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BOOK REVIEWS

Fast Track: A Legal, Historical, and Political Analysis. By HAL S. SHAPIRO, Ardsley, NY: Transnational Publishers, 2006. ISBN 1-57105-178-3, xvii 395 pp.

The 'fast track' trade agreement procedures in the United States—also known as trade promotion authority (TPA)—will expire on 30 June 2007. In other words, that is the last day that new US trade agreements can be entered into and still qualify for expedited consideration and approval by the Congress. (A trade agreement signed before 1 July 2007 maintains its eligibility for fast track and can be submitted to the Congress by the President at any time.) That fact alone might be of little moment to international economic policymaking if the United States were an average-sized country; however, the political and economic clout of the United States makes fast track a concern for the global trading system. In early 2006, World Trade Organization (WTO) Director-General Pascal Lamy commented that the timetable of US negotiating authority 'is today determining the calendar of our negotiations which will need to conclude by the end of 2006 to allow the US administration to act within the current US fast track authority'.[1] Now that WTO Doha Development Round negotiators have failed to meet that deadline, the future of the Round has become intertwined with the renewal of US fast track authority. Fast track's impending demise also endangers US bilateral free trade negotiations because they too benefit from fast track's special procedures.

The easiest way for the US Congress to re-energize fast track would be to reset the expiration date to 2010 or beyond. Whether that scenario is possible depends on the outcome of the fall 2006 congressional elections. The last general expiration of fast track in 1993 was followed by a short extension for the ongoing Uruguay Round negotiations, and after that came a long and frustrating eight-year hiatus in US TPA. As this book review is written in September 2006, fast track renewal is once again poised to become a contentious and hotly debated issue in US trade policy.

The coming debate will be edified by the well-timed release of a new book presenting a historical, legal, and policy analysis of fast track. The book is authored by Hal Shapiro, an international business and trade lawyer practicing in Washington, DC. Shapiro worked on the issues discussed

[1] Pascal Lamy, 'The Doha Development Agenda: Sweet Dreams or Slip Slidin' Away?', 17 February 2006, http://www.wto.org/english/news_e/sppl_e/sppl19_e.htm (visited 3 September 2006).

in the book as an economic policy official in the Clinton administration's National Economic Council. Although fast track has been the subject of numerous articles over many years and at least one edited volume, this is the first major book on fast track to be published. Shapiro has assembled a great deal of valuable information and presents it in a lively style.

The book makes its strongest intellectual contribution in discussing the constitutional and legal aspects of fast track. Under the fast track/TPA procedures, the Congress gives its own authorization[2] to the President to negotiate trade agreements with other countries and then to submit such agreements to the Congress for approval and implementation. Unlike the treaty approval process that requires consent by two-thirds of the US Senate, the approval of trade agreements under fast track occurs through the enactment of a law by bicameral majority votes.[3] A two-house majority vote is not necessarily easier to obtain than a two-thirds vote in the Senate. Rather, the real advantage of fast track is that the President is guaranteed an up or down vote on the implementing legislation that he (or she) submits to the Congress. As Shapiro explains, 'fast track prevents Congress from amending an agreement, from filibustering it, from bottling it up in committee, or from otherwise engaging in delaying or other tactics to frustrate an up-or-down vote' (p 5).

The Congress signs on to this self-discipline for pragmatic and for political reasons. 'The President offers the Congress more information about and a greater say in the negotiation of international trade agreements' (p 56) than the Congress enjoys in many other international negotiations. Moreover, the Congress has long recognized that reciprocal trade liberalization cannot be easily accomplished through the regular legislative and treaty processes.[4]

A question often asked about trade fast track is whether this method of approving international agreements is constitutional. International agreements that gain congressional approval outside of the Senate's 'advice and consent' process are known as 'Congressional-Executive agreements'. Many decades ago, when trade agreements were largely about tariff cuts, the US Congress gave advance approval to such agreements. Then, in 1974, as trade agreements began to address non-tariff barriers, the Congress developed the technique of approving such agreements after they were negotiated by the

[2] That is, the Congress adds statutory authorization to whatever constitutional authority the President has to negotiate trade agreements.

[3] See John H. Jackson, 'The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results', in Jackson (ed), *The Jurisprudence of GATT & the WTO* (Cambridge: Cambridge University Press, 2000) at 367, 377–78.

