test of the longevity of fast track actually came with President Reagan’s December 1985 request for fast track authority to negotiate with Canada.³³

CANADA AND FAST TRACK

Prior to the commencement of the Canada talks, fast track was modified in one key way when it was renewed by the Trade Act of 1984; it made the Senate Finance and House Ways and Means committees the primary “gate keepers” for trade legislation moving through Congress under fast track rules.³⁴ The practical effect of this change was to focus the consideration of trade legislation into a narrower range of committees to tighten the coherence of the legislation. However, it also meant that a negative vote in either of just two committees could derail an agreement and with it an important piece of a president’s foreign economic policy agenda.

In March 1985, President Reagan and Prime Minister Mulroney put in motion talks aimed at comprehensively removing most remaining trade barriers between Canada and the United States. The importance given to the “gate keeper” committees as a result of the 1984 changes was felt almost immediately as the president gave sixty days’ notification to both committees of his intent to initiate negotiations. Prior to the 1984 changes, such prenegotiation notifications had been near automatic, subject only to *disapproval* motions from either house of Congress. Yet, much to the surprise of the Canadians, the gate keeper committees also exercised their new-found power, quietly pressuring the president to withdraw the Canada proposal.³⁵

Much of the U.S. trade policy apparatus was in a perpetual state of conflict throughout much of the 1980s. Chronic trade deficits, foreign competition, and an anaemic domestic economy meant a difficult political climate for trade liberalization, even with a close ally like Canada. The executive branch was wracked with interagency turf wars over trade policy and the president’s

“Remarks at a Meeting with Hispanic Business Leaders in Houston, Texas,” April 8, 1991, in U.S. President, *Public Papers of the Presidents of the United States* (Washington, DC, 1991), George Bush, 1991, 345.

32. Source: WTO. See also Alan Deardorff and Robert Stern, “A Disaggregated Model of World Production and Trade: An Estimate of the Impact of the Tokyo Round,” *Journal of Policy Modeling* 3, no. 2 (1981): 127–52.

33. Technically, the 1985 FTA with Israel counts as the first. However, this agreement arguably represents a unique circumstance since it was heavily oriented toward defense procurement and the Trade and Tariff Act of 1984 extended fast track specifically for the purpose of pushing the deal with Israel through. See Destler, *Renewing Fast Track*, 8.

34. Koh, “Fast Track,” 148.

35. *Ibid.*, 149–50.



Figure 1: President Reagan and Prime Minister Mulroney at the Citadel, Quebec City, March 18, 1985. This summit, later coined the Shamrock Summit because of each leader’s respective Irish heritage, formally launched the Canada-U.S. FTA talks. Courtesy of Ronald Reagan Library.

periodic initiatives on trade were greeted with deep scepticism, all of it generating pressure for legislative action on Capitol Hill.³⁶

As anger over administration policies grew, so did the number of legislative proposals on trade making their way through Congress. In particular, a number of Omnibus trade bills were emerging from the House of Representatives, which “backers hoped would be an historic shift in authority over trade” in favor of Congress.³⁷ The Omnibus measures were watched with keen interest by the administration, which periodically tried to undercut congressional momentum by targeting “unfair” trading practices in Europe or Asia.³⁸ It was a White House

36. See *New York Times*, September 17, 1985, D1; President Reagan, Remarks at White House Meeting with Business and Trade Leaders, September 23, 1985, in *Public Papers of the Presidents of the United States, Ronald Reagan, 1985* (Washington DC, 1988), 2: 1127–29; Congressional Quarterly Inc., *Congressional Quarterly Almanac* (Washington DC, 1985), 253. See also *New York Times*, September 24, 1985, D26.

37. *Congressional Quarterly Almanac*, 1985 ed., 253–54.

38. See *New York Times*, April 1, 1986, D1.

effort to “get tough” with foreign practices that impressed very few on Capitol Hill.

When the Senate Finance committee began considering the president’s April 1986 formal request for fast track authority to negotiate with Canada, the Senate’s gate keeper only narrowly approved the request when a *disapproval* motion failed in a 10–10 vote. In fact, without an intensive White House lobbying effort, the disapproval motion probably would have passed, nixing the Canada talks before they really began.³⁹ Though Canada was the nominal subject of Senate Finance Committee deliberations, committee action was viewed more as a warning to the administration over trade issues generally than it was as congressional unhappiness with the Canada talks.⁴⁰ Responding to the Senate action, President Reagan remarked, “I’ll be very frank with you and tell you that the possibility—well, that some of the negative votes are not aimed at Canada but are based on certain political differences here within our own country and our government.”⁴¹ Canada may not have been the specific target of congressional ire, but the lack of enthusiasm from the Senate was telling; fast track was already fraying at the edges.

In early 1986, Republicans were still in the majority on Senate Finance and ought to have been more favorably disposed to the president’s fast track request. However, members of the president’s own party were reluctant to support the president, in part, because of approaching fall mid-term elections in which committee members would be vulnerable for supporting a variety of unpopular administration trade policies.⁴² Canada was the proximate issue being discussed, but much as it had been since the RTAA, the crux of the debate was really about the basic delegation of authority over trade policy from Congress to the president and, since at least the 1960s, the impact of an increasingly open and interdependent American economy. For Congress, fast track was a political middle-ground whereby it could continue to influence its constitutional prerogatives over “commerce with foreign nations” while offering the president significant authority vis-à-vis foreign interlocutors on trade policy. For the president, fast track maintained trade policy as a major tool in the president’s tool chest that netted outcomes closer to his policy preferences.⁴³

The Canadians saw things differently. Had the Reagan administration failed to secure fast track, Canada would not have come to the negotiating table. As former Canadian Prime Minister Brian Mulroney notes in his memoirs, “Without such authority, Congress would be able to attach amendments to any

39. *Wall Street Journal*, April 13, 1986, 13; *New York Times*, April 22, 1986, D2.

40. *Wall Street Journal*, April 21, 1986, 5; See also Koh, “Fast Track,” 150.

41. President Reagan, Interview with Foreign Journalists, April 22, 1986, in *Public Papers of the Presidents of the United States, Ronald Reagan, 1986* (Washington, DC, 1988), 1: 503–4.

42. Hart et al., *Decision at Midnight*, 142–46.

43. Koh, 170–71.

treaty that was negotiated, and free trade between Canada and the United States would die a death of a thousand cuts.”⁴⁴

In early August of 1986, before the House Subcommittees on International Economic Policy and Western Hemisphere Affairs, the two chief American negotiators in the Canadian talks, Peter Murphy and William Merkin, faced questions on the progress of the talks. Amid the cliché references to undefended borders and the longevity of peaceable bilateral relations, Murphy outlined the basic goals of the American negotiating strategy. Among the goals were reductions in basic tariff rates on goods, but also changes to Canadian foreign investment and intellectual property rights regimes—all of these NTBs that fast track was designed to deal with.⁴⁵ To the delight of the committee, Murphy argued that a fair and open trade system was incompatible with the use of subsidies by Canada and suggested that significant progress should be made on intellectual property issues, particularly patent rights over pharmaceuticals.⁴⁶ Moreover, he also emphasized the importance of the consultative process with both Congress and the private sector by saying, “We will be consulting with you. We will be consulting with our industries, and I can assure you you will know prior to you get[ting] it [the agreement] where we stand and what our positions are, and our objective is that through as much consultation as possible, we will be able to build a consensus for this agreement because from my own personal standpoint it is one [issue] that is important.”⁴⁷ However, Murphy, like nearly every other administration trade official to visit Capitol Hill in the mid-1980s, was in for a rough ride from the members of Congress. The principal subject matter was Canada, but the message was much broader.⁴⁸ Where, the committee wanted to

44. Brian Mulroney, *Memoirs: 1939–1993* (Toronto, 2007), 433–34. See also Alan Gotlieb, *The Washington Diaries: 1981–1989* (Toronto, 2006), 366.

45. See Statement of Peter Murphy, Special Negotiator for U.S./Canada Affairs, Office of the United States Trade Representative in, U.S. Congress, House, Committee on Foreign Affairs, Subcommittees on International Economic Policy and Trade and on Western Hemisphere Affairs, *United States/Canada Trade Relations, Hearing before the Subcommittees on International Economic Policy and Trade and on Western Hemisphere Affairs of the Committee on Foreign Affairs*, 99th Congress, 2nd session, August 12, 1986, 5; See also USTR Clayton Yeutter, “Text of Report by United States Trade Representative Clayton Yeutter to the President on Bilateral Trade with Canada,” issued September 17, 1985, in *Canadian Trade Negotiations* (Ottawa, 1986), 70–72.

46. By the mid-1980s, intellectual property rights had become a major preoccupation of the Reagan Administration’s overall approach to trade. See Ronald Reagan, “Remarks at a White House Meeting with Business and Trade Leaders,” September 23, 1985 in, U.S. President, *Public Papers of the United States* (Washington, DC, 1985), Ronald Reagan, 1985, 1127–29; *New York Times*, September 24, 1985, D26.

47. Statement of Peter Murphy, Special Negotiator for U.S./Canada Affairs, Office of the United States Trade Representative in, U.S. Congress, House, Committee on Foreign Affairs, Subcommittees on International Economic Policy and Trade and on Western Hemisphere Affairs, *United States/Canada Trade Relations, Hearing before the Subcommittees on International Economic Policy and Trade and on Western Hemisphere Affairs of the Committee on Foreign Affairs*, 99th Congress, 2nd session, August 12, 1986, 7.

48. By August 1986, when Murphy and Merkin were before the House Subcommittee, H.R. 4800 (the 1986 Omnibus Trade Bill) had already passed the House and was awaiting

know, was the congressional consultation? Where was the president's Advisory Committee on Trade Policy and Negotiations (ACTPN; private sector advisers) as constituted under the 1974 Trade Act that created fast track?

