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History & Background: The Outdated Fast Track Trade Concept

Globalization and trade issues are at the center of a growing international citizens' movement. This movement has created a new global debate about the failures of the status quo rules and institutions promoting the current corporate globalization. The real life outcomes of the corporate globalization model -- growing income inequality between and within nations, weak or non-existent growth in real per capita income, and the undermining of vital public interest protections providing safe food, environmental quality, and public health and safety - - has energized people throughout the U.S. and around the world. Starting with the 1999 Seattle protests, newly invigorated citizens movements have begun building the grassroots demand for change.

Any meaningful U.S. discussion of how to repair existing trade and investment agreements and rules or how to ensure that future pacts protect the public interest requires re-evaluation of *how* U.S. policy in this area is made. Indeed, a review of the history of the North American Free Trade Agreement (NAFTA) or the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) which established the World Trade Organization (WTO) shows that a significant contribution to these pacts' many provisions attacking environmental, consumer, human rights, labor and other public interest policies was the mechanism under which they were negotiated. Called "Fast Track," this procedure (described in detail below) delegates away four separate congressional constitutional authorities in one fell swoop, effectively removing Executive Branch negotiators from accountability from Congress or the public during negotiations.

Yet, Fast Track is merely one means by which U.S. trade policy could be established. Used only five times since its 1974 development by then-President Richard Nixon, Fast Track is simply outdated given the reality of the broad issues under discussion in today's international commercial negotiations. Indeed, in the year 2000 we saw the Executive Branch negotiating major trade agreements with Vietnam, China and a regional NAFTA expansion called the Free Trade Area of the Americas (FTAA) with absolutely no delegation of congressional authority or any congressionally or publicly-set goals for such talks.

We need to re-establish checks and balances in US trade-policy making. We need to get the steering wheel and brakes of accountability over trade negotiators now free-lancing new deals without Congress or public input. We need to take back trade policy making by establishing a new, forward-looking system of making these important choices. In thinking how to move forward, a review of Fast Track's history, design and applications is vital.

1. Busting the Fast Track Myth

Creative thinking about a modern U.S. trade policymaking process must start with the clearing up of a major misconception propagated by defenders of the status quo: Fast Track is not synonymous with "trade authority." Indeed, given that Fast Track has gotten such a bad name, the latest strategy is to rename it "Traditional Trade Authority."

Call it what you will, the system now known as Fast Track is just the proper name of one version of how Congress can delegate to the Executive Branch its exclusive constitutional authority to set international commercial rules. Yet, most Members of Congress were not in office before 1974 when Fast Track was established so they do not know that trade delegation has been done in different ways over the years.

Fast Track's structural design harkens back to a day when trade negotiations were about tariffs and quotas only. The Fast Track delegation mechanism, which was only used five times since its 1974 establishment, has now been outgrown by the reality of what is covered in today's international commercial negotiations, such as environmental, food, worker safety and local banking and tax standards.

Regardless of whether new negotiating objectives, such as on labor or environment, would be added to Fast Track, its structural design forecloses the enhanced role now necessary for Congress and citizens to confront the challenge of our age: globalization. A fact little known outside of trade lawyer circles is that Fast Track's negotiating objectives since 1988 already included linking market access to core labor standards.[(1)] That this binding objective was totally ignored in the 1994 GATT Uruguay Round and 1993 NAFTA is the best evidence that it is not the negotiating objectives in Fast Track, but the actual authority delegation mechanism itself that must be changed.

A forward-looking new trade authority delegation mechanism to replace Fast Track will be required simply to obtain what many in Congress and outside have stated time and again as their position on acceptable trade agreements -- those with "enforceable labor, environmental and other public interest provisions in their core texts." This is the case because to obtain such agreements, Congress must retain significantly greater accountability over negotiators. The congressional committees whose substantive jurisdiction is now covered in negotiations must have a role and the public must have more access.

Historically, the way the branches have shared authority for international commercial rule-making has changed as have the circumstances of international commerce. The many Members of Congress who supported the 1991 fast track extension and opposed fast track in 1997 learned through the experience of NAFTA that circumstances had changed drastically while the mechanism for U.S. trade negotiation had not kept up.

2. Policy Premise: U.S. Constitution Requires Congress and Executive to Share Trade Power

The U.S. constitution gives exclusive authority to the Legislative Branch "to regulate Commerce with foreign nations." [(2)] The Constitution gives exclusive authority to the Executive Branch for relations with foreign sovereigns. Thus, the negotiation and entry into international commercial agreements requires a shared authority between the branches.

This design is one of many checks and balances built into the U.S. constitution to avoid one branch of government from having absolute control of a vital policy area. Indeed, review of historical documents from the time of the constitution's framing shows that granting Congress the authority to regulate foreign commerce was an intentional decision to move away from the European model, which gave control of such matters to the "king," and instead to put that power in the body "closest to the people."

3. Historical Context: Why a New System of Trade Policy-making Is Needed

As both the nation and international commerce have changed, different mechanisms have been created to manage this sharing relationship between the branches. Prior to 1934, Congress maintained a tight control over every detail of the substance of international commercial agreements, delegating to the Executive Branch only the authority to sign agreements with foreign sovereigns that set specific tariff and quota rates approved by Congress. This system operated well when negotiations were conducted only bilaterally and were limited to specific products.