[4] Appendix B of Shapiro's book is a very useful 211-page compilation of the key provisions of trade negotiation authority legislation (and unadopted legislation) since 1934. One unfortunate editing error has the book captioning the Trade Act of 1974 as the Act of 1978.

President and reviewed by the Congress.[5] Such approval can be done with or without fast track in place. Yet in the absence of US fast track, other countries may hesitate to finalize (or even to negotiate) a trade agreement with the United States. Although the constitutionality of Congressional-Executive agreements is sometimes questioned, Shapiro brushes away such arguments quickly and concludes that these agreements may cover the same subject matter as a formal treaty and may extend as far as Congress' power to legislate. That conclusion seems correct to me.[6]

The constitutional problem with fast track on which Shapiro focuses is a more subtle set of issues that has not received much attention. That is, could fast track be an impermissible 'legislative entrenchment' or, alternatively, an impermissible 'legislative veto'? Fast track is a set of special rules in the House and Senate for considering and voting on trade agreements. These rules were written into the Trade Act of 1974, and US law states that the rules 'are enacted by the Congress—(1) as an exercise of the rulemaking power of the House of Representatives and the Senate, respectively, . . . and (2) with full recognition of the constitutional right of either House to change the rules . . .'[7]. In legislative entrenchment, one Congress writes rules that bind future Congresses. Shapiro argues that 'the Supreme Court disfavors legislative entrenchment' (p 58), and he explains that the US Constitution provides that '[e]ach House may determine the rules of its proceedings . . .'[8]. Although Shapiro sees 'some force' to the argument that with trade fast track inscribed in a statutized rule, the 'Congress has engaged in impermissible legislative entrenchment' (p 59), he concludes that because the rule makes clear that each House can change it, the problem of 'legislative entrenchment seems to be avoided' (p 60).

[5] Shapiro notes that the idea of fast track was developed by US Senate Finance Committee staff (p 14, n 29, and Appendix C) in response to the House-passed Trade Reform Act of 1973. Further detail is warranted here to supplement Shapiro's book and also the historical account in the now-classic I.M. Destler's *American Trade Politics* (4th edn, Washington: Institute for International Economics 2005). The House bill had provided for the President to issue proclamations and orders to implement a trade agreement, and such implementation would automatically take effect unless either House adopted a resolution of disapproval. One senate staffer, Dick Rivers, was especially disturbed about the implications of giving so much authority to the President. Working with others, he became the father of the idea of the trade fast track. See 'Richard Rivers International Trade Mediator, Lobbyist' (obituary), *Washington Post*, 9 May 2006. Thanks to Bob Cassidy (who, as a Senate staffer, was also one of the innovators of fast track) for providing me details of the events in 1974.

[6] Shapiro says that the issue of whether the Congressional-Executive agreement is constitutional 'has, to date, escaped review by the Supreme Court' (p 47). That is true, but dicta in a recent Supreme Court decision about an executive agreement offers some confirmation that executive agreements can be approved by Congress. *American Insurance Association* v *Garamendi*, 539 US 396, 415, 436 n 3 (2003).

[7] 19 USCS §2191(a).

[8] US Constitution, Article I, §5, cl. 2. Shapiro's book gives an erroneous citation (p 57) for this provision. His book is not as carefully edited as it should have been.

But that solution leads to the other horn of the dilemma. Because the Congress has placed the expedited procedures of fast track into federal law, the availability to the Congress of several ways to turn fast track off (known as 'disapproval')[9] raises a question of whether the Congress would be impermissibly changing statutory law outside of the normal process of approving a new law and presenting it to the President for signature. So far, neither House of Congress has taken action to withdraw fast track. Nevertheless, the possibility of doing so engenders 'serious constitutional questions' (p 71), Shapiro says.[10]

Shapiro's book explores these issues and argues that even though the fast track provision proclaims that it is an exercise of the *rulemaking power*, a functional analysis shows that the 'fast track provisions are more than rules' and not merely '*internal* matters to Congress' (pp 70–1).[11] Shapiro claims that the possibility that either House could change the rule 'appears to violate the constitutional bicameralism and presentment to the President requirements for modifying legislation' (p 152).

If Shapiro is right, then fast track's delicate institutional balance between Congress and the President might not be sustainable. The reviewer is doubtful that Shapiro is right, however, because the US Constitution does not state that Senate rules must be adopted only via a Senate resolution rather than via law. Nevertheless, the constitutionality of fast track is not free from doubt. On several occasions, the US Supreme Court has invalidated creative legislative procedures that blended congressional and executive powers in order to solve knotty inter-branch problems. For example, the so-called Congressional veto and line item veto were struck down by the Supreme Court.