After lecturing Murphy and Merkin along these lines, Congressman Robert Lagomarsino (R-California) wanted to know about the progress of the Canada talks—"not the details, but give some idea of what you have been doing."⁴⁹ After conceding that many substantive issues had yet to be discussed,⁵⁰ Murphy compounded the lack of progress by arguing for the necessity of conducting sensitive negotiations away from public scrutiny "because if you negotiate in public, in my view you aren't going to get very far anyway, because somebody is going to have a problems with it."⁵¹ In other words, by conducting negotiations away from public view, opposition groups could be kept in the dark and prevented from effectively organizing and raising concerns. In a congressional atmosphere that was increasingly intolerant of the vague pleadings of the Reagan administration on trade issues, Murphy's response was especially poor, prompting Representative Bereuter (R-Nebraska) to suggest that if "this was a parliamentary system, I would cast a vote of no confidence against the administration."⁵²

The administration may have been following the letter of the law in terms of fast track procedures, but in the view of Congress, they were violating its spirit. Bereuter sternly reminded Murphy of the proper lines of communication between the two branches saying:

Senate consideration. See Lloyd Bentsen in U.S. Congress, Senate, Committee on Finance, *Possible New Round of Trade Negotiations, Hearing before the Committee on Finance*, 99th Congress, 2nd session, July 23, 1986, 4. Bentsen complains that the consultative process had been so badly handled by the Reagan administration that it nearly resulted in a disaster for the Canada talks when the Senate Finance Committee considered fast track approval for them in April 1986. The 10–10 tie vote that granted fast track authority to the talks was seen as a vote of nonconfidence against the Reagan administration on many aspects of its trade policy. See *Wall Street Journal*, April 13, 1986, 13 and April 21, 1986, 5; *New York Times*, April 22, 1986, D2.

49. Congressman Robert Lagomarsino (R-California) in U.S. Congress, House, Committee on Foreign Affairs, Subcommittees on International Economic Policy and Trade and on Western Hemisphere Affairs, *United States/Canada Trade Relations, Hearing before the Subcommittees on International Economic Policy and Trade and on Western Hemisphere Affairs of the Committee on Foreign Affairs*, 99th Congress, 2nd session, August 12, 1986, 21.

50. While informal U.S.-Canadian trade discussions can be traced all the way back to the Shamrock Summit between President Reagan and Prime Minister Mulroney in March 1985, the first formal FTA talks took place on May 21–22, 1986. See Hart *et al.*, *Decision at Midnight*, 155. Murphy's August testimony and admission that substantive issues had not been addressed is even more poignant given that months of informal and formal talks yielded little progress.

51. Peter Murphy in U.S. Congress, House, Committee on Foreign Affairs, Subcommittees on International Economic Policy and Trade and on Western Hemisphere Affairs, *United States/Canada Trade Relations, Hearing before the Subcommittees on International Economic Policy and Trade and on Western Hemisphere Affairs of the Committee on Foreign Affairs*, 99th Congress, 2nd session, August 12, 1986, 22.

52. Congress, House, Representative Bereuter of Nebraska speech entitled "Make Haste Slowly in Canadian Free Trade Talks," 99th cong., 2nd sess., *Congressional Record* 132, no. 93, July 17, 1986), 23.

I think this administration has failed us and failed the American people, as has the previous one, very badly. The Constitution gives the responsibility for the regulation of international commerce to the Congress. This is not an Executive function you are pursuing, Mr. Murphy, and I am sure you are aware of that, but I think it needs to be reinforced from time to time. It is our responsibility, and I think that the kind of input that you need from Congress to see how we feel about this, ought to come at the beginning of the process or you are going to run into deep, deep, trouble when you come here with any kind of agreement that you do negotiate. It is the reverse order. You come to us first, not afterwards . . .

I don't see this happening. I don't see any sense of urgency anywhere about this problem, and I certainly don't see the kind of preliminary and essential, constitutionally essential, negotiation with the Congress about this matter. . . . I like the Canadians, but they are taking advantage of us, and have for years.⁵³

Canadian negotiators would have disagreed with Congressman Bereuter about who was being taken advantage of but were in agreement with his assessment of the U.S. negotiating team. According to them, Murphy was an inexperienced, junior trade negotiator who was "out of his depth" in tackling the Canada talks, and the entire American team was ill equipped to talk about substantive issues.⁵⁴ This assertion is supported by Alfred Eckes who, while chair of the U.S. International Trade Commission during the 1980s, observed that:

Other countries have more respect for history. Our principal economic competitors carefully review the records of prior negotiations and have a cadre of experienced negotiators with several generations of institutional memory. As a result, they frequently seem to exploit that advantage successfully in trade negotiations. During the bilateral free trade negotiations with Canada in 1986 and 1987, for instance, Canada fielded a team of veteran negotiators, led by Simon Reisman, who had negotiated the 1964 automobile pact. Not only did they have more experience than the Americans, but also the Canadians had a long institutional memory. They knew how specific commodity problems addressed in the free trade talks had been resolved in previous negotiations, particularly the unsuccessful attempt to negotiate similar agreement in 1947-48. The American negotiators lacked specific knowledge of this agreement or the one proposed in 1911. Oblivious to historical precedents, bright young U.S. officials rely on energy and intelligence in negotiations. Not surprisingly, they sometimes end up reinventing the wheel.⁵⁵

53. *Ibid.*, 23-24.

54. Gordon Ritchie, *Wrestling with the Elephant* (Toronto 1997), 77-80; Hart *et al.*, *Decision at Midnight*, 190-93.

55. Eckes, *Opening America's Market*, xvi.

STRATEGY, STRUCTURE, OR BOTH?

The critiques of the American negotiating team, its style, and its tactics may be overdrawn in the context of the real limitations of fast track as a foreign policy tool. As Harold Koh has argued, fast track as a political device has little to do with foreigners and is instead more of a domestic political agreement between two branches of government. In fact, fast track may not be a form of delegation of authority at all since, as the hearings on Canada attest, Congress has ample opportunity throughout the process to exercise its constitutional authority even under fast track rules.⁵⁶ Fast track cannot legally “bind” congressional latitude over trade since either house can amend the rules by which it considers legislation.⁵⁷ Fast track actually stimulates far more cooperation and consultation between the legislative and executive branches than it restrains. Hence, according to Koh, fast track sets up a fictional situation for foreign consumption, which plays up adversarial qualities of inter- or intrabranched policy conflict that are more theatre than reality.⁵⁸ The critique of the U.S. team and the dynamics of the negotiations reflect Koh’s skepticism of the legal importance of fast track. However, it is theatre with a significant role in distilling the U.S. political process into foreign policy options that are loud and clear to foreign interlocutors on trade.

Peter Murphy, for instance, was junior relative to his Canadian counterpart Simon Reisman but was an experienced textile negotiator, a position the political sensitivity of which requires learning to say “no” in many different ways. The critique that the U.S. team reinvented the wheel is misplaced, in part, because nothing on the scale or comprehensiveness of the Canada negotiations had been attempted before, nor had so many nontariff issues been such a major part of a negotiation.

One of the central frustrations for both U.S. and Canadian negotiators was that high-ranking officials in the Reagan administration had largely forgotten the American team.⁵⁹ As a result, a substantive exchange of ideas and positions between Murphy and higher-level members of the Reagan administration seldom took place.⁶⁰ Michael Hart and others have suggested that Murphy’s negotiating strategy appeared to be one of playing out the string. He would see what Canada was prepared to offer and at the last possible moment take this to Congress and see what it were prepared to pay in return. Meanwhile, he would make as few promises as possible. In this approach, he had the natural support

56. Koh, “Fast Track,” 149.

57. *Ibid.*, 151.

58. *Ibid.*, 166–67.

59. It is worth recalling that in late 1986, the Reagan administration was preoccupied with congressional midterm elections in which the Democrats recaptured control of the Senate, the explosion of the Iran–Contra scandal, and the congressional override of a presidential veto on economic sanctions against South Africa. Congressional Quarterly Inc., *Congressional Quarterly Almanac* (Washington DC, 1986), 57–61, 355–58.

60. See Hart *et al.*, *Decision at Midnight*, 190, 193, 255, 270; Ritchie, *Wrestling*, 78.

of his team members. Thus the U.S. strategy appeared to be forged not of design or vision, but of default and absence of leadership.⁶¹ Yet, this “strategy” may have had less to do with negotiating room tactics, or the Canadians, than it did the long-standing interbranch struggle over foreign economic policy preferences.

To the Canadians, Peter Murphy’s only real contacts on Capitol Hill seemed to be low-level congressional staffers. In negotiations, the American team would regularly suggest that certain Canadian proposals would not be acceptable to Congress. But without the apparent access to members of Congress that permitted one-on-one discussion, U.S. team pronouncements of what would be acceptable to Congress were guesswork at best.⁶² Hart and colleagues further observed that the talks never generated the political momentum necessary to force them to the top of the U.S. trade agenda in Washington:

The U.S. team never coalesced into a team with an acknowledged leader, a sense of purpose and direction, and a clear mandate. Rather than taking direction from the U.S. cabinet, every member looked to the interests of his or her agency and each individually kept a wary eye out for what Congress might or might not find acceptable. No one appeared to be in charge of a congressional strategy. Given the enormous importance that Congress plays in U.S. decision-making and the constant illusions as to what would or would not fly in Congress, it was particularly galling to learn as late as July [1987] that senators and representatives and their staffers had only the faintest notion of what was being considered in the bilateral talks.⁶³

Canadian negotiators were frustrated by the conflict inherent in the diffuse nature of U.S. foreign policy and struggle over policy preferences and outcomes between the two branches of government.⁶⁴ But some of this frustration was also rooted in 1984 changes to fast track that created gate keeper committees and concentrated much of the U.S. process in them. Moreover, the fight over the Canada talks was exacerbated because international trade negotiations increasingly involved sensitive NTBs. Canada was the first major test of fast track’s ability to handle these issues, which are inherently the domain of the legislative functions of Congress. One strategy for preserving executive discretion over that power is to keep talks off congressional radar screens.

The lack of awareness on Capitol Hill about the status of the Canada talks was underscored in early 1987 in testimony before the Senate Finance

61. Hart *et al.*, *Decision at Midnight*, 190.

62. *Ibid.*, 270; Ritchie, *Wrestling*, 78.

63. Hart *et al.*, *Decision at Midnight*, 312–13.

64. In the mid-1980s, bureaucratic power struggles within the executive branch created confusion over who was to take the lead on trade issues. In addition to the USTR, the Departments of Commerce, Treasury, Agriculture, and State, as well as the U.S. International Trade Commission, all had significant roles in the overall trade policy equation. During the first Reagan administration, for example, disputes between Commerce Secretary Malcolm Baldrige and the USTR over jurisdiction on trade issues became commonplace. Destler, *American Trade Politics*, 118–20.

