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No. 7 - The Future of International Trade: An American Perspective

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Occasional Papers

Dean Rusk Center

University of Georgia School of Law

Number 7

The Future of International Trade: *An American Perspective*

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The Future of International Trade: *An American Perspective*

PANEL 1: BUSINESS ASPECTS OF INTERNATIONAL TRADE

PANEL 2: CHALLENGES FOR THE FUTURE OF INTERNATIONAL TRADE

KEYNOTE ADDRESS BY AMBASSADOR DEMETRIOS MARANTIS, DEPUTY U.S. TRADE REPRESENTATIVE

PANEL 3: FUTURE OF MULTILATERAL TRADE NEGOTIATIONS AND DISPUTE SETTLEMENT

NUMBER 7 FALL 2011

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The Future of International Trade: *An American Perspective*

Organized and sponsored by the Dean Rusk Center for International Law and Policy and the University of Georgia's Terry College of Business, along with the Business Law Society and Graduate Business Association, *The Future of International Trade* was a daylong conference exploring issues related to the business aspects of international trade, future challenges for trade, and the future of multilateral trade negotiations. Ambassador Demetrios Marantis, deputy U.S. trade representative, served as the keynote speaker for the event.

Edited by: Laura Tate Kagel, Assistant Director, Dean Rusk Center for International Law and Policy, University of Georgia School of Law

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The Dean Rusk Center for International Law and Policy

The Dean Rusk Center was established in 1977 to expand the scope of research, teaching, and service in international law and policy in order to increase understanding of international issues, provide a sound basis for foreign policy decision-making, and contribute solutions to global problems. Today the Center serves as a nucleus for collaboration between University of Georgia School of Law faculty and students, the law school community, and diverse international partners on foreign and transnational legal and policy matters.

In fulfillment of its mission to globalize legal education at the University of Georgia, the Rusk Center administers a Master of Laws (LL.M.) program that brings students from around the world to our campus to deepen their knowledge of international and U.S. law. Every year the Center also invites scholars from abroad to engage in collaborative research with faculty and to teach short courses. In addition to faculty exchange programs with foreign universities, the Rusk Center administers a popular study abroad semester program for Georgia Law students at the University of Oxford, highly praised summer programs in Beijing and Shanghai, and Brussels and Geneva, and a Global Internship Program with placements in thirty countries around the world.

An important function of the Rusk Center is to provide a forum for the exchange of ideas about important international legal and policy matters. Every spring Georgia Law's international faculty hosts a colloquium series on timely topics in the field of international law. With the goal of engaging a broad audience on matters of global significance, the Center sponsors conferences and lectures with high-level policy makers, diplomats, scholars, and practitioners. The Rusk Center also offers guidance and support to international student organizations, including the *Georgia Journal of International and Comparative Law*, and frequently collaborates with them on organizing conferences and lectures.

Through its public service and outreach programs, the Rusk Center influences policy regionally and on a global scale. It has provided research and counsel to the Georgia governor's office on international trade issues since its inception, most recently by participating in the establishment of a trade office in China. In 2008, the Center's Director, C. Donald Johnson, a former ambassador for trade, met with President George W. Bush and his senior trade officials at the White House to advise them on current trade initiatives. Over the past thirteen years, the Center's renowned International Judicial Training Program (IJTP) has trained over one thousand foreign judges and court personnel and provided models for concrete judicial reforms in participating countries.

Finally, Rusk Center publications, such as this Occasional Papers series, disseminate the results of work done at the Center, including conference proceedings on diverse themes.

Further information on the Dean Rusk Center for International Law and Policy is available at:
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The Future of International Trade: *An American Perspective*

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The Future of International Trade: An American Perspective

February 18, 2011
Welcome

Rebecca H. White, Dean and J. Alton Hosch Professor of Law,
University of Georgia School of Law
C. Donald Johnson, Director, Dean Rusk Center for International Law
and Policy, University of Georgia School of Law

Rebecca White: It's a pleasure to be here this morning and to welcome you to Athens and to this conference on international trade. I am delighted to see the Terry College and the School of Law coming together as they have over the past five years to put together conferences such as this. This is the kind of interdisciplinary program that universities should be providing and we're delighted that we are. The array of talent that has been brought to Athens today to talk about these issues is so impressive and, on behalf of the law school, I want to say thank you to our students—our students at the law school and our students at the Terry College of Business—for all the work that they have done to bring this about. Conferences like these don't just happen; it takes an awful lot of work and most of that work is done by our students and we very much appreciate, Anne Marie, all you and your fellow students have done to bring this about. I am also very grateful to Don Johnson of the Dean Rusk Center, from whom you'll hear in a moment. As you know, international trade is a subject near and dear to Ambassador Johnson's heart and certainly also to the mission of the Rusk Center itself, and accordingly to the School of Law, so we are particularly delighted to have international trade as the focus of this conference. We're also going to go ahead and claim credit for the beautiful weather that you're going to be enjoying this week here in Athens. It is absolutely spectacular. We're grateful for it here on a nice February afternoon and morning. We hope that you do get some time while you're here, if you haven't been to Athens before, to get a little bit of what our city and our university have to offer. We have some alumni with us, and it's always a pleasure to welcome them back to Athens and to the law school, and we really appreciate their participation, as well as the participation of all of our other distinguished panelists and guests. Let me now turn it over to Ambassador Johnson, and again, on behalf of the School of Law, thank you so much for being here and for your participation in today's event.

Don Johnson: Thank you, Dean White. I just wanted to add one brief word of welcome on behalf of the Rusk Center. Many of you may not know what the Rusk Center is and I want to just put in one plug for it to let you know what the Rusk Center is. The reason I feel like I have to do this is that I went to the dentist yesterday and I was saying that

we were really busy getting ready for a conference at the Dean Rusk Center and she said, “The what Center?” I said, “The Dean Rusk Center. You don’t know who that is, do you?” She didn’t know who Dean Rusk was, and that’s the reason I have to say what the Dean Rusk Center is. The Dean Rusk Center was started in 1977 and, of course, it honors the former secretary of state under President Kennedy and President Johnson, who came here after he left the State Department and taught here for almost twenty-five years. He had a tremendous influence on this school, not only the law school, but also the whole campus. Gary Bertsch is here—he assisted him in starting his center, the Center for International Trade and Security. He was so influential and such a mentor to his students, as well as a great colleague for other faculty members.

The Center was started in 1977 to expand the scope of research, educational programs, and outreach in the area of international law, which was not just emerging then, but blooming at that time. It has been very successful in that mission. We have, of course, the LL.M. program. A number of our LL.M. students are here. We have study abroad programs, one in Brussels that we’ve had for over thirty years. We’re expanding it to add Geneva, a week in Geneva on international trade. Six years ago we started a program in China at two great universities over there, Tsinghua in Beijing and Fudan in Shanghai, with a large focus on international trade. As some of you know, we have some trade issues with China, and we think it’s important for us to be engaged. We have a lot of great speakers here, some of whom will be talking about China. One of our alumni, Audrey Winter, is the Deputy Assistant for USTR [The Office of the United States Trade Representative] on China. We have a great panel, many old friends and some new friends for us. We want to welcome you and I want to add my thanks to all the people who have been involved in putting this together, the people at the Terry College of Business, Rich Daniels, of course, as well as the staff, both here and there. I want to mention Blake McDaniel along with Anne Marie Pippin, who together have done such a wonderful job in the student organization of the Business Law Society to make this happen. Without further ado, I will turn it over to Mark Laplante, who is the moderator for the first panel, and he will introduce the speakers.

