

AMERICAN BAR ASSOCIATION
SECTION OF INTERNATIONAL LAW AND PRACTICE
RECOMMENDATION TO THE HOUSE OF DELEGATES

RESOLVED, That the American Bar Association supports the renewal of legislation providing for the fast track negotiating authority of the President of the United States, as introduced in the Trade Act of 1974 and later extended.

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REPORT TO THE HOUSE OF DELEGATES

1. The United States, as a founder of the liberalized world trading system established by the General Agreement on Tariffs and Trade (GATT), as a signatory to the Agreement Establishing the World Trade Organization (WTO), the North American Free Trade Agreement (the NAFTA) and other important international trade agreements, and as a participant in ongoing discussions toward the development of a Free Trade Area of the Americas (FTAA), has an important national interest in maintaining the integrity of these international agreements and in pursuing the further liberalization of international trade. For these reasons, the American Bar Association continues to support efforts of the Government of the United States to liberalize international trade, consistent with the objectives as stated in the preamble to the agreements constituting the WTO of raising standards of living and allowing for optimal use of the world's resources in accordance with the objective of sustainable development.

2. Since the Reciprocal Trade Agreements Act of 1934, Congress has periodically delegated authority to the President to negotiate trade agreements with other nations, subject to approval by Congress. However, this system of Presidential negotiation and ordinary Congressional approval did not always function to the satisfaction of the United States or its trading partners. In fact, disagreements between Congress and the President, which both play important roles in U.S. trade policy¹,

1 As stated by Professor C. O'Neal Taylor:

Trade negotiating authority, in its current form, provokes a great deal of attention and concern because the negotiation of international trade agreements requires the combined efforts of two branches of the federal government. By its terms, the Constitution gives Congress authority over U.S. international trade issues because it has the power to "lay and collect Taxes, Duties, Imposts, and Excises" and to "regulate Commerce with foreign Nations." On the other hand, the President is empowered to make treaties and has been described as the representative of the United States in foreign affairs matters. Thus, if the United States is going to enter

and to enhance Congressional involvement in the drafting of implementing legislation.

4. Fast track's procedures encourage interaction and cooperation between Congress and the President as the two branches develop an agenda for the President to pursue during negotiations which may result in the need for Congress to pass related domestic legislation. Referring to the cooperation required between Congress and the President under the Trade Act of 1974 and subsequent legislative improvements of fast track, Professors Ackerman and Golove posit that

[a]lthough the Constitution requires the senators to give their "advice" as well as their "consent" to treaties, this text lapsed into desuetude over the centuries. Today's Senate often confronts completed agreements that it can reject or revise only on pain of international embarrassment. In contrast, the Trade Act provides a dynamic framework through which Congress can give effective advice before the President signs on the dotted line...

[T]he Trade Act insists that the President consult with all relevant committees, include members of Congress in American negotiating delegations, and provide ninety day notice of an intention to sign any agreement. In discharging these functions, the executive must generate reams of paper explaining how its evolving proposals satisfy the Act's detailed statement of objectives. More important than the paper trail is the genuine discussion and serious horse-trading that goes on during the advisory period. Thus, this modern statute has redeemed the promise of "advice and consent" in a way that eluded the constitution-writers of 1787.⁴

⁴ Bruce Ackerman and David Golove, *Is NAFTA Constitutional?*, 108 Harv. L. Rev. 801, 904-905 (1995) (citations omitted).

process, fast track has played a significant role in expanding U.S. exports, reducing prices of imported goods, and improving the quality of life in the United States. As observed by the House committee during the 1979 extension of fast-track authority for an additional eight years (until January 3, 1988):

[E]xtension of this authority provides the President with an essential tool to reduce barriers to U.S. exports, a necessary element of export expansion, vital to U.S. economic well-being in the future.⁸

Prior to the most recent expiration of fast track authority in April, 1994, the procedure had enabled the United States to negotiate and implement the Agreement Establishing the World Trade Organization (the Uruguay Round GATT negotiation), the NAFTA, the U.S.-Canada Free Trade Agreement, and the U.S.-Israel Free Trade Agreement.

7. Other countries will not enter into a bargain with the United States that Congress could try to "reopen" through selective amendments. Thus, an up or down vote on the entire bargain is critical. This is why the European Union and Canada emphasized the importance of fast-track to the successful conclusion of the Uruguay Round and the NAFTA, respectively. Similarly, discussions with Mexico, Canada and Chile concerning Chile's accession to the NAFTA were suspended by Chile in 1995 when it was evident that fast track would not be renewed that year. Mexico and Canada now await renewal of fast track prior to engagement in further NAFTA negotiations.

8. Without fast-track authority, it appears there will be no meaningful negotiations to provide for the inclusion of additional countries within the NAFTA pursuant to its provisions

on consultations with Congress, requiring the USTR to submit an annual statement to the House Committee on Ways and Means and the Senate Finance Committee setting forth trade policy objectives and priorities, actions and legislation to achieve them, and progress toward their accomplishment. It also required the USTR to seek advice from congressional advisors and provided for Members of Congress to be accredited as official advisers to U.S. delegations to trade conferences, meetings and delegations.

⁸ Report of the House Committee on Ways and Means, Trade Agreement Act of 1979, H.R. Rep. No. 317, 96th Cong., 1st Sess. 184 (1979).

GENERAL INFORMATION FORM

Submitting Entity: Section of International Law and Practice

Submitted By: Lucinda A. Low, Chair, Section of International Law and Practice

1. Briefly summarize the recommendation.

The recommendation supports renewal of fast track negotiating authority, which enables the President to negotiate trade agreements (with extended consultation with Congress during the negotiation period) that are not subject to amendment by Congress during the approval process.

2. Indicate whether the recommendation was approved or will be considered, the governing body of the submitting entity which has or will approve it, and the date of such action.

Approved by the Council of the Section of International Law and Practice at its meeting on February 1, 1997.

If the vote was taken other than at a regularly scheduled meeting of the governing body, describe the procedure.

Not applicable.

3. If this or a similar recommendation has been submitted previously to the House of Delegates or the Board of Governors, include all relevant information.

A resolution approving extension of fast track authority for negotiation of the Uruguay round of trade agreements was approved by the ABA Board of Governors on May 9, 1991. (This resolution was narrow in scope and was limited to approval of a two-year extension of fast track negotiating authority for the Uruguay Round.)

4. Are there any existing ABA policies which are relevant to this recommendation, and if so, how would they be affected by the adoption of this recommendation?

Prior ABA support for fast track would be renewed. See above.

5. Explain what urgency exists which requires that action on this matter be taken at this meeting. If deferral is acceptable, note the time by which action is necessary.

Fast track legislation is to be a top priority of the new Administration and in the Congress. Hearings on the subject are expected in the first half of 1997. Action is

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11. Indicate the name of the person who will present the report to the House and who should be contacted at the meeting when questions arise concerning its presentation and debate.

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12. Indicate if there are any known proposed amendments at this time and the name, address, telephone, fax and ABA/net number of the person to contact.

None