Committee. In January, former U.S. Trade Representative (USTR) Robert Strauss said that he supported the Canadian negotiations but admitted “the problem we have there is that those negotiations are the biggest political item in Canada and here nobody knows anything about them. They are unknown here. They are on the back burner.”⁶⁵

The lack of awareness of the Canada negotiations periodically extended to those in the administration ostensibly overseeing them. In testimony before the Senate Finance Committee in February, USTR Clayton Yeutter was asked by Senator Bill Bradley (D-New Jersey), “How many people do you have working on the Canadian negotiations directly?” To which Yeutter replied “I can’t tell you how many we have specifically assigned to the Canadian negotiations, Senator Bradley, but the answer is enough. We will do our part in that negotiation. There are a lot more working full time in Canada, and I am prepared to accept the responsibility for having fewer on this side than on that side. We believe that it is not simply a matter of numbers.”⁶⁶

That same month, also in front of Senate Finance, Treasury Secretary James A. Baker III and USTR Clayton Yeutter faced a similar, but much more hostile, gauntlet of tough questions about U.S. trade policies. Amid familiar warnings from senators about where ultimate authority for trade policy rests and the need for greater administration consultation with Congress, Yeutter retorted that “Consultation is one thing; tying your negotiators hands in another thing, Mr. Chairman, and we may have some debate as to what the word “consultation” means. . . . Certainly we should have discussion about our objectives and what our basic policy is and what we would try to achieve; but when one begins to rigidify that process, it can really turn out to be counter productive.”⁶⁷

Yet, fast track rules actually generate much of this theatre and perpetuate the “Cry and Sigh Syndrome” coined by Robert Pastor as a way of describing the ambivalence of Congress toward assuming full constitutional control of trade policy.⁶⁸ While Congress is constitutionally responsible for economic policy, shifting that responsibility to the executive branch allows members of Congress, particularly in the House, where election cycles are short, to deflect direct criticism over policy toward the administration. Moreover, this serves to further “embed” liberalism as the default outlook of U.S. foreign economic policy by

65. Former USTR Robert Strauss, in U.S. Congress, Senate, Committee on Finance, *Mastering the World Economy, Hearings before the Committee on Finance*, 100th Congress, 1st session, January 13, 1987, 44.

66. See Senator Bradley and USTR Clayton Yeutter testimony in, U.S. Congress, Senate, Committee on Finance, *Mastering the World Economy, Hearings before the Committee on Finance*, 100th Congress, 1st session, February 19, 1987, 112–14.

67. See U.S. Congress, Senate, Committee on Finance, *Mastering the World Economy, Hearings before the Committee on Finance*, 100th Congress, 1st session, February 19, 1987, 104.

68. Robert Pastor, “The Cry and Sigh Syndrome: Congress and Trade Policy,” in Allen Schick, *Making Economic Policy in Congress* (Washington, DC, 1983).

deflecting or channeling constituent demands for protection.⁶⁹ As a domestic political device aimed at reconciling divided foreign policy authority over trade between branches of government, fast track generated considerable interaction, if not cooperation, between the branches in negotiations with Canada. Yet, as Koh argues, by the 1980s, fast track had become much more about procedural issues between the branches than about the substance of U.S. negotiating positions on trade barriers.⁷⁰ Hence, as a domestic political device designed to facilitate U.S. positions on tariff, but especially nontariff, barriers in international negotiations, fast track was beginning to fail over the Canada talks. As Canadian negotiators became increasingly frustrated over the lack of substantive progress through 1986, Congress began considering even more procedural changes to fast track's rules.

The Omnibus Trade and Competitiveness Act

The Canada talks were an important test of fast track as a new institution set in a much broader, and more enduring, domestic conflict between branches of government over foreign affairs generally, and foreign commerce specifically. Throughout the 1980s, congressional assertiveness on trade policy had been building momentum. It is tempting to chalk this period of congressional activism on trade up to saber rattling or the "cry and sigh syndrome" seen so often on Capitol Hill. However, this round of congressional assertiveness turned out to be different and culminated in the 1988 Omnibus Trade and Competitiveness Act. At more than one thousand pages, it became the longest, and most comprehensive, piece of trade legislation in the postwar era.⁷¹ More importantly, it signaled a significant shift in the domestic balance of power over foreign commerce since it was the first time since before the Trade Act of 1930 (Smoot-Hawley) that the House of Representatives had, on its own, initiated and passed trade legislation of any kind.⁷²

In 1985, the U.S. trade deficit was projected to top \$160 billion. Although small by the standard of 2009 where the U.S. trade deficit for November alone was \$36 billion, rising trade deficits tend to simulate congressional saber rattling on trade issues.⁷³ As the deficit grew in the mid-1980s, so too did the number of trade measures working their way through congressional committees. At the same time Peter Murphy and other U.S. trade officials were being grilled about Canada, House Democrats were using their majorities on key committees to promote pieces of trade legislation that were eventually passed as House

69. See Judith Goldstein, "Ideas, Institutions, and American Trade Policy," *International Organization* 42, no. 1 (Winter 1988): 179–217. Ruggie, "International Regimes, Transactions, and Change," 379–415.

70. Koh, "Fast Track," 152.

71. Destler, *American Trade Politics*, 96.

72. *Congressional Quarterly Almanac*, 1986 ed., 339–441; Destler, *American Trade Politics*, 92–96.

73. Source: Bureau of Economic Analysis, Trade in Goods and Services, 1992–Present.

Resolution 4800 by a wide, bipartisan, majority of 295–115. The White House quickly condemned the draconian bill as a “meat-axe approach” to trade policy.⁷⁴ The Senate never considered H.R. 4800 prior to the 1986 mid-term elections, but the battle lines had been drawn, and most of the proposals were simply reintroduced as the 100th Congress convened in early 1987, this time with Democratic majorities in both houses.⁷⁵

Some of the toughest proposals included the imposition of mandatory retaliation against “unfair” trading practices, punitive measures against countries alleged to be subsidizing, and the relaxation of “escape clause” mechanisms to more readily provide domestic workers relief from competition.⁷⁶ However, the most menacing proposal was the so-called Gephardt Amendment that would have compelled the president to impose import restrictions on countries maintaining large trade surpluses with the United States.⁷⁷

As momentum built for many of these proposals after 1986 midterm elections, the administration went into damage control, sending numerous officials to Capitol Hill to try and ward off as many of the restrictive proposals as possible.⁷⁸ Most legislators were unimpressed with White House appeals for moderation.⁷⁹ Administration officials and their Republican allies on Capitol Hill routinely cautioned that protectionism was anathema to an open world trading system.⁸⁰ Yet, there was widespread sentiment among members from

74. “Statement by Principal Deputy Press Secretary Larry Speakes on House of Representatives Approval of Omnibus Trade Bill,” in U.S. President, *Public Papers of the Presidents of the United States* (Washington, DC, 1986), Ronald Reagan, 1986, 658–59. President Reagan criticized the measure by saying that the bill was the product of protectionist Democratic leadership in the House that sought to close markets, raise barriers, and subject America to retaliation from other countries. See *ibid.*, 650–51.

75. See Opening Statement by Lloyd Bentsen, Chairman, Finance Committee, in U.S. Congress, Senate, Committee on Finance, *Mastering the World Economy, Hearings before the Committee on Finance*, 100th Congress, 1st session, January 13, 1987, 2; See also *Congressional Quarterly Almanac*, 1986 ed., 341.

76. See *Congressional Quarterly Almanac*, 1986 ed., 341–45.

77. *Ibid.* The president would have been required to initially engage in negotiations with trade surplus countries aimed at reducing imbalances by 10 percent per year. Failing a negotiated reduction, restrictions to the same level would have been mandatory.

78. Statement of Treasury Secretary James A. Baker III, in U.S. Congress, Senate, Committee on Finance, *Mastering the World Economy, Hearings before the Committee on Finance*, 100th Congress, 1st session, February 19, 1987, 9 and 41.

79. See I. M. Destler, “U.S. Trade Policy Making in the Eighties,” in Alberto Alesina and Geoffrey Carliner, eds., *Politics and Economics in the Eighties*, (Chicago, 1991), 271; U.S. Congress, House-Senate Conference Committee, *Summary of Conference Agreement on H.R. 3, The Omnibus Trade and Competitiveness Act of 1988*, 101st Congress, 1st session, April 19, 1988; See U.S. Congress, Senate, Committee on Finance, *Mastering the World Economy, Hearings before the Committee on Finance*, 100th Congress, 1st session, February 19, 1987, 42. Senator Max Baucus conceded that while the President’s competitiveness proposals were an improvement, they were not nearly enough; Senator Rockefeller (D-West Virginia) likened the rhetoric coming from the White House to a giant Japanese Kabuki dance in which elaborately costumed actors engage in highly stylized and exaggerated acting, singing, and dancing.

80. See Senator Bob Packwood (R-Oregon) in U.S. Congress, Senate, Committee on Finance, *Mastering the World Economy, Hearings before the Committee on Finance*, 100th Congress, 1st session, February 19, 1987, 5.

both sides of the isle that some kind of trade bill was necessary. Even Republicans, generally supportive of President Reagan's preference for additional trade liberalization, were increasingly arguing for a stronger congressional hand in setting trade policy.⁸¹

The Omnibus Trade and Competitiveness Act of 1988 represented a significant shift toward the reassertion of congressional control over U.S. trade policy as it existed prior to Smoot-Hawley. It was a shift that occurred while existing arrangements between Congress and the president were, in effect, being tested during negotiations with Canada. Omnibus continued the trend toward new restrictions on how fast track would facilitate the negotiation on nontariff measures with international partners, precisely what fast track was designed in 1974 to do.

The Omnibus package won overwhelming bipartisan approval in both Houses; 376–45 in the House, and 85–11 in the Senate.⁸² The most egregious proposals, such as the Gephardt Amendment, were eliminated from the final bill, while others, such as mandatory retaliation and investigations, were altered to make them less draconian.⁸³ Changes also took place in five key areas including expanding the role of private sector advisory committees in formulating negotiating positions,⁸⁴ resolving interagency turf battles over trade policy, and mandating the executive branch more vigorously investigate and prosecute a wider range of "unfair" foreign trading practices, including subsidies, dumping, and intellectual property rights violations.⁸⁵

81. For Republicans, see Representative Doug Bereuter (R-Nebraska) in U.S. Congress, House, Committee on Foreign Affairs, Subcommittee on International Economic Policy and Trade and on Western Hemisphere Affairs, *United States/Canada Trade Relations, Hearing before the Subcommittees on International Economic Policy and Trade and on Western Hemisphere Affairs of the Committee on Foreign Affairs*, 99th Congress, 2nd session, August 12, 1986, 23; Representative Carlos J. Moorhead (R-California) in U.S. Congress, House, Committee on the Judiciary, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, *Intellectual Property and Trade—1987, Oversight Hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, of the Committee on the Judiciary*, 100th Congress, 1st session, March 18 & 26, 1987, 6.