The Future of International Trade: An American Perspective

Panel 1: Business Aspects of International Trade

Moderator: Mark Laplante

Panelists: John Sheppard, Chris Papageorgiou, Charles Hunnicutt, William Gillon

Mark Laplante: Good morning and welcome to the Business Law Symposium. This is the Business Aspects of International Trade panel. We have some great guests today. We have John Sheppard, operating partner for Advent International. He is the former president of Coca-Cola Europe. We have Chris Papageorgiou, senior economist at the International Monetary Fund [IMF], which has been in the news a lot lately. We have Charles Hunnicutt, partner with Troutman Sanders. He is the former assistant secretary of transportation for aviation and international affairs. We are also pleased to have William Gillon, the CEO and president of the Cotton Board. Gentlemen, I believe we should kick this right off. I believe Mr. Sheppard will begin the presentation. Take it away.

John Sheppard: It's a pleasure to be here today and this is not going to be an advertisement for Coca-Cola. I really want to try to give you, in the brief opening remarks, a couple of real life examples about operating and how a multinational, global consumer giant like Coca-Cola handles its international trade. I specifically want to talk about Eastern Europe. I'm going to talk about a couple of things: the history of how Coca-Cola handled their international trade in the early '80s and '90s and what the future of international trade is all about with Coca-Cola. I was in Eastern Europe for about twelve years with Coca-Cola and basically what happened is that in the '80s, before I got to Eastern Europe, Coca-Cola's international trade consisted of mainly having Communist bottlers. There were very few imported goods in Eastern Europe and most of the products were made by state-owned bottlers. The soft drinks in Eastern Europe were what we used to call "bathtub brands," which meant anybody could go in their bathtub, mix up some product, and that would become a soft drink and they would put it on the shelf.

That moved in the late '80s, to what was known as countertrade. In countertrade, as you're well aware, the way we were able to get product into many of these Eastern European countries where there was very little Coca-Cola at all was to work with the governments, the Communist governments, particularly in Russia, Ukraine, and Poland. We would basically take countertrade vodka from these countries and sell

them Coca-Cola. That was how we were able to get Coca-Cola in there; they would export vodka and we would import Coca-Cola. That changed in the ’90s, and that was really a balancing point for Coca-Cola in regard to international trade. The interesting part here was how different companies handled it. Pepsi really decided to, what we call, strike early, and they signed deals with the existing Communist governments, which allowed them to get a head start on cola in Eastern Europe, but it locked them into some very unfortunate trade agreements with them. The quality was hard to control and there was very little marketing, but it was the fastest way at the time for Pepsi to stay in the market. They had a huge lead over Coca-Cola in terms of market share. Coca-Cola decided to wait and hold out for more advantageous business conditions, but mainly to wait for these deals they had signed years and years ago to run out, so that as soon as those government contracts ran out, Coke was going to come in with a different strategy.

That strategy really started in the late ’80s and the ’90s. I went to Poland in the early ’90s, so I want to give you a brief example of what we did there. In 1990, Pepsi was outselling Coke; Pepsi had state-owned bottlers, and they were in the market. Coke really had very little presence there. Pepsi had full distribution and production. Coke was really only available in less than half of the country and there was really no marketing or production. What we did in Poland in 1992 when I got there was to set up a system of anchor bottlers. Anchor bottlers are bottlers that have the same interests and are aligned with the Coca-Cola Company. This allowed us to work very closely as the bottler contracts with the government ran out, and have a very quick deployment of assets. We put in $250 million there, we built seven plants—we actually built one plant in ninety days—and we did what was called “paint the town red,” which was a Coke way of saying you go and put umbrellas and anything red anywhere you can. The effect of that was that, even though Pepsi had been ahead for quite a number of years, in about a two-year timeframe we were able to start outselling them by about three-to-two. It was a great way to show how they handled Eastern Europe, Poland being a microcosm of that. That same strategy was then applied to Ukraine, Romania, Bulgaria, Albania—pretty much all around Eastern Europe and many of the emerging markets.

What I want to take a minute now and talk about is the future of international trade and how Coca-Cola is looking going forward. In reality, in about 2000, Coca-Cola’s revenue growth in the U.S. had really flattened out. So there needed to be a plan; they had to change strategy to go forward. When you go way back, to about 1970, less than half of Coca-Cola’s income and revenue came from outside the U.S. and the company realized very quickly that the future growth from a revenue standpoint was going to have to come from outside the U.S., from international trade. So, for the future strategy Coke did something very interesting here, which was [to have] a different strategy for volume and a different strategy for profit. Being a public company, particularly on the beverage side, they have to show strong revenue growth and also profit growth. What Coke did is to say: We are going to do that in different ways. We’re going to go ahead and get our revenues from emerging markets, particularly China, going forward, and India and Eastern Europe, but we’ll continue to get our profits from the U.S. and

from Western Europe. Particularly in emerging markets, when you look at China, for example, the key is going into China and India and many markets like that with local bottlers, very low prices, but a lot of control from the Coca-Cola Company in terms of quality. Really all you're trying to do in that first stage is to get availability, get the product everywhere you possibly can to seed the market. The second stage is to bring in the aligned bottlers, the anchor bottlers, bring in a lot of marketing support and start to raise prices. Again, the strategy on the revenue side is so the company can report revenue growth at the top line. Using the emerging market growth, you get that top line growth. Profits at this stage are irrelevant in these emerging markets. Even today, Coca-Cola makes very little money from China, but the growth engine, the reason why they can report 4-5% revenue growth every year, is that they are getting that from China. The profit growth, though, all comes from the U.S. and Japan. So, basically, Coca-Cola went from having less than half of their revenues from international markets in 1970, to about 80% of their revenues projected to come from international trade by 2015. So with that, I'll turn it over to Chris.

Chris Papageorgiou[1]**:** Thank you very much. I also wanted to thank Anne Marie and Blake for putting this symposium together; they have done a wonderful job. Given that I work at the IMF, I thought it's best for me to give you an international perspective on the most recent trends of trade, particularly focused on two historic events of the last twenty years. The first is globalization, and I'll define it specifically in a few minutes, but basically these are all the reforms you have experienced since the beginning of the '90s, maybe mid-'90s, with reforms of trade, but also finance, politics, and the like, and of course the emergence of China and India. And then, of course, [there is] the global financial crisis. By way of introducing this, I want to make the point that these two historic events go back two centuries. If you look at trade trends going back in time you will find that globalization, different waves of reforms, and crises have defined these trends. So we have the same thing repeated now over the last twenty years, maybe with more force.

So let's start with globalization. Here I have in mind something that I'm sure a lot of you can relate to. The first [thing] is all of these waves of reform from the trade side, but with a lot of support from the finance side, the political side, and so on, that started, really, early in the '90s. In particular here, I'm thinking about emerging countries and low-income countries that basically occupied a very small share of trade prior to the 1990s now becoming major players, as we'll see with some figures. At the same time, right about the early 1990s, we had a technological revolution. It is enough to say that nowadays 50% of the products we use as consumers incorporate some type of intelligence, of technology, which is an amazing ratio.

At the same time, through all of this reform and this technological revolution, we have the emergence of a couple of bright stars, China and India. A lot of people here may

[1] The views expressed in this talk are the sole responsibility of Chris Papageorgiou and should not be attributed to the International Monetary Fund, its Executive Board, or its management.

not relate to this, we also have the rise of Russia and Brazil as major trade players. In fact, in Washington we call these four countries the BRIC—Brazil, Russia, India, and China. In many ways we think of them as a particular group of new rising stars. It will become clear why we think that even Russia and Brazil belong in this club. It is also important to highlight here that this great revolution of trade and technology affected for the first time not only advanced and emerging countries, but also developing countries. As we look into the future, all of a sudden low-income countries start being important players and at least have the chance to be important trade partners.