To remedy the Constitutional violation he sees in fast track, Shapiro recommends that the Congress embed trade fast track 'in its ordinary rules and not in legislation' (p 152). Furthermore, he suggests an open-ended, rather

[9] The Bipartisan Trade Promotion Authority Act of 2002 provided two ways in which fast track could be withdrawn by Congress: (1) both the House and the Senate vote to pass a disapproval resolution stating that the President has failed to notify or consult with the Congress, or (2) either the House or the Senate votes to disapprove the two-year extension from 2005 to 2007. Also, either House can turn off fast track by changing its rules unicamerally.

[10] I take it that Shapiro is arguing that even the possibility of retracting fast track is unconstitutional. He says that Congress cannot 'reserve for itself a right of unicameral repeal' (p 153) of a provision of law. Shapiro admits that fast track could escape being struck down by the courts because of the political question doctrine, but he says that 'the courts should not sidestep the issue' and should review fast-track 'with a suspicious eye' (p 76).

[11] The italicized 'internal' refers to the Supreme Court's *Chadha* decision wherein the Court referred to congressional internal matters as an exception to the rule that any congressional action having the force of law is subject to the bicameral passage requirement and presentment to the President. *Immigration and Naturalization Service* v *Chadha*, 462 US 919, 955–56 n 21 (1983).

than time delimited, authorization in order to avoid the need for re-debating fast track every few years. Shapiro writes: 'It is counterproductive to turn fast track into a quest in its own right' (p 151).

Making fast track more durable is sound policy and is long overdue. During the Uruguay Round, the pending expiration of US fast track served as a useful de facto deadline for the global negotiations. But that gambit failed to work in the Doha Round. Today, as Shapiro notes, the built-in expiration of fast track 'is arbitrary and can be a major impediment to advancing trade talks' (p 153). The impending expiration of fast track could mean a return to what Shapiro aptly calls 'the damaging stalemate that governed during the eight years preceding enactment of the Trade Act of 2002' (p 160).

Shapiro's other idea—his solution to the purported constitutional problem—would not be easy to implement because the expedited procedures in fast track can only work if the House and Senate rules intermesh in order to guarantee a vote on identical proposed legislation. Although placing fast track rules in a statute is not the only way to ensure that the House and Senate rules match up, a statutory vehicle may be the best approach for getting the two Houses to agree simultaneously to mutually-compatible procedures.[12]

The looming US debate on renewing fast track will once more raise the topic of whether fast track is necessary in the first place. Shapiro devotes a thoughtful Chapter 6 to this question wherein he explains that fast track becomes useful whenever a trade agreement requires US implementing legislation, as modern trade agreements do. Moreover, as he observes, 'America's negotiating position is stronger when foreign governments are assured that complex trade agreements requiring extensive changes to US laws will be given a timely up-or-down vote' (p 150–51). Yet, Shapiro also argues that 'future Presidents would be well-advised to postpone seeking fast track until a compelling case can be made that contemplated negotiations will yield agreements of sufficient complexity and scope to necessitate fast track' (p 157).

I find this argument perplexing. Looking ahead, such a compelling case will typically be present so long as fast track is available. With fast track unavailable, US negotiators will gradually become less focused and less productive, and the absence of an immediate need for fast track will be mutually reinforcing with an empty trade policy. Indeed, that was the unfortunate predicament of the Clinton administration after Republicans

[12] Shapiro calls for the House and Senate to cooperate in 'negotiating a common set of rules' (p 152). But no matter how warranted, House–Senate cooperation is hardly inevitable. Moreover, there is a benefit in having the President record his agreement to the fast track process by signing the authorizing legislation.

took control of the Congress in 1994. As Shapiro recalls, 'in 1997 and 1998, with no trade agreement pending, fast track failed in the House' (p 151).