82. Congressional Quarterly Inc., *Congressional Quarterly Almanac* (Washington DC, 1988), 209.

83. The plant closing provision would have required sixty days' notification of intent to close, but was eliminated at the insistence of the White House. The provision was later passed by Congress as a separate piece of legislation, Senate Resolution 2527, on August 4, 1988 and became Public Law 100–379 without the president's signature.

84. See U.S. Congress, Senate, Committee on Finance, *Omnibus Trade Act of 1987, Report of the Committee on Finance, on S. 490 Together with Additional Views*, 100th Congress, 1st session, June 12, 1987, 5–6.

85. See U.S. Congress, House, Committee on the Judiciary, Subcommittee on Courts, Intellectual Property, and the Administration of Justice, *Intellectual Property, Domestic Productivity and Trade, Hearing before the Subcommittee on Courts, Intellectual Property, and the Administration of Justice, of the Committee on the Judiciary*, 101st Congress, 1st session, July 25, 1989, 66–70, 106–7. *Congressional Quarterly Almanac*, 1988 ed., 209–10; Destler, *American Trade Politics*, 126–27; See also Sharyn O'Halloran, *Process, Politics, and American Trade Policy* (Ann Arbor, MI, 1994), 107–08.

Close but No Cigar

The tough new provisions in Omnibus Trade and Competitiveness Act of 1988, however, were partially offset by the continuation of the basic delegation of constitutional authority over the conduct of trade as it had evolved since the RTAA and been modified by fast track in the 1970s. At the same time Congress was complaining bitterly about the administration's handling of trade, in June 1987, the Senate Finance Committee and the Congressional Budget Office separately acknowledged the necessity of presidential negotiating authority as part of the president's foreign policy repertoire.⁸⁶ A June 1987 Finance Committee report noted that "Governments of other countries realize that under the unique form of government prescribed by the U.S. Constitution, trade agreements cannot be implemented without action of Congress. The President will be a more effective negotiator to the extent he can assure foreign governments that he is implementing a Congressional directive, since the Congress is more likely to approve action in accordance with what it has directed than action it had no part in formulating."⁸⁷

All of this supported the administration's arguments in favor of delegation, an argument reiterated by former USTR Robert Strauss before Senate Finance that same month:

On a scale of 1 to 10, it is a 10. There is no question in my mind that it [an extension of fast track negotiating authority] must be passed if you hope to have a successful negotiation. And if I represented the Europeans, the Japanese, or others, and you did not have fast track legislation, I would say this negotiation really means nothing. They [Congress] are going to amend this thing to death when it gets back. It is going to sit awhile, and nothing will happen. And why should I put this on the table and then have it bit on here, and nibbled on there, and torn apart here, and then you come back and insist that I do this, that and the other. I want to know when we shake hands and walk out of this room, that is what your Congress is going to vote up or down on or I won't go.⁸⁸

This is why the April 2008 House rule change for considering the Colombia agreement was so significant. One main function of fast track had always been to assure foreign negotiating partners that Congress would consider agreements reached by the executive branch in a timely manner and without amendment.

86. See U.S. Congress, Senate, Committee on Finance, *Omnibus Trade Act of 1987, Report of the Committee on Finance, on S. 490 Together with Additional Views*, 100th Congress, 1st session, June 12, 1987, 5; United States Congress, Congressional Budget Office, *The GATT Negotiations and U.S. Trade Policy*, June 1987 (Washington, DC, 1987), ix.

87. *Ibid.*

88. See former USTR Robert Strauss, in U.S. Congress, Senate, Committee on Finance, *Mastering the World Economy, Hearings before the Committee on Finance*, 100th Congress, 1st session, January 13 and 15, 1987, 53. Specific Fast Track legislation will be addressed in a section to follow.

At a minimum, the 2008 House rule change has undermined guarantees regarding timely consideration. The potential for amendment may not be far behind.

By contrast, Omnibus threatened, but stopped short of a full reassertion of congressional prerogatives on trade in 1988. Instead, Omnibus represents a series of carrots and sticks, but mostly sticks, designed amid the trade policy acrimony of the 1980s and as a byproduct of experience with fast track procedures within the Canada talks. These carrots and sticks went on to structure U.S. trade policy throughout the rest of the 1990s:

1. A carrot for the administration: Congress extended, until May 31, 1993, its delegation of authority to the executive branch to enter and conclude bilateral or multilateral agreements, the main purpose of which was completion of the Uruguay Round of the GATT.⁸⁹ Left a major set of foreign policy tools in the executive branch's tool chest.
2. A carrot and a stick aimed at foreigners: Omnibus also extended fast track authority to May 31, 1991, with a possible two-year extension subject only to a *disapproval* motion from either gate keeper committee but added the House Rules Committee as a third gate keeper.⁹⁰
3. Congressional sticks: Omnibus expanded private sector input into U.S. negotiating positions; clarified the roles of executive branch agencies, making them more accountable to Congress; and pushed the administration to be more aggressive with "unfair" foreign trade practices.
4. Congressional stick: Omnibus established a mechanism for terminating fast track approval—commonly referred to as *reverse fast track*—where the ranking members of Senate Finance and House Way and Means could introduce resolutions disapproving the use of fast track for any particular agreement.⁹¹

The 1988 Omnibus Trade and Competitiveness Act began in 1985 as a collection of proposals that looked as though they would again concentrate primary responsibility for trade in Congress for the first time since before the Great Depression. Moreover, the domestic battle was evolving on the cusp of what proved to be a broader reconsideration of the global trade regime and the "compromise of embedded liberalism" that had, for most of the postwar period, shielded domestic interests from the harshest consequences of trade liberalization. Included in that reconsideration was fast track as it was reformulated to help manage domestic and international conflict over the reduction of NTBs.

89. President Reagan originally proposed the first ever permanent delegation of negotiating authority from Congress to the executive, but this motion was never seriously considered. See U.S. Congress, Senate, Committee on Finance, *Omnibus Trade Act of 1987, Report of the Committee on Finance, on S. 490 Together with Additional Views*, 100th Congress, 1st session, June 12, 1987, 4–6.

90. See *Congressional Quarterly*, 1988 ed., 209–10; see also *Congressional Quarterly*, 1987 ed., 640–61.

91. *Ibid.*; Koh, "Fast Track," 151.

These changes also evolved at the same time the United States was engaged in its first significant test of fast track provisions with a country of some economic consequence, Canada. Early threats that Omnibus would reverse fifty years of liberal, outward-looking U.S. trade policy, directed by the president were unrealized. However, delegation had again been more severely limited and became another nail in the fast track coffin. Compared with the nearly nonstop economic bickering with Japan and Europe during the period, the Canada talks seldom captured the spotlight and were ultimately supported by large majorities in both houses of Congress. Yet, the Canada talks drew the battle lines over which Omnibus was drafted and passed. When legislation to implement the CUFTA became law in September 1988, it was both the first and last major agreement concluded by the United States under fast track rules as they were designed in 1974.⁹² Future U.S. trade initiatives, including the NAFTA, would not have such favorable terms under fast track rules.

THE HIBERNATION OF FAST TRACK AND THE BUSH REVIVAL

Omnibus in no way stopped U.S. trade policy, but it did tighten the congressional reins. The years immediately following passage of the Omnibus legislation were among the most active, and controversial, in American trade history. In 1990, the George H. W. Bush administration launched several economic schemes, including the Enterprise for the Americas Initiative, which later morphed into the Free Trade Area of the Americas negotiations (FTAA) in the Clinton years.⁹³ More controversial, the president also announced in June that he would enter talks with Mexico that then became trilateral negotiations culminating in the NAFTA in 1994.⁹⁴ Much as the Canadians had done in 1986, Mexico insisted upon American fast track authority before negotiations could begin in earnest.⁹⁵ In 1991, President Bush pushed for and received fast track extension to continue the less controversial, but still incomplete, Uruguay Round of multilateral GATT negotiations. The linkage of fast track extension to the NAFTA negotiations was, for some members of Congress, an unwelcome surprise.⁹⁶

92. See U.S. Congress, Senate, "United States-Canada Free Trade Agreement Implementation Act," 100th Congress, 2nd session, *Congressional Record*, September 19, 1988, obtained from Nexus-Lexis online information service, August 15, 1998; *Congressional Quarterly Almanac*, 1988 ed., 222-23. The implementation legislation was approved by the House on August 9, 366-40 and by the Senate September 19, 83-89.

93. "Remarks Announcing the Enterprise for the Americas Initiative," June 27, 1990, in U.S. President, *Public Papers of the Presidents of the United States* (Washington, DC, 1990), George Bush, 1990, 873-77.

94. "Mexico-United States Joint Statement on Negotiation of a Free Trade Agreement," June 11, 1990, in U.S. President, *Public Papers of the Presidents of the United States*, George Bush, 1990, 806. Formal notification of intent to negotiate with Mexico was not submitted to Congress until September 1990.

95. See Carlos Salina De Gortari, *Mexico: The Policy and Politics of Modernization* (Barcelona, 2000), 100.

96. President Bush, "Remarks at a Briefing on Extension of the Fast Track Trade Negotiation Authority," March 5, 1991, in U.S. President, *Public Papers of the Presidents of the United*



Figure 2: NAFTA initialing ceremony marking the end of negotiations, San Antonio, Texas, October 7, 1992. Standing from the left are President Carlos Salinas de Gortari, President George H. W. Bush, and Prime Minister Brian Mulroney. Seated are Mexican Secretary of Commerce and Industry Jaime Serra Puche, United States Trade Representative Carla Hills, and Canadian Finance Minister Michael Wilson.

The NAFTA turned out to be one trade agreement too far. It became a political hot potato in the 1992 presidential campaign, and President Clinton's commitment to subsequently support the NAFTA through approval on Capitol Hill ultimately cost the new administration significant political capital. Three attempts to win renewed fast track authority in the 1990s were abject failures, significantly hobbling the U.S. trade agenda.⁹⁷ That hobbled agenda was damaged even further by the debacle at the World Trade Organization (WTO) Ministerial in November 1999. The "Battle in Seattle" was emblematic of the decline in support for trade liberalization both in the United States and abroad.