Let me start with a picture, which we won't have much time to explore here, but just to give a hint of what has been going on in terms of reforms. This is a picture—a graph—that was put together by the research department of the IMF, which shows the amazing number and magnitude of reforms which happened in the '90s. We have trade reforms, capital flow reforms, network and telecommunication reforms, in addition to current account and agricultural reforms. When you think of reforms, trade reforms, I want you to be thinking about a bunch of other reforms that happened at the same time that have aided trade. By the way, this is an aggregated picture; we sort of have indices aggregated at the most general level, including emerging, low-income, and advanced economies. These are subgroups of countries, so basically what you see here is not very distinguishable, but I want to make the point here that these reforms have happened everywhere. It's not as if these reforms happened in Asia versus Latin America versus Africa. It is interesting that these reforms truly had this global dimension. This is historic, because in the past reforms happened in particular regions, in particular income classes. What we see from this picture here is a convergence from emerging and low-income countries to the level of advanced countries. Basically you think of these reforms as relaxation of bad constraints. These reforms brought about openness in trade. How we measure this is simply by measuring imports plus exports. All of the reforms have happened and the outcomes are what you see in the top panel here, an explosion of trade imports and exports, and at the same time we have a slashing of tariffs.

As I mentioned previously, what happened in this period of reforms is the emergence of BRIC, of these rising stars. What I want to do here is to focus your attention on three lines. This line here shows you the GDP of the BRIC in 1991 and '94. This was 5.8% of the world GDP. From 2000 to 2004 it went to 8.5%, from 2005 to 2009 to 13.1%, and the forecasts from our colleagues at the Fund are close to 20% by 2015. Notice how closely correlated that ratio is to exports and imports. Exports went from 4.2% in 1991 to close to 10% of world exports in 2015, and these are conservative estimates. This is the lower bound. The same is true with imports; 5.1% of world imports were attributed to these countries in 1991, moving up to 12.3% in 2015. So this is a major change in terms of their being key players in trade. One thing that a lot of analysts are missing when they look at trade is what goes with trade. For example, this picture shows the outward FDI (foreign direct investment) from BRIC, from India and China, to all of their partners. From this we can see some type of a strategy by China and India. It's not as if they only do trade; on the other hand it's more about investing in the

places they do trade with. This picture is a very nice picture, which shows that there is a huge amount of investment, foreign direct investment, going to their trade partners. So there is trade, but [it is] also going hand-in-hand with major investment.

Now you may be wondering about whom China and India are trading with, and the simple answer is: with everyone. Here I have an example that makes the point. This is a small player in Africa: Tanzania. Look at what has been their export and import experience over the past six to seven years. From 2003, it's just explosive. You may have guessed right: They have been exporting crude material—oil, gold, and so on—and they have been importing manufactured goods. This is the story everywhere. We'll move to the challenges later.

I want to move very quickly and spend two minutes on the crisis. The crisis was unexpected and the effect of the crisis on trade was even more unexpected. We have seen an 18% drop in volume and 30% in value during the period of the crisis, which is huge. There has been much work in trying to understand this. It's all about global chains. It's all about having small intermediate goods that are traded many times before you produce an intermediate good that will be used later on. Every time you have trade changes now—all of the intermediate goods that were before produced in one country now are produced in many countries—trade for this good will also go down. From this point moving forward, ten to fifteen years from now, any time we see an upside or a downside in the trade market, it will be much, much stronger than before because of this global chain. The collapse was unprecedented. We have never seen a trade collapse like that in the past. However, there was a great recovery out of this collapse. This is also something that is a lot of work to understand. The point I want to make here is that there is a very clear correlation between trade recovery and, as I will show next, growth recovery. For the first time, we observed that growth recovery, which is shown in blue here, for low-income countries has been more pronounced than in emerging and advanced economies. Low-income countries, including African economies and East Asian economies, have been recovering out of this crisis a lot faster, and the reason is that they were not hit by the financial crisis, but rather by a trade shock that they were more used to. On the other hand, emerging markets have been hit harder because they were more involved in this financial synergy and therefore collapsed. And, of course, advanced economies had the hardest time escaping the crisis because the financial crisis was most profound for them.

I wanted to finish with challenges moving forward, and basically we are set up for an exciting twenty years to come. Looking twenty years back, I remember being a graduate student with my professors, not being able to get anyone to work on China issues. It was a dead country; we didn't have data; we didn't think that we had issues; socialist economics, and the like. Looking ahead now, unfortunately, I have to say that we don't know what we'll find in three or four years, so it is very hard, even from the Fund side and, across the street, the World Bank side, to make any meaningful forecasts. We know that things will be changing year-by-year, so we are going to be more like Bayesian updaters, in the sense that taking in information year-by-year and making short forecasts will probably be the best business strategy moving forward.

Charles Hunnicutt: Good morning, I'm delighted to be here. I hope you all have the handout that I provided of the slides, because I am eternally the optimist and have included a great deal more material than I'm going to be able to cover this morning. What I'd like to do this morning for this group of bulldogs for international trade, as I like to call the conference, is to move from what John has told us about how business is operating today in international markets, from Chris' macro description of where we are, to one particular type of structural reform that we can make in our own country, that we have control over, and that could make a significant difference. I want to say first, also, that I may run roughshod over some details here because I've got to move quickly to give you a little background on a technical area before we can talk about the reform of the area. I'm going to skip some slides as we go through, but if anyone has questions or wants to talk about some of those issues afterwards, I'll be glad to do that. I want to recognize also, as Ambassador Johnson did, Gary Bertsch here today, because I'm going to be talking about export controls, and the Center for International Trade and Security here in Athens, with an office in Washington, has become world renowned in the area of counseling governments and businesses on export controls, proliferation, and other issues. I urge you, if you're interested in this area, to grab Gary. He really is the expert and I told him earlier that he's not allowed to ask any questions today. This issue was interesting to me and I thought it would be interesting to the conference participants, because it comes at the real intersection of business, law, and politics right now in our history.

I want to give those of you who are not familiar with export controls a basic primer, so that you'll see the complexity and the potential impact. The United States regulates certain aspects for U.S. foreign policy for national security purposes. We also identify certain individuals and entities and prohibit U.S. persons and organizations from doing business with them. This slide shows the key export control and enforcement agencies. Each agency controls different aspects involving export of goods or services from the United States. Before I discuss this slide, let me just highlight that any item of data sent from the United States, not just hard goods shipped via air or ocean, is considered an export. In today's increasingly electronic manner of doing business, it's important that an export can occur at the click of your mouse or during a telephone call. Furthermore, any item of information which is restricted and export controlled in most cases cannot be further re-exported once it has arrived at its licensed, approved foreign destination without first obtaining additional approval from the U.S. government.

The questions on this slide are straightforward and give you the initial feedback necessary for an enterprise to begin due diligence and help determine the scope of any review and analysis for export license purposes. First, OFAC, the Office of Foreign Asset Control, which is part of the Treasury Department, administers and enforces economic and trade sanctions, such as the Iran Transaction Regulations and the Cuban Assets Control Regulations. OFAC's regulations target specific foreign countries and regimes, terrorists, international narcotics traffickers, and other specially designated nationals. U.S. exporters should always be checking the list of Specially Designated Nationals (SDNs) before entering into transactions with foreign parties. The OFAC

prohibitions can be either general, for a country, or specific to individuals. Currently the real comprehensive sanctions are for Myanmar, Cuba, North Korea (although not specifically listed as comprehensive, when you add everything up that are the sanctions of the U.S. government on Korea, they are completely sanctioned), Iran, and Sudan. All U.S. persons must comply with OFAC regulations, including all U.S. citizens. I'm going to talk a little bit about coverage a couple of times, because it's important and can be counterintuitive, as several of these regulations are. U.S. citizens and permanent resident aliens, regardless of where they are located, are covered by these regulations. It also includes all persons and entities within the United States, and all U.S. incorporated entities and their foreign branches. In cases of certain programs, such as those regarding Cuba and North Korea, all foreign subsidiaries owned or controlled by U.S. companies also must comply. As you can imagine, they can be a very complex and complicated compliance issue.