Although Shapiro supports the use of fast track, he believes 'there is greater scope to secure approval of trade agreements without fast track than is generally acknowledged' (p 157). He points to congressional approval of the US–Jordan Free Trade Agreement to show the viability of the no-fast-track option. Indeed, at one point, Shapiro says of fast track, 'it is not necessary, and it does not promote the right debate' (p 161). Recently, US Senate Finance Committee Chairman Charles Grassley publicly pursued a similar line of argument, averring that, 'Maybe even without negotiating authority you could still continue to negotiate bilaterally'.[13] As Senator Grassley further explained, if the US Congress were to amend a bilateral trade agreement, which it could do without fast track in place, it could be possible for the United States to go back to the country with which it is negotiating and ask if it could agree to the change.

Shapiro is right that fast track is not absolutely necessary, but without fast track it would be much harder to negotiate and consummate trade agreements.[14] The free trade agreement with Jordan notwithstanding, there will be severe practical difficulties for Congress in trying to approve a trade agreement without fast track. A decade ago, there were some optimists (including senior trade officials in the Clinton administration) who claimed that the United States could successfully negotiate with Chile and other countries in the absence of fast track. Yet, the thin trade agreement record of the 1995–2001 period stands in marked contrast to the productive period for free trade negotiations since 2002. Readers who want to study these trends and causal relationships further could start with the prescient 'No Fast Track' scenario put forward and criticized by Jeff Schott in early 1998.[15]

Shapiro's discussion in Chapter 6 of whether fast track is necessary looks beyond the United States. This brief discussion of the parliamentary situation in other countries is valuable. (In a recent article in this Journal, Erika Mann, a member of the European Parliament, wrote that, 'In democracies, parliaments are usually consulted before international negotiations are kicked off, and they must ratify trade agreements once they have

[13] 'Grassley Says Fast Track Might Not Be Necessary for Bilateral FTAs', *Inside US Trade*, 11 August 2006.

[14] For that reason, critics of trade liberalization are often hostile to fast track and criticize it as unconstitutional or anti-democratic. Shapiro wryly notes that 'perhaps the greatest irony of fast track is that it has come under attack as being undemocratic and for undermining public accountability when it was actually designed to enhance congressional oversight . . .' (p 3).

[15] See Jeffrey J. Schott, 'Whither Fast Track?', in Schott (ed), *Restarting Fast Track* (Washington: Institute for International Economics, 1998) at 29, 30–3.

been signed'.[16]) Shapiro points out that the United States is not the only country that faces difficult votes to implement trade agreements. For example, in Australia, the implementing legislation for the US–Australia Free Trade Agreement had to be negotiated among different parties in Australia's House and Senate. In addition to Australia, the book provides a brief discussion of the European Union and Switzerland. Based on this analysis, Shapiro says 'it is safe to conclude that there is nothing so unique about the U.S. form of government that makes fast track necessary' (p 104). His analysis ends abruptly at that point, however, and does not consider whether other WTO members besides the United States would benefit from a fast track procedure.

One overall theme in the book is that fast track gets more attention than it should and has become a 'distraction' (p 162) from the more important need for a US 'national globalization strategy' (p 144). Shapiro laments that the 'lack of clear vision has led the United States to fall dangerously behind in the "trade race"' (p 129). To remedy this gap, he recommends a number of policy changes for the United States to become 'more competitive' (p 146) and 'to better arm its people to wage battle in free markets' (p 144). For example, he calls for improving public education, creating a 'culture of excellence' (p 147), expanding and streamlining the US trade adjustment assistance programme, extending the research and development tax credit, and simplifying federal regulations.

Shapiro is surely correct that fast track is just one small component of an overall US competitiveness policy. Yet, while his book offers a useful roadmap on fast track, the book does not dig deeply enough into the multiple challenges of competitiveness to make a significant contribution to those policy debates. For example, the book contains almost no analysis of the appropriate responsibilities of the national government, states and localities, business enterprises, and most importantly, natural persons.

The book envisions improving US competitiveness as a way to diminish the polarization in trade politics that has pervaded the US Congress during the past decade. The erosion of bipartisanship on trade is certainly lamentable, and Shapiro gives due attention to this continuing problem.[17]

[16] Erika Mann, 'A Parliamentary Dimension to the WTO – More Than Just a Vision?!', 7 JIEL 659 (2004), at 660.

[17] The book contains a useful set of tables on the key congressional votes on trade negotiating authority since 1974. The tables show the voting percentages of Democrats and Republicans in the House and Senate. In the 2002 enactment of fast track/TPA, the Democratic support in both the House and Senate was less than 50%. Shapiro notes that although the Republican Chairman of the House Ways and Means Committee titled the bill 'Bipartisan Trade Promotion Authority,' the top Democrats on the Committee immediately complained that they had not even been consulted. If the Democrats regain a majority in the House following the November 2006 elections, they will have a chance to restore the trade bipartisanship whose absence they regularly lament.