Another way to look at the impact of the experience with the Canada talks is to dig deeper into a couple of specific issues; dispute settlement, investment, and labor and the environment. Fast track was designed to manage the increasingly complicated politics of a trade liberalization agenda featuring NTBs as the most prominent issues.⁹⁸ The Canada talks were the first to test fast track as a political device committing the executive and legislative branches to a course of action on NTBs, and many in Congress found it wanting. Dispute settlement, investment, and labor and the environment are all relatively new issues in the context of international trade and rife with domestic governance issues and all of the

States, George Bush, 1991, 212–13. Destler, *Renewing Fast Track*, 37–38. See also Koh, "Fast Track," 159.

97. Destler, *Renewing Fast-Track*, 16–27.

98. Koh, "Fast Track," 159.

challenges for sovereignty that come with them. In the Canada talks, many of these matters were touched on for the first time.

These are technical issues, seemingly tangential to the broad thrust of American economic diplomacy. However, the alterations to U.S. negotiating positions taken on each of them are indicative of the weakening utility of fast track in managing the reduction of NTBs in international negotiations and as a tool in American diplomacy. The Canada talks suggested weaknesses with fast track in doing all of this. In 1988, Congress tried to fix some perceived weaknesses with its more restrictive renewal of negotiating authority as the U.S. entered the final stages of the Uruguay Round and commenced NAFTA negotiations. Largely as a result of the NAFTA fight, the White House was unable to win fast track at all between 1994 and 2002.⁹⁹ And when, in 2002, fast track was renewed (and rechristened as Trade Promotion Authority [TPA]), the limitations of renewal were more restrictive still. So, did the Canada talks kill fast track? No, but most of the substance of the Canada talks, NTBs, did! The evidence is in the progressively restrictive terms under which Congress was willing to grant its constitutional authority over trade to the president. Each change to fast track brought with it important limitations on presidential discretion in negotiations with U.S. trading partners.

Dispute Settlement

The CUFTA was innovative in many ways but dramatically so in terms of the management of disputes arising from the application of domestic trade remedy (antidumping and countervailing duty) laws. Some form of immunity from U.S. trade remedy laws was a major Canadian negotiating objective when CUFTA talks began in 1985.¹⁰⁰ Before the ink was even dry on the CUFTA, Canadian negotiators knew they had won only a partial victory in seeking full immunity. The United States had been indifferent to dispute settlement covering trade remedy law from the beginning and resisted its inclusion in CUFTA until very late in the negotiations.¹⁰¹ While the CUFTA did include a quasi-judicial binational body to review administrative decisions, each country maintained near-maximum discretion in terms of applying their domestic laws, even in the event of a negative finding by a Chapter 19 panel.¹⁰² Panel findings with respect to a

99. Destler, *Renewing Fast Track*, 16–19.

100. Hart *et al.*, *Decision at Midnight*, 379–80. Hart and colleagues argue that immunity was never a Canadian goal. Rather, Canada had the much more limited objective of seeking “some means of controlling or influencing their interpretation and application. It sought an end to unilateralism and the ease with which the U.S. Congress could change the rules if it did not like the way they were applied.”

101. Hart *et al.*, *Decision at Midnight*, 328–36.

102. *Ibid.*, 380. Hart and colleagues’ assertion here seems to fly in the face of Article 1904(9) that reads that “the decision of a panel under this article shall be binding on the Parties.” However, Hart and colleagues’ broader point about the inability of Canadian negotiators to establish limits on the U.S. ability to apply trade remedy laws (1902.1), as well as U.S. discretion to arbitrarily change them (1902.2) in the aftermath of a panel decision adverse to U.S. interests is valid.

particular case (Article 1904.9) were binding on each government, but a finding that a domestic agency had misapplied its own laws could only be remanded back to the agency for further investigation and subsequent re-review by the panel (Article 1904.8). There are no permanent dispute settlement institutions, only rosters of potential panelists for each ad hoc panel that is struck.

When the NAFTA talks began, one of Mexico's most important initial negotiating positions was to seek major changes in the application of U.S. trade remedy laws, statutes seen by foreigners as Congress responding to protectionist industrial interests in the United States. Mexico's position was similar to that taken by Canada several years earlier in bilateral negotiations and was again also premised on the U.S. administration's ability to win fast track authority.¹⁰³ Articles 1906 and 1907 of the CUFTA had called for follow-on talks to agree on a new combined binational regime governing the application of trade remedy laws—presumably designed to eliminate completely trade remedy law as applied to each other. Yet, no progress on those provisions was ever made—indeed, there were no talks at all. When the NAFTA was finally implemented in January 1994, the CUFTA's Chapter 19 had been firmly implanted in the new trilateral agreement with few substantive changes. However, unlike the CUFTA's optimistic promises to negotiate a common regime that would ultimately lead to an end to the application of trade remedy laws against each other, the NAFTA dropped any such references, and there is no indication that the negotiators ever contemplated implanting a future process that would do away with the application of trade remedy law altogether.¹⁰⁴ Why? By the early 1990s, disagreements were emerging between Canada and the United States over how much longer the CUFTA's Chapter 19 provisions were to remain in force.¹⁰⁵ Chapter 19 was one of the final issues concluded in the CUFTA negotiations as the two sides scrambled to cobble together an eleventh-hour agreement to meet the U.S. fast track time table in October 1987.¹⁰⁶ Indeed, when the agreement was announced, few in Congress had been party to the commitments made by the administration concerning trade remedy law.

Although Canada sought an end to the application of U.S. trade remedy laws to its exports, Chapter 19 fell far short, opting instead for an ad hoc system of

103. Maxwell A. Cameron and Brian W. Tomlin, *The Making of the NAFTA: How the Deal Was Done* (Ithaca, NY, 2000), 88–89, 117; Salinas, 99–103.

104. Patrick Macrory, "Dispute Resolution in the NAFTA: A Surprising Record of Success," *C.D. Howe Institute Commentary* 168 (September 2002): 5.

105. *Ibid.* See also *The Canada-U.S. Free Trade Agreement*, Articles 1906, 1907. Specifically, Article 1906 put in place the panel process for five years "pending the development of a substitute system of rules in both countries for antidumping and countervailing duties as applied to their bilateral trade." Articles 1907.1 and 1908 actually established never-used working groups and committed resources to move toward a substitute system. If no agreement was reached within five years, the terms of Chapter 19 were to extend for two more years after which failure to agree on a new regime would permit either party to back out of the terms of Chapter 19 upon six months' notice.

106. Hart *et al.*, *Decision at Midnight*, 298–303, 318–42.

panels that would review decisions of domestic administrative bodies responsible for applying antidumping and unfair subsidy legislation.¹⁰⁷ The new mechanisms left domestic trade remedy laws intact, established no permanent adjudicatory bodies, and were only allowed to investigate whether domestic laws had been applied properly.¹⁰⁸ Yet, as limited as Chapter 19 of CUFTA actually was, domestic trade remedy laws are politically sensitive since they are often invoked by firms facing fierce, sometimes unfair, competitive pressures from abroad. Coupled with the eleventh-hour nature of their negotiation, the terms of Chapter 19 almost immediately began raising congressional angst. That angst grew as Chapter 19 came into operation and did so as Congress began considering fast track extension under Omnibus rules in 1991 for the NAFTA negotiations.¹⁰⁹

Some of the earliest and harshest critiques of the CUFTA Chapter 19 process came from retired U.S. Appellate Judge Anthony Wilkey in a blistering dissent issued after a decision in a case concerning the long-running Canada-U.S. softwood lumber dispute. Judge Wilkey questioned the constitutionality of a process that subjected American legal decisions to review of any kind by an extrajudicial binational panel system. In his view, such a system was a denial of “due process” under the Fourteenth Amendment and was hardly impartial. Moreover, foreign panelists could hardly be expected to have the experience necessary for judicial review of the domestic laws and administrative actions that would be at issue.¹¹⁰

The Doubts Grow

By the time the NAFTA negotiators began considering the dispute settlement provisions, many of the concerns about the CUFTA were being heard on Capitol Hill, where members of Congress were already uncomfortable with the sovereignty implications of extrajudicial review brought about by Chapter 19.¹¹¹ The criticisms leveled at the whole process by Judge Wilkey and others only fueled these concerns. When President Bush requested fast track extension on March 1, 1991, for the Uruguay Round, and ultimately the NAFTA, it was a request for extension under rules that had been changed again with the Omnibus Trade and Competitiveness Act in 1988. Whereas the 1986 fast track extension

107. Greg Anderson, “Can Someone Please Settle This Dispute: Canadian Softwood Lumber and the Dispute Settlement Mechanisms of the NAFTA and WTO,” *World Economy* 29, no. 5 (June 2006): 586.

108. *Ibid.*, 585–89.

109. *Ibid.*, 591–96.

110. See U.S. Circuit Judge (Ret.) Malcolm Wilkey, Extraordinary Challenge Committee Review Under United States-Canada Free Trade Agreement Softwood Lumber Products from Canada, ECC-94-1904-01 USA, Dissenting Opinion, 63–67; generally 62–94.