The next agency is the Bureau of Industry and Security at the Department of Commerce. This agency regulates the export and re-export of most "dual-use" items. These are covered by the Export Administration Regulations (EAR). The EAR contains the Commerce Control List (CCL); those of us who are old enough still call it the Commodity Control List, but it is now the Commerce Control List. The process is to check to see if an item is on the CCL and then look at the specific controls for the item for the country at issue using the country chart. A dual-use item is an item that has both commercial and military or proliferation applications. For example, the government will consider whether the item could be used for, or is essential to, the proliferation of weapons of mass destruction, including nuclear, chemical, or biological weapons, or missile technology. The government also considers whether an item needs to be controlled for purposes of national security, anti-terrorism, crime control, or other issues of regional stability. I'm going to skip discussion of the Wassenaar Agreement of the Australia Group, but there are multilateral arrangements to which the United States is a party, which require us to have certain particular controls. License requirements depend upon a number of elements in the transaction, including the item that is at issue, its technical characteristics, the destination, the end user, and the end use. So with each export you must ask: What am I exporting, where am I sending it, who will receive the item, and how will they use the item?—and you also have recordkeeping requirements. An enterprise, therefore, has to know its customer and every party along the supply chain. In some cases you are required to obtain an end use certificate from the customer, or you may wish to request such a document for your own protection. An enterprise should look for red flags throughout the transaction. If you look in the government guidelines and advisories, there will be a list of red flags for complying with these various controls. I usually give the example to clients: If the end-user is a bakery, but orders surreptitious listening devices, this is a red flag. If your customer is located in Switzerland and, upon closing the transaction, they suddenly request you ship the controlled item to China or Pakistan, this is a red flag. The export control regulation places legal responsibility on people who have information or authority, so, therefore, this may include exporters, freight forwarders, carriers, consignees, and other participants in an export transaction.

Finally, the third agency I want to cover is the Director of Defense Trade Controls (DDTC) of the State Department, which oversees the sale, export, and re-export of defense articles and defense services. This is the agency that enforces ITAR, the International Trafficking in Arms Regulations. Goods and services controlled by DDTC and ITAR appear on the U.S. Munitions List. The Munitions List has approximately twenty categories, including firearms, ammunition, tanks and military vehicles, aircraft, war vessels, nuclear weapons, and spacecraft systems. My work in this area, personally, is in spacecraft systems. All space launch and space systems, whether they are commercial or military, are by definition of the U.S. government "military." When determining whether an item is covered by ITAR, you need to ask yourself whether it is a defense article or service. In other words, ask whether the article or service is specifically designed, developed, configured, adapted, or modified for military application and does not have a predominant civil application. As we'll see in just a minute, when discussing reform policies, the Obama Administration is beginning to focus more on the function of the article and its capability, rather than the form, design, configuration, or adaptation for military uses. Currently, however, I have clients whose coffee pots and toilets are considered ITAR controlled, simply because their size has been modified to fit on board U.S. military aircraft. ITAR applies to any person who in the United States engages in the business of manufacturing, repairing, or exporting defense articles, defense services, and technical data. It also applies to brokers for these products, wherever located, who act as an agent for others in negotiating and arranging contracts, purchases, sales, or transfers of U.S. defense articles or services.

Remember my earlier comment: An export under the EAR and ITAR doesn't just occur when physically shipping items outside of the country in international trade. An export also occurs when you "export for export control purposes." Obviously, for normal, ordinary legal purposes, an export is still an export, but we call these types of transactions exports for export control purposes. An export occurs when you send controlled information, such as data, technology, or software outside the United States by email, fax, or computer download in another country. An export also occurs if you also provide controlled information or technology to a foreign person, even if located here in the United States. Even an oral discussion or visual inspection can result in exports if they result in sharing controlled information with a foreign national. This slide has more details on deemed exports. I'm going to skip some of this discussion, except to say, currently, in my experience, this is where a lot of U.S. companies are getting into trouble and finding it difficult to comply with what the U.S. government intends for good U.S. corporate citizens to do in order to be in compliance.

While all three agencies I mentioned have nuances in applying their relevant laws and regulations, this slide in general shows who is subject to U.S. export control laws. I want to mention briefly that the regulations often refer to persons under the jurisdiction of the United States. This is becoming increasingly controversial abroad, as there is a trend by these agencies to try to extend their extraterritorial reach for these particular statutes. This slide has possible penalties, which I always try to soft-peddle because there are a lot of attorneys that go out to U.S. corporations and scare them into hiring

them, but the penalties for violation of these statutes are quite severe and people need to pay attention to them. You notice they are criminal as well as civil, and that for civil penalties this is essentially strict liability. If you violate, it doesn't matter if it was a mistake, nothing matters; if you have a violation, you have a violation. One of the largest penalties in recent years was the $100 million penalty against ITT Corporation for exporting military night-vision technology to China, Singapore, and the United Kingdom. ITT lost its export privileges, was debarred from U.S. government contracts, and had to implement a very extensive and onerous export compliance program.

I'm going to skip what you have in your slides on compliance. This is the work I do. Most U.S. companies want to be good corporate citizens and work very hard to have effective compliance programs, but you can just see when you look at this list of enforcement actions that this is not an inexpensive proposition for a large corporation. These are very complex and sometimes complicated regulations for them to comply with.

So now to reform. This slide provides a background on steps taken within the Administration and it led last April to Secretary Gates' unveiling of the Administration's reform proposals. It was a seismic shift in the world for the secretary of defense to be advocating for reform of these national security programs. This slide shows the Administration's recommendations and goals: a single control list, instead of the Commerce Control List and the Munitions List—those lists are very complicated and do not integrate very well; one single enforcement agency, instead of enforcement responsibility split among OFAC [Office of Foreign Assets Control], BIS [the Bureau of Industry and Security], and DDTC [Directorate of Defense Trade Controls]; one information technology system, so that communications, license applications, status updates, etc., are all in the same system; and only one licensing agency, which will eliminate commodity jurisdiction issues between State and Commerce.

They propose to accomplish this reform in three phases; the first is underway. They are moving to look at changes in the Commodity Control List and the Munitions List. They started work on the tank and military vehicle section, category seven of the Munitions List—and I'll come back to that in a minute. Phase three will require legislation, and this is where I'm headed. I'm trying to get there quickly; I hope I'm not running out of time. So Congress will be involved and that will be the most difficult phase, given all of the official agencies and members of Congress who will want to weigh in on the legislation. This is where reform efforts over the last twenty to thirty years have consistently been killed and buried. The policy behind the Administration's reform is to impose a higher wall around the most sensitive items, and, hopefully, this will result in fewer controlled items.