The 1934 Reciprocal Trade Agreements Act was passed in recognition that circumstances had changed: negotiations on tariff and quota levels were more often multilateral and multi sectoral. Thus, with the 1934 Act, Congress delegated to the Executive Branch multi-year authority to set tariff and quota levels within a specified range without requiring further congressional approval. This new authority was called "tariff proclamation authority." It allowed the Executive Branch to proclaim tariffs changes within the congressionally permitted band. It was the basis for the first five rounds of negotiations for the General Agreement on Tariffs and Trade (GATT.)

The next change in the form of trade authority delegation came in 1974. The issue at hand was how to deal with the few non-tariff issues then newly arising in international commercial negotiations. The specific problem which led to the establishment of Fast Track was a fight over how to deal with changes in tariff classifications negotiated in the 1960s Kennedy Round of GATT. The Executive Branch had not gotten additional authority from Congress to commit the U.S. to terms beyond changes to tariff and quota levels, yet did so anyway. This change pertained to the domestic laws that designated how different goods were to be classified by tariff categories. This move caused a turf fight between branches about how the Executive Branch would delegate authority for issues that could require changes to existing domestic federal law, a matter clearly in the sole jurisdiction of the Legislative Branch.

President Nixon had proposed that Congress grant the Executive Branch a proclamation authority to simply declare changes in U.S. federal law agreed to in international commercial negotiations without requiring congressional approval of such changes. Besides being unconstitutional, this proposal was politically unacceptable to Congress.

With the next Tokyo Round of GATT pending, Congress agreed to delegate half of the requested power through the mechanism we now call Fast Track. Under this new delegation mechanism, the Executive Branch could negotiate terms that would require changes in domestic law and enter into such agreements, thus binding the U.S. in international law to such changes. Fast track provided Congress with a vote on the final amendment of domestic laws, but only after the contents of such amendments had been pre-determined by the negotiations and signing of the binding legal agreement text.

Also, unlike any previous law or any created to date, the Fast Track delegation mechanism?set in advance the procedural terms for later congressional floor consideration of conforming legislation. The Executive Branch would write the amending legislation, normal congressional committee procedures (such as committee amendments called mark ups) would be suspended, the legislation would be given privileged access to the House and Senate floor no later than 90 days after the Executive submitted it and absolutely no amendments or Senatorial floor prerogatives would be allowed.

4. Fast Track Concept is Outdated and Must Be Replaced

When Fast Track was established, the issues under consideration in international commercial agreements were narrowly limited to traditional trade matters. For instance, the first use of fast track was for the 1979 GATT Tokyo Round Agreement.[(3)] The Tokyo Round implementing bill was a thin document of under 50 pages; few U.S. laws were modified. The only nontariff issues even discussed in the Tokyo Round were customs classifications, a non-binding, non-enforceable product standards code, fine tuning of existing anti-dumping rules and some limited government procurement policies. The second use of fast track was the U.S-Israel Free Trade Agreement of 1995.[(4)] The pact's entire implementing bill was less than four pages long and pertains only to lowering tariffs and rules on government procurement between the two countries. Only with Fast Track's third use, for the 1988 U.S.- Canada Free Trade Agreement, did the issues under discussion in "trade" talks begin to expand into new areas. The U.S.-Canada Agreement made some changes to domestic agriculture, banking, investment, food inspection and other policies. This was the first trade agreement implementing bill that spanned over one hundred pages.

The 1993 NAFTA and 1994 GATT Uruguay Round exploded the boundaries of what was included in "trade" pacts. NAFTA, GATT-WTO and their implementing bills rewrote huge swaths of U.S. law.[(5)] The pacts required the reshaping of domestic laws on service industries and investments, not just terms for trade in goods. Each of these agreements' implementation bill contained over 1,000 pages of changes to a vast array of U.S. laws. Each also had a court system with economic penalties, but not the due process guarantees of domestic law.

Whether or not the Fast Track delegation mechanism was suitable in the past, it is clearly no longer appropriate for the broad areas of domestic policy and law implicated in today's international commercial agreements.

1. Omnibus Trade and Competitiveness Act of 1988, Section 1101(b)(14).

2. U.S. Constitution, Article II, section 8.

3. Trade Agreements Act of 1979 (P.L. 96-39, July 26, 1979).

4. U.S.-Israel Free Trade Agreement Act, 19 USC 2112, 1985.

5. 9. As NAFTA'S implementing bill rushed by on fast track, few Members of Congress even recognized the diversity of laws being changed. For instance, NAFTA'S implementing bill made substantive amendments to U.S. meat, poultry, and live animal inspection laws to permit imports from NAFTA countries that do not comply with U.S. food safety laws (NAFTA Implementation Act (Dec. 8, 1993), Pub. L. No. 103-182, ? 361(b), (c), ? 361(f) amending 21 U.S.C. ? 466(d).(Also affected were laws on the length and weight of trucks on U.S. highways, local banking rules, telecommunications laws, intellectual property laws, how states can spend tax dollars, investment rules, consumer labeling laws and much more.

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