111. Howse, “Settling Trade Remedy Disputes,” 8. See also Congress, Senate, Senator DeConcini of Arizona speaking for the United States-Canada Free Trade Agreement Implementation Act, 100th Congress, 2nd session, *Congressional Record* 134, no. 129, September 19, 1988.

for the Canada talks had taken place at the committee stage (as a result of 1984 changes to fast track), the 1991 extension request for NAFTA was fought largely at the extension *disapproval* phase.¹¹² The fast track provisions of Omnibus had effectively put in place more opportunities for Congress to exert significant leverage over or kill any administration trade initiative. While the *disapproval* motions in House Ways and Means and Senate Finance were defeated (9–27 and 3–15, respectively), both measures went to the House and Senate floors where they enjoyed far less support (231–192 and 59–36, respectively). That the measures were sent to the floor of the House and Senate, in spite of unfavorable disapproval motions in committee, was itself a byproduct of Omnibus language that significantly broadened the debate and therefore the challenges for the NAFTA agenda. In fact, were it not for the fact that the extension disapproval motion was also tied to the Uruguay Round of GATT negotiations, the NAFTA might not have won an extension.¹¹³

The extra hurdles to winning fast track authority put in place by the 1988 Omnibus trade bill also had an impact at the negotiating table in terms of the outer limits to U.S. bargaining positions. Whereas the CUFTA Chapter 19 had explicitly called for future talks on dispute settlement and moves toward “a substitute system of rules in both countries for antidumping and countervailing duties” (CUFTA Articles 1906 and 1907), the NAFTA Chapter 19 contained no such language.¹¹⁴ In many ways, enshrining Chapter 19 within the NAFTA at all was an enormous victory for proponents of binding dispute settlement because its inclusion came with important new limitations in scope and vision. Moreover, the NAFTA also contained language that seemed to be in direct response to Judge Wilkey’s critiques about the impartiality, the expertise of panelists, and standard of review to be applied by Chapter 19 panels.¹¹⁵

These alterations are subtle, but they are a direct consequence of a broader congressional assertion of control over the terms of foreign commerce through progressively more limited extensions of fast track authority. Fast track can be viewed as a political device with both domestic and international functionality. Domestically, it represents a vehicle over which diffuse constitutional power and divergent policy preferences on international trade are arbitrated between Congress and the executive branch. Internationally, fast track sends important signals to potential trading partners about how far, where, and on which issues, the United States is prepared to advance in trade negotiations.¹¹⁶ The changes

112. Koh, “Fast Track,” 152–53.

113. *Ibid.*, 154–55.

114. See note 99.

115. Specifically, the NAFTA encourages the relitigation of the entire case within the Extraordinary Challenge Committee process. The EEC provisions of the NAFTA also differed from the CUFTA in making a “failure to apply the appropriate standard of review” (Article 1904.13(a)(iii)) a basis for striking an Extraordinary Challenge Committee. CUFTA Article 1904.13 sets the time limit for determination at thirty days. See also NAFTA Article 1904.13.3. See also Anderson, “Can Someone Please Settle This Dispute,” 594–96.

116. Destler, *Renewing Fast Track*, 33–35.



Figure 3: Second presidential debate, October 15, 1992, University of Richmond. From the foreground, President Bush, Independent Candidate H. Ross Perot, and Arkansas Governor Bill Clinton. The NAFTA was a hot topic at this debate and featured Perot's famous quip warning that the Agreement would create a "giant sucking sound" as investment and jobs left for Mexico. Bush administration images are courtesy of the George Bush Presidential Library and Museum, College Station, Texas.

made to Chapter 19 from the CUFTA to the NAFTA reflected concerns highlighted in the changes to fast track in 1988. Fast track extension in 1991 for the NAFTA signaled how far the United States was willing to let Chapter 19 be extended. So, whereas Canada and Mexico both sought immunity from U.S. trade remedy law at the outset of the CUFTA and NAFTA negotiations, the NAFTA enshrined but also amended Chapter 19 in important ways.¹¹⁷

Further restrictions on dispute settlement covering trade remedy law continued after the administration of George W. Bush won renewed fast track authority in the spring of 2002 for the first time in nearly a decade. The renewal of fast track in 2002—rechristened TPA—was explicit about the administration preserving “the ability of the United States to enforce rigorously its trade laws, including the antidumping, countervailing duty, and safeguard laws, and avoid agreements that lessen the effectiveness of domestic and international disciplines on unfair trade, especially dumping and subsidies, or that lessen the effectiveness of domestic and international safeguard provisions, in order to ensure that United States workers, agricultural producers, and firms can compete fully on fair terms and enjoy the benefits of reciprocal trade concessions.”¹¹⁸ Even the most cursory look at U.S. trade agreements

117. Anderson, “Can Someone Please Settle this Dispute,” 596–87; Cameron and Tomlin, *Making of NAFTA*, 88–89.

118. Trade Act of 2002 (Pub. L. No. 107–210), Division B, Bipartisan Trade Promotion Authority, Title XXI, Section 2101 (b)(3), Section 2102 (b)(12) and Section (b)(14). See also 19 U.S.C. § 3802 (b)(12) and (b)(14).

concluded after TPA immediately reveals its impact. The U.S.-Chile Free Trade Agreement, implemented in 2004, for instance, includes a chapter on trade remedy laws but significantly limits the scope under which dispute settlement mechanisms can be invoked.¹¹⁹ Furthermore, instead of several different dispute settlement mechanisms as found under the NAFTA (Chapters 11, 14, 19, and 20), the Chile text generically consolidates them into a single chapter (Chapter 22).

Another important set of changes concern the binding nature of the dispute settlement mechanisms themselves. Under the NAFTA, panel findings disagreeing with a domestic antidumping or countervailing duty determination were “remanded” to the domestic agency with the expectation that the offending measure would be brought into compliance with the panel’s findings.¹²⁰ The extrajudicial quality of both the CUFTA and NAFTA panels, along with the CUFTA’s language calling for follow-on negotiations to replace trade remedy altogether raised hackles among those concerned about the erosion of U.S. sovereignty. The terms of TPA and the provisions of U.S. agreements concluded under it pull back from even NAFTA-level commitments. Under the Chile agreement, dispute settlement is nonbinding. Panel reports are sent to the respective governments for further negotiation rather than to administrative agencies for obligatory implementation.¹²¹ Such changes may appear subtle but are a direct response to, and consequence of, many of the critiques that had been building in Congress and elsewhere about both the agreements the United States was entering and the fast track process that was supposed to have mediated U.S. position-making on nontariff measures.

Investment

Since the early 1980s, the United States has employed bilateral investment treaties (BITs) as a means of dealing with private commercial law issues in the context of international law between states.¹²² A series of investment disputes between Canada and the United States in the early 1980s led to the incorporation of Chapter 16 into the CUFTA covering investment.¹²³ Chapter 16 is essentially a U.S.-style BIT, one of the first ever concluded between two

119. See U.S.-Chile FTA, Article 8.8.2. Instead of several different dispute settlement mechanisms as found under the NAFTA (Chapters 11, 14, 19, and 20), the Chile text also consolidates them into a single chapter (Chapter 22).

120. See NAFTA Article 1904.5-8. See also Anderson, “Can Someone Please Settle This Dispute?” 585-610.

121. See U.S.-Chile FTA, Article 22.13-14.

122. Jeswald Salacuse, “BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries,” *International Lawyer* 24 (1990): 664-73. See also C. Fred Bergsten and Edward M. Graham, “Needed: New International Rules for Foreign Direct Investment,” *International Trade Journal* 7, no. 1 (Fall 1992): 15-44.

123. Earl Fry, *The Politics of International Investment* (New York, 1983), 80-89; Hart *et al.*, *Decision at Midnight*, 222-24.



Figure 4: NAFTA kick-off event, White House East Room, September 14, 1993. Left to right behind President Clinton (seated) are President Ford, House Speaker Tom Foley (R-WA), Senate Majority Leader George Mitchell (D-ME), President Carter, Senate Minority Leader Bob Dole (R-KS), President Bush, Minority Leader Robert Michel (R-IL), and Vice-President Gore. William Jefferson Clinton Presidential Library.

developed countries, the first incorporated into a U.S. trade agreement, and a prime example of a new nontariff issue in international trade.¹²⁴

Chapter 16 of the CUFTA guaranteed that investments made in the host country by each other's nationals would be accorded treatment no less favorable than that accorded to firms in the domestic market (national treatment). Such treatment included securing rights of establishment, acquisition, sale, and conduct of enterprises in each other's territory.¹²⁵ In addition, the threat of the imposition of performance requirements, such as minimum export levels or local content rules, as a condition of investment would no longer be permitted under the CUFTA.¹²⁶ Both parties also agreed to a prohibit measures that directly or indirectly nationalized or expropriated investments of the other party in its territory and promised not to impose any measures that would be tantamount to expropriation such as those that intentionally depressed foreign asset prices.¹²⁷

Chapter 16 of the CUFTA was relatively uncontroversial, and remained so when the same provisions were replicated in the NAFTA a few years later as Chapter 11. Yet, members of Congress began to have doubts about Chapter 11 when Raymond Loewen, chairman of Loewen Group, filed a Chapter 11 case in

124. Jeswald Salacuse, "Toward a Global Treaty on Foreign Investment: The Search for a Grand Bargain," unpublished manuscript, 2002, 10.

125. CUFTA Article 1602.

126. CUFTA Article 1603.

127. CUFTA Article 1605.

1998 claiming that an unfavorable 1996 Mississippi jury decision against Loewen Group denied the firm national treatment, expropriated the firm's private property, and its future earnings.¹²⁸ While this case was eventually dismissed in its entirety in June 2003, five years of litigation, and the apparent mechanism provided by Chapter 11 for circumventing the decision of a Mississippi jury suggested the BIT-like investor protections in U.S. trade agreements were not being used as intended. Indeed, as of the fall of 2010, forty separate Chapter 11 arbitration cases had been filed; twelve against Canada, twelve against Mexico, and sixteen against the United States. The distribution of cases by itself has alarmed critics of the NAFTA and members of Congress alike since, given its history of expropriation, the presumptive target of Chapter 11 investor protections was actually Mexico. However, critiques of the case distribution were merely indicative of a broader and growing set of concerns unforeseen when fast track was renewed or extended between 1984 and 1991.