Getting rid of the overlap between the Munitions List and the Commerce Control List is going to require a very extensive review, which they have begun now. Here is one of the basic problems, if you see the positive list. Positive list means using only objective criteria when describing an item that will be subject to export controls. Obviously, using objective criteria makes it easier for a company to determine whether its product is or is not covered on a particular list. Controlled items will only

be described using technical parameters, relating to, say, performance or capability, delineating characteristics, such as horsepower, speed, accuracy, wavelength, etc., and eliminating open-ended, "specifically designed" criteria—because how do you know whether something is or is not specifically designed for a purpose? Each category on the Munitions List contains catch-all categories, and the result is that a bolt designed for an F-16 is subject to the same controls as the F-16 itself, something that we're working very hard to correct in this reform effort.

In addition [to showing] the revamping of the Munitions List, the Commodity Control List, and the Commerce Control List to use only positive criteria, this slide shows the tiers reflecting three different levels of control. As I mentioned earlier, the attempt is to get more controls around the truly sensitive items and fewer controls around items that are not really sensitive for defense or other purposes of the control regime. This slide lists some of the challenges facing the effort that has been announced by the Obama Administration. Really, it is not overstating to say that in the past, and we probably will run into this now, maintaining their committee's jurisdiction in this area has always been a great concern for congressional foreign affairs and national security committees. There may be a lot of reluctance on the part of the Congress to enact this reform, because creating single agencies will more than likely mean some committees will have to give up the jurisdiction they currently have over the disparate agencies that are currently operating. Even under the current system, agencies involved in making policy decisions that want to cooperate, like State, Commerce, Defense and others, have difficulty reaching a consensus. It may be even more challenging for them all to agree on how the reform program should be implemented, and one of the things the Administration has not been clear about to date has been the role that Defense will play in imposing controls on new items, technology, and licensing determinations. With the Republican takeover of the House, the key committees through which legislation must pass will have new chairs, and some of these chairs probably do not support changing export laws the way the leaders in the last Congress did. For example, one of the most important chairmen now in the house is a Republican congresswoman from Miami who is an inordinately strong supporter of leaving Cuban sanctions in place and not putting anything in a reform that would allow any changes to occur, so we're going to have some problems there. There is also the problem of ninety-three new members of the House and sixteen new members in the Senate, who, in regard to everything else they are doing, including the other trade issues we're going to hear about today, have to be educated in this area in order to make decisions on whether they would support reform or not.

One of the things that I want to talk about—and I'm almost through—is the reason these challenges are important. The reason this is the intersection between law, business, and politics is that the law is going to be reformed in some ways, because we know the Administration has authority to change some of its regulations on its own, but if it's really going to be substantial reform that allows the business community and U.S. industry to operate in ways they haven't in the past, business and industry are going to have to weigh in to make this happen. It's not going to happen on the basis of the Obama Administration asking the current Congress to do this. It's going to require

a lot of effort, and it also requires participating in just the current reform process. For example, when they did the review of category seven in the Munitions List of tanks and vehicles, they ended up moving more products into the Controlled List than had been there before, which was the exact opposite of where this is supposed to be headed. They also moved into the controlled category the hybrid propulsion systems that are in a Toyota Prius and the armor that the L.A. police department is wearing, so we know that this process can run amok if business doesn't genuinely participate and let the government agencies know what's happening.

I'm going to, in the interest of time, really skip India, I wanted to use India as an example, (1) because there is tremendous potential and (2) because the Administration is really focused on reforming our own controls with regard to India, and that is happening quickly. Those reforms, together with basic structural reforms, could lead to a great deal of economic activity for the United States in India, which is soon to be the third-largest economy on our planet and one in which we have a much lower market share than we do in, say, China, where we have been focusing our efforts, or where we have much less economic activity in trade than we do with Brazil, which has a much smaller economy than India. I think this gives you a good example; India is a good example of why specific reform and focusing on changes to our relationship will help our economy.

Export control laws negatively impact U.S. business beyond what is necessary to achieve their objectives. I want to be really clear that the government agencies and the folks in those agencies who are working on these regimes take their role very seriously and try to do it objectively, but they have a goal that is always in tension with actually accomplishing commercial transactions. Their stated objective is to stop you from having commercial transactions. So there is always a tension there and we need to work with them when we can, because almost all lawyers and most businesses want to be good corporate citizens and want to cooperate with U.S. statutes, but sometimes, when they are in conflict with common sense, we really have to go to battle with our own government. Reform of these laws is possible now. You can talk to Gary Bertsch about this later. I think for the first time in my lifetime, change is probably really possible and this opportunity may not come around again for a long time, so my message to the legal community and the business community and our government participants is: Let's try to make this happen now. Thank you.

William Gillon: I, too, want to join in thanking the people who put this conference together, Ambassador Johnson for asking me, Anne Marie and Blake. It's a little humbling to see law students with such capabilities and such determination do a really professional job. When I was here, I was lucky to get to class on time, much less put together a conference so well and so ably. So I want to thank in particular the two students I interacted with, Anne Marie and Blake, because you really did a great job.

Today I thought I would speak about something I know a little bit about, I guess from a distance, and that's primarily about trade in textiles and apparel, and to look to see how regional trade preferences can provide opportunities for businesses that you will

be representing in the future, when you leave this fine institution. One of the first trade items on my plate when I left Washington to join the National Cotton Council in 1992 was the North American Free Trade Agreement [NAFTA]. NAFTA, of course, was a significant trade agreement in almost all respects, but for the cotton industry it was an especially difficult policy choice. It was widely believed that NAFTA would cause the rapid exodus of small cut-and-sew apparel operations that, at that time, still provided a lot of jobs across the South. At the same time, it was believed that those jobs were going to leave the United States anyway, as a result of growing competition from Asia. Cotton producers and yarn and fabric manufacturers supported NAFTA at that time, using the logic that if the cut-and-sew business was going to leave the United States anyway, it would be preferable to have some of those operations at least locate in this hemisphere, providing a greater chance that they would use U.S. fibers, yarn, and fabric in making the apparel that would ultimately come back to the United States. Beginning in 1994 then, the U.S. fiber industry began to embrace the concept of regional, preferential trade arrangements that included preferences for textile and apparel products. As worldwide textile quotas were phased out, U.S. manufacturers believed that with lower cost apparel and workers in Mexico, and later Central America and the Caribbean and the Andes, products made from U.S. yarn and fabric in this hemisphere could compete with Asian-manufactured apparel, provided it had a tariff advantage. These regional trading arrangements generally provide duty–free entry to garments manufactured in the preferential region.

Since 1994 and NAFTA, we've entered into free trade agreements with Central American countries like El Salvador, Honduras, Guatemala, the Dominican Republic, Costa Rica, and Nicaragua. We entered into similar agreements with Peru and Chile, we have negotiated an FTA [Free Trade Agreement] with Colombia and Panama, but they haven't been implemented yet by Congress. There are trade preference programs in place for countries in the Caribbean and a few of the Andean countries that did not complete a free trade agreement with the U.S., and the U.S. has passed special trade preference programs for Haiti.

So these things worked and they didn't work, I guess, from the perspective of the U.S. textile manufacturing industry. I need to set the stage just a bit more for you if you aren't very well versed in this. Prior to the Uruguay Round Agreement, the textile trade was subject to significant multilateral international quotas, imposed by most developed countries. The Uruguay Round Agreement began a phase–out of this worldwide textile quota system, which meant that ultimately U.S. textile and apparel manufacturers would gradually only be protected by tariffs. Anticipating significant increases from Asia, the quota phase-out triggered U.S. textile and apparel manufacturers to focus on regional trade preferences. Because we were opening the doors and getting rid of the quotas, they got scared of China. However, their worst nightmare occurred in 2000, when the accession of China to the WTO [World Trade Organization] was complete. That meant now we were going to phase out quotas that were applicable to China as well. Those quotas began phasing out, I believe, in 2002 and with it the onslaught of textile imports into the United States really began in earnest.