In the chapters on the history of fast track, Shapiro discusses the inability or unwillingness of the Republican-led Congress to grant fast track authority to the Clinton administration from 1995 to 2001, and then the conflicts and mischief that occurred in 2002 when the Bush administration and the Congress succeeded in getting TPA adopted by 'razor thin margins' (p 150) after promising several protectionist payoffs.

As Shapiro notes, when the Congress withheld fast track authority from the Clinton administration, the ostensible reason was a sharp disagreement about whether US negotiating objectives should include outwardly directed labour and environmental goals. Yet in 2002, that disagreement was erased after labour and environmental linkages were mainstreamed into US trade negotiations.[18] Shapiro observes that, 'the enactment of Trade Promotion Authority legislation and the agreements approved subject to it have revealed that conservative opposition to "linkage" in the United States may be waning' (p 137).

Looking ahead, Shapiro ponders whether it is now time to move away from environmental and labour linkages and to work to achieve these objectives by enhancing the international programmes designed to do so. He calls for 'putting industrialized country money where our mouths are' (p 145). Although Shapiro rightly notes that the labour and environmental goals being sought by the United States in trade liberalization agreements could be pursued by other means, I doubt that there would be much political support for removing these objectives the next time that Congress considers Presidential trade authority. Shapiro's book does not explore the implications of the Bush administration's unexpected attentiveness to worker rights in the negotiation and implementation of free trade agreements.

Shapiro devotes Chapter 7 to the subnational dimension of US trade agreement implementation. After reviewing the history of how the General Agreement on Tariffs and Trade dealt with subnational measures and how national-level responsibility was enhanced in the WTO, Shapiro discusses the provisions in US law for dealing with a situation where state law constitutes a violation of WTO rules.[19] Shapiro sees deficiencies in the US provisions because they contemplate the federal government suing states or localities in court in order to have an offending measure set aside. Instead, he proposes a two-track solution: First the executive branch could announce federal policy with respect to the subnational governmental measure in contention. Secondly, if the offending measure is not changed, then the executive branch could ask a federal court to nullify the measure based on a certification that the measure is harmful to federal policies. In addition, Shapiro urges

[18] The current disagreement between Democrats and Republicans is whether the United States should make conformity to international labour standards a goal for new trade agreements.
[19] 19 USCS §3512(b)(2), (c).

that the federal government give states some latitude 'to play a role in the international economic order…' (p 123). He tags this approach 'Madisonian' (after James Madison) in that it would leave some room for the states to be 'a limited counterbalance to the great weight of the federal government in regulating foreign commerce' (p 123).

Despite a few weak spots, Shapiro's *Fast Track* presents a thoughtful and highly readable analysis of many of the key issues surrounding that legal mechanism. I completely agree with Shapiro's assessment that 'Presidents and congressional leaders tend to rely on tried and true methods—that is, they are reluctant to be bold and innovative' (p 135). With trade promotion authority due to expire in less than a year, Shapiro's book will be valuable to anyone who works on these issues, including veterans of past fast track debates.

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Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law. By Jennifer A. Zerk, Cambridge: Cambridge University Press, November 2006. ISBN-13: 9780521844994 | ISBN-10: 0521844991, 369pp.

Jennifer Zerk's new book, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law*, addresses one of the most unsettled and ambiguous areas of law: the control of multinational corporations (MNCs) and the relevance of corporate social responsibility (CSR) in the discourse. The debate has spanned several decades and has informed various initiatives at national, international, regional, and private levels aimed at tackling the challenge.

The central theme of the book is that while international law has its limitations (primarily its 'state-centeredness'), it also offers more opportunities for the social and environmental regulation of MNCs than many assume. In advancing this idea the author focuses mainly on the role of home states and MNCs themselves.

MNCs for Zerk are comprised of a parent company, located in a home state and linked to its foreign affiliates through a relationship of control. Zerk argues that MNCs have defied national boundaries, thereby limiting the ability of national law to regulate their activities. In relation to international law, the position of MNCs has remained ambiguous. MNCs are often viewed as falling outside the sphere of international law. Therefore, even if corporations violate jus cogens (peremptory norms from which no derogation is permitted), there is no international forum in which they could be