Both the case distribution and apparent abuse of the provisions to challenge domestic legal regimes, in spite of explicit language within the NAFTA to the contrary (Articles 1101 and 1114), have alarmed public interest advocates, environmentalists, and a growing number in Congress. Several cases have drawn the ire of environmentalists,¹²⁹ but none more so than *Methanex Corp. v. United States*. Methanex Corporation, a Canadian marketer and distributor of methanol, claimed damages of \$1 billion for alleged injuries resulting from a California ban on the use or sale of the gasoline additive MTBE that contains methanol as a key ingredient. Methanex contended that a California executive order banning MTBE was a discriminatory act tantamount to expropriation of its property under several provisions of NAFTA Chapter 11.¹³⁰

Unfortunately, Chapter 11 of the NAFTA was given no clear definitions or criteria for determining which measures rise to the level of expropriation, no body of jurisprudence which to draw upon, and a clause in the agreement (Article 1136 (1)) explicitly separating the cases from one another limiting the scope for the creation of precedent. In partial response to critics, and in light of several worrisome cases such as *Methanex*, in July 2001 the NAFTA Commission issued a definitional "interpretation" concerning the "minimum" and "fair and

128. See *The Loewen Group, Inc. and Raymond L. Loewen v. The United States of America*, "Notice of Claim" (30 October 1998), online: NAFTA Claims <<http://naftaclaims.com/Disputes/USA/Loewen/Loewen%20-%20Notice%20of%20Arbitration%20-%2030-10-98.pdf>>

129. For instance, see: *Ethyl Corporation v. Canada*, "Award on Jurisdiction" (24 June 1998), online: NAFTA Claims <<http://www.naftaclaims.com/Disputes/Canada/EthylCorp/EthylCorpAwardOnJurisdiction.pdf>>; *S.D. Myers, Inc. v. Canada*, "Damages Award" (21 October 2002), online: NAFTA Claims <<http://www.naftaclaims.com/disputes/canada/sdmyers.htm>>; *Metalclad Corporation v. The United Mexican States*, "Award," ICSID Case No. ARB(AF)/97/ (20 August 2000), online: NAFTA Claims <<http://naftaclaims.com/Disputes/Mexico/Metalclad/MetalcladFinalAward.pdf>>

130. See *Methanex Corporation v. United States*, "Statement of Claim" (3 December 1999), online: NAFTA Claims <<http://naftaclaims.com/Disputes/USA/Methanex/MethanexStatementOfClaim.pdf>>



Figure 5: Prime Minister Martin and President Fox stroll with President Bush (center) at the President's ranch in Crawford, Texas March 23, 2005, as part of the first-ever North American Leaders Summit. George W. Bush Presidential Library Collection.

equitable” standards of treatment private investment could expect under the NAFTA’s rules.¹³¹ The “interpretation” laid down an important political marker for future arbitral panels regarding the standard by which foreign investment was to be judged.¹³² More importantly, the “interpretation” came at a time when the Bush administration was trying to build support for fast track’s renewal in early 2002.

The July 2001 NAFTA “interpretation” not only outlined how Chapter 11’s provisions should be read, but strongly informed the language of fast track’s renewal in 2002. All U.S. negotiating positions thereafter, notably those with Chile, Singapore, and five Central American states (Costa Rica, Honduras, Nicaragua, Guatemala, and El Salvador) and the Dominican Republic (CAFTA-DR) contained language flowing from the “interpretation.” The investment chapters of each of these agreements goes to great lengths, much further than the NAFTA, to more precisely define terms such as “fair and equitable” and “full protection and security.”¹³³ Yet, the language of 2002’s TPA goes much further

131. Recall that customary international law, like international law generally is difficult to define since it all it really refers to is the ever changing customary practice of states.

132. See NAFTA Free Trade Commission Clarifications Related to NAFTA Chapter 11, July 31, 2001 at <http://www.ustr.gov>.

133. See Article 10.4 of the U.S.-Chile Free Trade Agreement, Article 10.5 of the U.S.-Central American FTA, and Article 15.5 of the U.S.-Singapore FTA, all available at <http://www.ustr.gov>. Each of these agreements also contains a provision regarding the Parties shared understanding regarding the definition of the “minimum standard of treatment” under customary international law, which reads “the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.”

than the NAFTA Commission's "interpretation," by mandating new U.S. trade agreements contain greater specificity on what expropriation is—something the NAFTA did not do.

Chapter 11 beyond the NAFTA?

The changes made to fast track between 1984 and its renewal in 1991 had important consequences for U.S. negotiating positions in the CUFTA and NAFTA, and placed limitations on executive branch flexibility vis-à-vis foreign trading partners and nontariff issues in trade negotiations. Yet, many of those changes are comparatively subtle when compared to the changes mandated by TPA to the investment provisions of new U.S. agreements. The Chile, Singapore, and CAFTA-DR agreements all contain the same basic language as the NAFTA with respect to expropriation but also contain annexes derived from the NAFTA experience detailing how that language is to be interpreted. Unlike the NAFTA, which leaves customary international law undefined, each of the new agreements does so explicitly by confirming "their shared understanding that 'customary international law' generally and as specifically referenced . . . from a general and consistent practice of States that they follow from a sense of legal obligation."¹³⁴ In a clear response to the perceived threat posed by cases like *Methanex*, the Chile FTA contains clearer definitions narrowing the scope within which state regulatory actions could be interpreted as expropriation.¹³⁵

And the source of these changes? 2002's TPA. While the Bush administration deserves credit for reviving fast track procedures after nearly a decade long hiatus, the terms of congressional acquiescence in TPA on investment came with new strings attached. First and foremost, Congress demanded that the investment provisions of new agreements steer clear of conferring greater substantive rights to foreign over domestic investors.¹³⁶ Although it was never the intention of the NAFTA negotiators that this be a consequence of Chapter 11, the case history suggested otherwise, and required language in subsequent agreements that limited the application of investment protections to future situations. In response to critiques regarding process transparency, Congress also mandated that new investment provisions provide for third-party amicus submissions, appellate mechanisms, and language to prevent the launch of frivolous claims.¹³⁷

134. See U.S.-Central American FTA, Annex 10-B and U.S.-Chile FTA, Annex 10-A. See also "Administration Proposes Higher Thresholds for Investor Suits," *Inside U.S. Trade*, September 27, 2002; "Administration Kills Judicial Exhaustion Plan for Investment Disputes," *Inside U.S. Trade*, September 27, 2002.

135. "Except in rare circumstances, nondiscriminatory regulatory actions by a Party which are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations." U.S.-Chile FTA, Annex 10-D, 4(b).

136. U.S. Congress, Trade Act of 2002, Division B, Bipartisan Trade Promotion Authority, Pub. L. No. 107-210, § 2102 (b)(3), August 6, 2002.

137. *Ibid.*

While augmented transparency might be desirable, these new provisions do significantly alter the original intent behind Chapter 11 and its BIT antecedents by introducing a range of potential new actors to the process. Whereas the U.S. BIT program was designed to help manage the narrow relationships between firms and hosts, negotiating U.S. investment provisions now contemplate the inclusion of a much broader range of interests with increasing congressional oversight and an uncertain utility in resolving investment disputes. Lastly, apart from the limitations TPA placed on executive branch negotiating discretion, these limitations also represent reduced incentives for foreign governments to negotiate with the United States at all. Clear and transparent trade agreements are important, but the evident limitations placed on U.S. negotiating latitude through TPA may be reducing the incentives for foreigners to enter talks with the United States at all. Moreover, the incentives for U.S. firms to support liberalizing agreements wanes as the terms of liberalization become more restrictive. This in turn exacerbates the challenging politics of modern trade liberalization since popular support of presidential trade initiatives obviously facilitates their successful completion and augments the utility of trade policy as an executive branch foreign policy tool. Fast track as a mechanism designed to facilitate the international negotiation of nontariff issues may have lost its utility as Congress has inexorably clawed back bits and pieces of control over it since 1974 when it was created. This is a problem since nontariff issues now make up the majority of those considered in international trade negotiations, among them labor and especially the environment.

Labor and the Environment

The NAFTA famously includes two side agreements on labor and environmental issues which then-Governor Clinton insisted be amended to the NAFTA as a condition of his support of the agreement during the 1992 U.S. presidential contest. Some critics have assailed the side agreements as having permanently complicated the trade policy process by directly inserting issues that are only indirectly tied to trade.¹³⁸ Others look at the side agreements as toothless tokenism designed by governments to mollify criticism by elements of civil society worried about the effects of trade liberalization on labor and the environment.¹³⁹ The facts with respect to the NAFTA side agreements rest somewhere in between.

Each side agreement established permanent trilateral institutional bodies, the Council on Environmental Cooperation (CEC) and the Council on Labor

138. See Policy Forum, *Environment and Development Economics* 5, no. 4 (October 2000): 483–529; Joseph F. Dimento and Pamela M. Doughman, “Soft Teeth in the Back of the Mouth: The NAFTA Environmental Side Agreement Implemented,” *Georgetown International Environmental Law Review* 10, no. 3 (Spring 1998): 651–752.

139. Daniel Esty, “Environment and the Trading System: Picking Up the Post-Seattle Pieces,” in Jeffrey J. Schott, ed., *The WTO After Seattle* (Washington, DC, 2000); see also Daniel Esty, *Greening the GATT* (Washington, DC, 1994), 243–52.

Cooperation (CLC) mandated to study environmental and labor issues affecting North America. Such was the optimism surrounding these developments that numerous environmental organizations came out in support of the NAFTA as a whole.¹⁴⁰ In fact, the CEC has evolved into a useful, if limited, forum for scientific exchange as well as interaction between government and civil society on a range of environmental questions.¹⁴¹ The CLC has been less effective in this regard.¹⁴² On the environment, the Clinton administration committed far fewer federal dollars to the CEC than had been hoped for. The success of the CLC has been hamstrung by divisive politics in all three NAFTA countries.¹⁴³ Much to the disappointment of environmentalists and labor activists, neither the CEC nor the CLC have the ability to implement findings or recommendations independent of governments, nor are there mechanisms designed to push governments to act.

As weak as the CEC and CLC are in some eyes, they also represent a pinnacle, above which no subsequent U.S. agreement has ever risen. No subsequent agreement contemplates any of the institutionalization on labor or environmental issues found in the NAFTA.¹⁴⁴ In fact, the Trade Act of 2002 calls merely for the United States and its trading partners to enforce their own labor and environmental standards as they relate to trade.¹⁴⁵ If fast track was intended as a mechanism to facilitate U.S. position taking on nontariff issues in international trade negotiations, it could reasonably be judged to have failed an important test where labor and the environment are concerned. The environment, in particular, has become an increasingly important element in international bargaining generally, but it has been a growing part of the international trading regime for several decades.¹⁴⁶ The NAFTA's labor and environmental side agreements were ad hoc political arrangements conceptualized in the heat of the 1992 presidential election campaign and were not part of any fast track extension. However, the NAFTA firmly, and permanently, inserted these issues into the realm of nontariff trade negotiations. That the Trade Act of 2002 pulls back from the limited standard of the NAFTA in conferring negotiating authority to the president is striking for a mechanism specifically designed to help manage these kinds of issues.

140. Gary Clyde Hufbauer and Jeffrey J. Schott, *NAFTA Revisited* (Washington, DC, 2005), 154.

141. *Ibid.*, 155–62, 178–86; See also Gilbert Winham, “Enforcement of Environmental Measures: Negotiating the NAFTA Environmental Side Agreement,” *Journal of Environment and Development* 3, no. 1 (1994): 29–41.

142. *Ibid.*, 114–15, 119–122.