Looking at a few slides now tells a little part of the story. The anticipated increase in cotton textile imports was borne out. Most of my slides start fairly late, but this one starts in 1999. You can see the increase in textile imports coming into the United States from worldwide. Since China's accession to the WTO, when it began to be phased in, there have been continuous and significant increases in China's apparel exports to the United States. Before [then], NAFTA and regional preferential trading arrangements that I mentioned earlier were causing a significant increase in textile and apparel trade in this hemisphere. After China's accession, the regional trade picture doesn't look like too much of a success story. Trade with both Mexico and Canada has recently fallen off considerably. Those aren't really very good trends. While trade with Central America and Caribbean countries managed to grow from 2002 to 2004, it fell after that, although it has rebounded a little bit in 2010, so there is a little bit more life in trade with the Central America and Caribbean region. This slide shows the source of U.S. imports of cotton products by region and shows a decline in hemispheric trade, while China and other sources, such as Vietnam and Bangladesh, grew. China currently makes up about 47% of all U.S. textile imports, while the Western Hemisphere accounts for only 14%.

This isn't the only way to look at this trade picture, however. Most analysts believe that without the strong efforts to liberalize textile trade in this hemisphere more trade would have been lost to China and other Asian producers, harming U.S. textile manufacturers even more. As one economist told me when I was preparing for this discussion, trying to prove that NAFTA and CAFTA [Central American Free Trade Agreement] have worked for U.S. textile manufacturers is essentially trying to prove a negative. The impact of Asian competition on U.S. manufacturers would have been even more dramatic without the possibility of a western hemispheric market. You can see by looking at the next two major categories of exports, the remaining U.S. textile producers are heavily dependent on their ability to export to NAFTA and CAFTA countries. Here, this particular yarn category makes up about 90% of the U.S. cotton yarn export market, and it is in the trade preference countries in this region. Likewise, in cotton, at least this particular category of cotton fabric exports, 85% of our exports are going to regional areas that have trade preferences.

This slide shows it also, but it doesn't show something else. Starting in 1999, you can see exports of U.S. cotton products, about four million bale equivalents, drifting down to around three million bale equivalents, which isn't a horrible fall off, all told. You see how NAFTA and the CBI [Caribbean Basin Initiative] far and away account for the lion's share of exports from the U.S. textile industry. What this slide doesn't show are the things up on top of that bar that aren't there, which is U.S. use of cotton products in terms of textile manufacturing. When this slide started back in 1999, the number was probably around nine or ten, or possibly even eleven million bales, consumed inside the United States annually by textile manufacturers. Where this slide ends back here in 2009, the consumption by U.S. manufacturers is just barely above that export line, so exports of textile and apparel products now are about 90% of the total amount that's even used by the U.S. industry, because we've had that large of a decline in our U.S. textile manufacturing industry over these years. By removing tariffs on CAFTA-

eligible shirts, for example, and leaving that tariff on shirts imported from China, the CAFTA-produced shirt has a chance to be somewhat price competitive.

Now, I want to make a few more points before I conclude. First, within the trading arrangements I just outlined and discussed, there are myriad exceptions, loopholes, hurdles, and puzzles to solve for the trade professionals trying to help clients expand the apparel business in their region. While the notion of opening up trade for textiles produced in the NAFTA or CAFTA regions sounds simple enough, one of the most difficult questions to answer is when a product is actually made in the region. Even though the U.S. textile industry generally supported these western hemispheric free trade agreements, they fought hard for relatively stringent rules of origin for the textile and apparel products themselves. In other words, they didn't want to open the door for fabric manufactured and cut in China to simply be sewn or receive minor processing in a CAFTA country and thereby become eligible for duty-free, quota-free entry into the United States. Other companies that wanted more liberal origin rules argued that placing these types of limits on these small countries in the Caribbean and in Central America handicaps them, because their manufacturing capacity is so small to start with. They argued that allowing pieces to be sewn and completed in these regions went a long way toward beginning to build that manufacturing capacity and would be better for these economically weak countries. In the end, the regional arrangements we put in place contained relatively stringent rules of origin, with many complex loopholes. As a professional working in this area, as you will be, you have to know these very specific and detailed rules of origin. You also have to know where the loopholes are, so you can use them to your client's advantage.

While so much of the focus is on China and other Asian suppliers these days, it may be that the Western Hemisphere may not completely lose the apparel battle to Asia. The impact of high commodity prices (including fiber), greater intra-Asian trade that we're seeing lately, and greater economic growth in Asia than in the United States, may begin to divert some textile and apparel sourcing decisions back to this hemisphere. Clothing brands and retailers are learning this year that when there is significant volatility in prices, sourcing contracts are often not complied with in more remote jurisdictions. They are also getting pinched by higher labor costs in China, a possibility of reduced shipping capacity between the United States, and China, and even by greater travel demands involved. It is both shorter and easier to fly to Guatemala than it is to fly to Shenzhen. I was talking recently with a textile sourcing executive from a large apparel brand here in the United States, and she was complaining bitterly that she was forty-eight and her company had just cut out business class travel, and she did not like flying coach class to India, so she was looking more closely at sourcing, and in fact made some sourcing decisions and moved them to Guatemala recently. I'm fifty, it's not a bad reason to change it, trust me. I'm hearing several reports of brands and retailers attempting to move their sourcing needs back to this hemisphere, as I just mentioned. One example: There is a large cotton cooperative in Texas, that made the decision about two years ago to purchase an apparel manufacturing facility in Guatemala. They purchased that facility and they significantly modernized that facility. Over the past several months, they have begun to believe that their gamble paid off, as they continue

to receive more and more orders, particularly as the supply situation is tightened. At a recent meeting of companies that source and market apparel worldwide, I heard a very well-respected executive of one of the largest retailers of the world, and it wasn't Wal-Mart, say that the era of low-price apparel was over—I don't think Wal-Mart is admitting it yet. He believes that sourcing companies have just about run out of new, lower-wage locations for manufacturing. They are witnessing growth in intra-Asian trade, as I mentioned, as that middle class in India and China that we've been waiting on seems to be starting to show up, and they are showing signs of becoming stronger consumers. They are seeing more labor unrest in China and higher wages in manufacturing facilities, particularly along the coastal regions. While there are still low-cost avenues to pursue, there appear to be fewer of them today than there were just a few years ago.

Likewise, I don't know how many of you have been paying attention lately, but I have. We are experiencing some very tight supply situations in almost every major agricultural commodity produced in the United States. Carry-over stocks of corn, soybean, wheat, and cotton are the tightest that I've ever seen. The result is that prices of these commodities have reached levels I have never seen. If I had any cotton to sell today, I could get well over $2 a pound for it. For those of you who don't know what to compare that with, I fought the Brazilian Cotton Case for about five years, primarily because the cotton price worldwide hovered between $0.45 and $0.55 and couldn't get any greater than that. Today, cotton futures are selling at three times that level; corn is above $7 a bushel, an equally amazing price. Cotton is literally going up every day, because there is hardly any cotton right now to sell or buy in this transition from one crop to the next. Price volatility is wreaking havoc on contracts in the international area. JC Penny, for example, may think it had an agreement in place to source its spring line of cotton dress shirts at $18 a shirt, but the foreign plant that was supposed to fulfill that contract either has or will be demanding changes in that agreement. The mini-retailers are not able to rely on the sourcing contracts that they had in place and they are at least considering rethinking their sourcing strategy, which leads me back to this hemisphere.

It is possible that the upheaval occurring now in world textile and apparel markets could drive some of this business to the Western Hemisphere if retailers believe companies here are more likely to adhere to their contracts and are more likely to make longer-term sourcing decisions, so that they can count on them more. Manufacturing capacity in Central America and the Caribbean region, however, will probably continue to put a damper on growth in the textile and apparel trade in this area. There remains a concern that a shortage of capacity may prevent many brands and retailers from fully returning to the Western Hemisphere, as opposed to Asian sources. With world prices where they are and companies having a harder time sourcing their products and enforcing their contracts, it may be the case that existing capacity in this hemisphere will be put to the test in the upcoming year or so, and I kind of hope that it will be. It is very possible that good opportunities exist for companies to choose to move their sourcing back to this hemisphere and take advantage of the trade preference programs that are currently in place.

With that I will conclude and listen to the panel and discussion. Thank you very much.

Mark Laplante: Thank you, gentlemen. Let me just say that we are very fortunate today to have such a broad set of perspectives on international business here. We have Mr. Sheppard, who did work for a world-wide, multinational corporation. We have Mr. Papageorgiou, who works for an entity that basically compares economic systems around the globe. Mr. Hunnicutt has the point of view, or the perspective, of a regulator and business interaction with the regulatory bodies. Then we had Mr. Gillon, who has a very focused perspective on the interests of a particular industry and how that industry is doing on an international playing field. I have these gentlemen at a disadvantage, because they have no idea which direction this panel discussion is going to go, so this is very much an improvisation for them. When I am teaching my classes in international finance, the first thing I try to train my students to do is to think from the perspective of a manager who is running a value maximizing business on an international stage and, from listening to the four presenters here, [it is clear that] when a manager goes from a purely domestic firm to running a multinational, it is many orders of magnitude more complicated. The skill set that is required to be successful in an international arena is vastly more demanding than what would occur on an already demanding level in a purely domestic firm. The way I would like to do this, since we have these four different perspectives here, is that I would like to present a perspective, I'm not saying it's *my* perspective, but I would like to present a perspective and have our panelists comment on that perspective, see what they think of that perspective, see if they have anything interesting to say. It may take me a minute to lay out my perspective, but here we go.

We had the crisis of 2008 and how did we see countries respond? China continued to pursue its export-led growth objectives. China has fared fairly well since the 2008 crisis. Germany has pursued its export-led perspective. It has essentially carried the European Union on its back through the crisis. All the money that is coming to pay for the implosion of the European banking system is coming right out of the German taxpayers' pockets. And very briefly in 2008 it was the U.S. export markets, the exporters of the United States, who were actually preventing unemployment numbers from becoming much worse than they would have been otherwise, even though unemployment hasn't improved very much since then. I can't help but wonder: What is the United States' general trade policy? Does it even have a trade policy?

I step back from this perspective, not I, but me, the fictitious person with this perspective, and I think about ITAR [International Traffic in Arms Regulation]. I have a friend who works for NASA and it seems very reasonable to say: We shouldn't ship missile parts to countries we don't like. It could be very dangerous, but a consequence of ITAR, according to my NASA engineer friend, [is that] it has decimated the U.S. launching of foreign satellites. Basically, nobody wants to launch a commercial satellite in the United States anymore. It has decimated that market. Where is that market going? The Soyuz Program, the Russian-led launch program, has built a facility in French Guiana, and the forecast is that it will essentially have a monopoly on commercial launch of satellites around the world. Basically, because of ITAR no international

entity launching a weather satellite wants to go through the United States bureaucracy. They're done; they'll just go with the Russians. [ITAR] has killed off the U.S. launch market.

I think of rules imposed on U.S. business people that are not imposed on foreign business people, for example the Foreign Corrupt Practices Act. In many places around the globe, bribery is the cost of doing business. It's like a tax. When you say to American businesses, "You can't bribe," you're putting them at a competitive disadvantage. In many places where this is the normal cost of doing business, again, American firms are put at a competitive disadvantage. After the financial crises of WorldCom and Tyco, the United States responded with the Sarbanes-Oxley Act (SOX). Sarbanes-Oxley is killing U.S. publicly-traded small firms. Small firms no longer want to be listed in the United States, because the regulatory compliance with Sarbanes-Oxley—if you think of it as a fixed cost to comply with all the audit rules and whatnot— is disproportionately large for small companies. So where are those companies going? Those companies are going to the London Stock Exchange, where they have to comply with a voluntary code called the Cadbury Code of Conduct, which appears to be about as effective as Sarbanes-Oxley. We are driving small businesses to London. Those small businesses, like Apple and Microsoft, will essentially become large businesses someday and they'll be on foreign capital markets.

I think about U.S. tax policy. The United States corporate tax rate is the second highest in the world, not including the stated income taxes you could tack on to those corporations, [and that] penalizes U.S. corporations for being headquartered in the United States. If you are headquartered in the United States and you're a U.S. company, you have to pay tax on your global earnings. If you are headquartered outside the United States and you do business in the United States, you only have to pay tax on what you sell in the United States. It is a total advantage to be headquartered outside the United States.

When I look at China pegging the yuan to the dollar, although there have been squawks in Congress, I look as a U.S. business person and say: You're telling me it's a national policy to do nothing about a country that is making my goods more expensive in China, even goods where I have a competitive advantage, like the manufacture of commercial aircraft? You're making my products more expensive in the market, thereby stimulating the domestic supply of that product that will eventually replace me. If I look at the recent South Korean trade pact, that I don't believe has been passed yet, when I look at the specifics, the United States government has put an enormous emphasis on agricultural interests, but it is silent on services. Services is one area in the United States where firms have a competitive advantage and there is not a lot of pressure to reform United States firms' access to the Korean market. So when I step back from this perspective, I say, what's the U.S. policy? One, the most benign view is that it is inconsistent, fractured, incoherent, and astronomically expensive. A more cynical view would be that the U.S. government is going out of its way to put me out of business and has no interest in my being successful as a firm. It's doing everything it can to destroy me as an entity. Comments?

Charles Hunnicutt: Wow, what a scenario, Mark. If anybody else wants to jump in, do so, but I guess I was with you on China and export-led recovery in Germany. So what's the U.S. policy? I got a little lost in every regulatory area that was covered, but I think that one of the things that has been a clear, declared policy for the current administration, and I think it was true of the Bush Administration, was to promote U.S. export capacity and capability. That's the reason they were negotiating the Colombian, Panamanian, and Korean free trade agreements. They're pursuing other methodologies of lowering trade barriers to U.S. markets and I have to say, while I won't defend the Korean agreement as to what's covered in services, other than Boeing Aircraft, agriculture is one of our major exports and competitive advantages, so the U.S. government focusing on agriculture is probably a good thing.

On the launch services of satellites—and a disclaimer here, I represent clients in this area—one of the reasons, contrary to your friend at NASA, that we don't have a more developed, commercial service here is that Lockheed and Boeing, I think, realized about fifteen years ago that there was more money to be made in government launches than was to be made in commercial launch services where there was an oversupply of capacity. They formed a joint venture, United Launch Alliance, that could also do commercial launch services, but they don't [do them]. They do government launches and they make a lot of money doing it. In fact, a University of Georgia law school graduate, Karri Garrett, is now their General Counsel out in Denver. And we have new companies like SpaceX that are really beginning to move into commercial launch. Of course, the Europeans have their own launch capacity, which is used a lot, and I think Sea Launch, which is a multinational company, may be coming back on to the market. There is concern with China's launch capacity, because of military concerns and the transfer of commercial capacity to military issues. I think in space launch we do need to be there, we do need to get the satellites up, our satellites up, and you're right, there are movements to ITAR-free production, which is [in order] to move production outside the reach of the United States' regulatory regime for satellites. But most satellites, for example even if it's an Arab satellite being launched by Khrunichev in Baikonur, require U.S. systems integration technology to put one launch vehicle with a particular satellite. So, in Baikonur you have Russian technologies that are protected, that American engineers and Arab engineers can't see; you have the Arab satellite technology, that they may not want Americans and the Russians to see; and you have the American systems integration technology, which is required, but that is protected from the Arab engineers and the Russian engineers—and it works. I think it's part of the globalization that we talked about. Lawyers and technicians and government agencies, when commercial activity has to happen, figure out a way to get there.