143. *Ibid.*, 121–22.

144. Environmental “reviews” assessing the likely environmental impact of a new trade agreement are, however, now common features of U.S. trade agreements. In addition, new agreements include provisions for the enforcement of domestic environmental laws, commonly known as the “Jordan standard,” after the U.S.-Jordan FTA in which they were first inserted.

145. Trade Act of 2002 (Pub. L. No. 107–210), Division B, Title XXI, § 2102 (b)(11).

146. See Esty, *Greening the GATT*.

CANADA, COLOMBIA, AND THE FUTURE OF FAST TRACK

When George W. Bush took office in January 2001, there was renewed optimism in trade advocacy circles regarding the future of U.S. trade policy, some going so far as to call it a “renaissance” when compared to the previous decade.¹⁴⁷ The divided government and partisan politics of trade that characterized so much of the Reagan, Bush, and Clinton years seemingly had new momentum with Republicans in charge of both branches of government in 2001. In early 2002, the Bush administration was able to renew fast track (TPA) authority, nearly a decade after it had expired.¹⁴⁸ Yet, the margin of victory was perilously thin (215–212), and actually emphasized how fractured the consensus on trade had become since the Omnibus Trade and Competitiveness Act in 1988. Moreover, the limitations of TPA were tighter than ever regarding U.S. objectives and negotiating limits on both tariff and, increasingly, nontariff measures.

For some, a win is a win, and given the decade-long absence of fast track authority in a U.S. administration, TPA was greeted as a welcome change. After a decade of lackluster leadership in international trade, the Bush administration seemed to be taking advantage of Republican majorities in both houses of Congress and the policy latitude generated by the September 2001 terrorist attacks to reassert U.S. leadership in the global trading regime. The launch of the Doha Round of multilateral negotiations in late 2001, passage of TPA in 2002, and the initiation of numerous regional and bilateral negotiations also signaled the reassertion of the executive branch as the principal driver of U.S. trade policy as it has been over most of the postwar period. Moreover, the Bush administration had seized the initiative over a major set of foreign policy tools that presidents since Franklin Roosevelt have used to great effect in the conduct of U.S. foreign policy and the assumption of a major leadership role in the global economy. The “renaissance” in U.S. trade policy under President Bush could be seen in the willingness of numerous trading partners to engage with the United States. Like Canada and Mexico more than a decade earlier, potential U.S. trading partners viewed TPA as an essential starting point for negotiations with the United States as it signaled an internal commitment to presidential leadership on trade policy.

Yet, like nearly every other grant or extension of congressional authority since the creation of fast track in 1974, TPA came with new strings attached. Many of the new strings were stronger versions of those created by the Trade Act of 1974; others were rooted in the experiences with trade agreements starting with Canada. However, all were firmly rooted in the same basic conflict

147. C. Fred Bergsten, “A Renaissance in U.S. Trade Policy?” *Foreign Affairs* 81, no. 6 (November/December 2002): 86–98.

148. “Bipartisan Trade Promotion Authority Act of 2002,” technically division B, title XXI of the Trade Act of 2002, Pub. L. No. 107–210. Passed the House of Representatives July 27, 2002 by a vote of 215–212 and the Senate on August 1 by a vote of 64–34. Signed by President Bush, August 6, 2002.

over constitutional authority in conducting U.S. trade policy and the new challenges brought about by the growing importance of NTBs in international trade. Fast track preserved the delegation of authority to the president started by the RTAA in 1934, thereby giving the executive a powerful set of diplomatic tools in leading the global economy. Yet, with each renewal and set of attendant restrictions, fast track has increasingly become a vehicle for transmitting U.S. protectionist sentiment to foreign trading partners.

One of the more important elements of the original 1974 fast track legislation fueling this dynamic was the creation of private sector advisory groups with whom the president was required to consult regarding trade negotiating objectives.¹⁴⁹ The importance of the ACTPN, originally created by the Trade Act of 1974, has only grown in importance.¹⁵⁰ In fact, the role of private sector advisers has grown in tandem with the need to broaden stakeholder consultation to other elements of civil society adding further transparency to the process. By the time of the Trade Act of 2002, Congress had virtually scheduled the range and frequency of consultations between itself, private sector interests, and executive branch agencies over trade policy, making the process of trade policy formulation in the United States more significant than the international negotiations themselves.¹⁵¹

The Canada talks were the first major test of fast track as an institution designed within the U.S. system to deal with NTBs as the principle issues in international trade negotiations. Since then, each congressional renewal or extension of fast track has entailed additional restrictions giving Congress increasing leverage over the details of U.S. trade policy.¹⁵² The increasingly difficult politics of trade liberalization are partly to blame. Addressing NTBs in trade negotiations has often been compared to the many problems associated with draining a swamp; as the water recedes, stumps and snags are revealed. Added to the standard distributional consequences of liberalizing markets at all, NTBs are like the stumps and snags of international trade since they include not only subsidies and quotas with a direct impact on trade, but a range of others, such as safety, health or pollution standards, or regional development subsidies, whose purpose and orientation are primarily domestic but that nevertheless have an impact abroad. Given that many of these policies are intimately tied to domestic policies with all their social, cultural, political, environmental, and economic implications, these subjects have become, and will continue to be, extremely contentious issues in future economic relations.

Yet, the added congressional leverage in each iteration of fast track has been part and parcel of a much longer tug-of-war between the branches of

149. See 19 U.S.C. § 2155(b)(1).

150. See Office of the United States Trade Representative, http://www.ustr.gov/Who_We_Are/List_of_USTR_Advisory_Committees.html.

151. See 19 U.S.C. §§ 3802 (d)(1), 3803(c)(3)(A), 3804(a). See also Koh, "Fast Track," 152, 164.

152. Koh, "Fast Track," 167.

government for policy control in foreign affairs. The early experience with fast track in the Canada talks led to successive changes that have culminated in what may prove to be the permanent demise of fast track in April 2008 over the U.S.-Colombia Trade Promotion Agreement. Fast track is, at bottom, less legally binding than a political agreement between branches of government and a political signal to foreign trading partners.¹⁵³ The House rule change in April 2008 that put the U.S.-Colombia trade agreement in limbo has finally broken both of these elements. As it has evolved, fast track is not really a delegation of congressional authority to the president since it has always required significant interbranch consultation before, during, and after fast track is approved.¹⁵⁴ Moreover, Congress can amend, at any time, the rules under which completed agreements are considered, much as it did with the Colombia agreement in April 2008.

The breach of fast track is really political. The change to House rules covering the Colombia agreement constitutes a breach of the course of action agreed to by Congress and the president under the terms of the Trade Act of 2002. It also sends an important negative message to foreign trading partners about the strength of the domestic political commitment under fast track rules. In other words, like the Colombia deal, future trade agreements concluded by the United States could suffer the same fate as Congress changes the terms of the negotiation. After negotiating in earnest with the executive branch, foreign countries could be faced with congressional demands for numerous amendments.

A persuasive argument could be advanced that fast track is far from broken and, indeed, perhaps unnecessary. Moreover, fast track may simply be reflecting the complex challenges now characteristic of the global trading regime. In spite of not having fast track authority for much of his presidency, Bill Clinton could point to a significant list of achievements, not the least of which was the ascension of China to full membership in the WTO and the extension of permanent normal trading relations by Congress in late 1999. It was an impressive effort by a Democratic president with a Republican Congress to win support for a significant trade initiative. Why not pursue the same kind of ad hoc political process for each and every trade agreement the president pursues? The main objection to an ad hoc approach such as this is that it was ad hoc and does not signal a broad consensus between elements of the American polity about the general direction of U.S. trade policy or about who will be its main conductor. The disastrous consequences of Smoot-Hawley era control of trade policy by Congress continue to loom large.

As restrictive as TPA has become, it still represents an important political bargain with a greater longevity about where trade policy is going and who is

153. *Ibid.*, 159, 163–65.

154. *Ibid.* Koh points out that there are numerous ways by which Congress restricts itself to a course of action by setting the rules of debate on pieces of legislation.

going to be the main point of contact for it. Moreover, it preserves more explicitly for the president a set of policy tools that have become almost as essential to the conduct of American foreign policy as any formally written under Article II of the U.S. Constitution.

CONCLUSIONS

Fast track has suffered a slow, creeping death as a policy instrument for managing nontariff issues for the United States in international trade negotiations with Canada and Colombia as bookends to fast track's utility.

Did the Canada talks kill fast track in terms of administering the fatal blow? No. But the Canada talks were the first major test of fast track as an institution designed within the U.S. system specifically to deal with NTBs as the principle issues in future international trade negotiations. The experience with these institutions quickly precipitated changes that have led to the Colombia agreement perhaps being the final, failed test of fast track in its current form.

In the Canada talks and Omnibus Trade and Competitiveness Act of 1988 legislation, we see the early stages of evolution of U.S. trade policy institutions toward more restrictive grants of authority, increasing levels of consultation and transparency, and growing congressional criticism of administration trade policy, all of which culminated in the April 2008 breaking point reached over Colombia.

Since at least 1934, the conduct of U.S. trade policy has involved some grant or delegation of authority from Congress to the executive branch setting the terms by which the president would negotiate trade barrier reductions. The success of this arrangement, coupled with U.S. leadership in the global trade regime, resulted in the significant decline of tariffs as impediments to international trade by the late 1960s.

Fast track was designed in 1974 as a mechanism for preserving liberalism and openness in U.S. trade policy as the nature of trade liberalization moved increasingly toward NTBs. Yet, in the very nature of NTBs we also see the roots of the erosion of public support for trade liberalization and the slow demise of fast track as the institution designed to help the United States manage them. Nontariff measures necessarily involve difficult questions of domestic governance that would challenge any mechanism designed to handle them. However, because Canada and the United States were already substantially open and integrated economies in 1985 when talks began, they were dominated by nontariff issues that fast track subsequently seemed ill suited handle.

After years of progressively more restrictive grants of fast track negotiating authority, the utility of fast track as a mechanism for political accommodation at home and signaling abroad is in doubt. Some delegation of constitutional authority over trade from the Congress to the president has been a virtual

necessity in the conduct of foreign economic policy, and America's leadership of the global economy, since at least 1934. An institutional arrangement that replaces fast track's functions at home and the signals it sends abroad will need to fill the void from the fallout from the Colombia deal in April 2008. Yet, fast track as designed in 1974 is probably dead, and Canada talks marked the beginning of its demise.