On Sarbanes-Oxley and some of the other regulatory regimes, which are currently burdensome—and I'm only disagreeing in order to have a conversation here—I don't necessarily disagree with your underlying premise. I think if you look at the Foreign Corrupt Practices Act, the United States developed this statute for, I think, good reasons: 1) I think U.S. business was being disadvantaged around the world because of corruption; and 2) it was ethically the right thing to do, to have businesses abide by good ethical business practices that didn't include bribing government officials of

foreign governments. We went down that road on our own, but the U.S. government didn't realize the disadvantage it was placing U.S. industry at and through the OECD [the Organization for Economic Co-operation and Development], we have now created a regime where the UK has an anti-bribery statute coming into force that is even stricter than the United States' [statute]. We have really, more or less, brought the world along [with the idea that] corruption is an issue, that it is a legitimate government trade issue that has to be dealt with, because you can't have free trade if you've got people out there having to bribe government officials to participate.

I guess, to sum it up, while I don't necessarily agree with you, my benign view is considerably more benign than your benign view as to what is going on. As I said in my presentation, these government agencies have governmental objectives that are not maximization of gross domestic product of the United States, and those other government objectives are in fact real objectives that we want pursued, like control of nuclear weapons or weapons of mass destruction of a chemical or biological nature, and that requires regulatory regimes that restrain commercial activity. I think what we want is a balance. What we want is to recognize the extent that it's reducing America's industrial base in some areas, an industrial base that we need and want to maintain. For example, in defense production we make the best weapons on the planet, and a lot of that can't be commercialized because of controls that really aren't needed and that could be removed. I think that it's a balance that's needed, that maybe is not always there and maybe there's not always coherence to the policies and how they develop. That's again perhaps something that if the business community—rather than being obsessively focused on tax policy (not that tax policy isn't incredibly important), but if they weren't obsessed on certain issues and really took a broader approach—recognized the regulatory interest of the government [and] that all regulation isn't bad, then we could really get further in the political process. The political process is particularly hung up because of the inability of both the business community and the government to see both sides of the question. I'm sorry I filibustered, but that was a long scenario.

Mark Laplante: It's great to get that perspective. I'd like to get some other perspectives, but my other, alternative persona would say, look at the stock markets in Europe, there are more companies listing: Europe—more companies listing; Asia—more companies listing; and Brazil—more companies listing. The United States is the only capital market where the number of publicly traded firms is falling; that's a fact. Alternative views, Gentlemen? Three other voices here . . .

John Sheppard: I tend to agree with you about the U.S. policy being strict. I think what I've seen is that most companies have a way of working around that legally. The Foreign Corrupt Practices Act is clearly out there for a reason. Coke had what is called a facilitating payments rule, which basically allowed us, within certain limits, you know, to pay off. If you had to have your electricity turned on, there was a certain amount you could pay to have that done. I think SOX will be overturned; at least a good part of it will be overturned in the next five years. I think in terms of taxes. Many companies have figured out a way to be headquartered in the U.S., but their taxes are

reduced by having a lot of the services that they provide [overseas]. At Coca-Cola the concentrate is made overseas and taxed in Ireland, and that's where the company says most of the value is brought in, so Coke pays a very low tax rate, because that's where effectively the tax takes place. Anyway, I think there are ways that most companies are working around that, or many companies are.

Chris Papageorgiou: I agree with Mark in both his perspective on how we came out of the crisis and also on the confusion that exists in U.S. trade policy. Let me start with coming out of the crisis. Coming out of the crisis, definitely China and a lot of emerging countries are doing pretty well. I wouldn't agree so much about Europe. Europe is still not out of the woods. We have Greece, Ireland, and more recently Portugal and Spain being questioned about their ability to sustain their fiscal policies. If Portugal and Spain have problems, then the IMF or other international organizations will not be able to sustain them. So then we are again looking for Germany, and Germany will not be able to sustain that load itself. So there is a big question mark about Europe and the fear is for the next two years more than down the road. Interestingly enough, out of the crisis we see some regions being strengthened in their trade environment, for example, low income countries, again trading with China and so on, those emerging markets in Latin America, not only Brazil and Argentina, but smaller countries. So the world is moving toward an environment where China and other emerging markets are doing better in terms of trade. Low-income countries will show up in a few years; we'll see how it goes there. Again their way of trading is through China, not so much through Europe. And the U.S., again, is sort of a big question mark.

But I wanted to put some of this U.S. trade confusion in a bigger perspective. I think the U.S. has a major dilemma and it's very simple. On the one hand, China provides goods that are very cheap and, of course, welcomed by the consumers. On the other hand, we know that China may be [playing unfairly with] the exchange rate. This is almost established at this point. So what does the U.S. do? On the one hand, we like the cheap prices—they are important, they are important for welfare—and, on the other hand, we know that there may be foul play. So my recommendation is that politically it would be very difficult to do much with this dilemma, and therefore, why not move forward? Why not do more of what the U.S. has a comparative advantage in? We're just the top innovator, and moving, for example, into another industrial revolution, this would be a technological revolution. The Green Age: Why not move there? And so I leave behind what I think is a very difficult issue, which is of course endogenously determined, by on the one hand, having these cheap prices that are very tough to go against, and on the other hand, knowing that something is going on with the exchange rate in China and may be foul play. So move the dialogue forward to something that I think the U.S. has the clear comparative advantage in, which is creating this new environment that nobody can compete with.

Mark Laplante: Just devil's advocate, which I hate to argue with a senior economist. You're saying move on, but, let's say it's an established fact: [. . .] having an unfairly pegged currency [. . .] is making those high value-added goods more expensive in China and therefore [giving] an incentive for China to develop that technology and

produce those goods domestically, and substitute away from the U.S. goods that have that high value added. So it's not just that they have an unfair advantage because they are selling T-shirts at $0.20 less a shirt, it's that it's putting the industries that we have strategic advantages in, competitive advantages in, at a disadvantage in the Chinese market and that gives those Chinese firms an incentive to replace our value-added goods.

Chris Papageorgiou: I totally agree with that. What I meant is, move forward with developing new markets where the U.S. has shown historically that nobody can compete. I'm thinking here of the green revolution now, with all of these environmentally friendly technologies. Whoever produces a car that is sustainable, cheap, and using electricity may be the frontrunner for the next thirty or forty years. This is true also in housing and other markets. China cannot compete in these markets quite yet. That's the suggestion. Staying where we are is a huge dilemma and I don't think we can resolve it. It's a huge problem to be able to stand politically on raising prices or even dealing with China and their "unfair play."

Mark Laplante: Mr. Gillon?

William Gillon: Well, I feel a significant disadvantage with some of the intellectuals that are here. Going back to your original discussion about the cost of regulation, I guess my initial thought from it was: The cost of regulation sometimes isn't so bad as long as there's a return. An unregulated stock market, or stock market that has less regulation and allows more players, of course can lead to greater catastrophes down the road if you don't have the right constraints in place. It would be nice if all those regulations we have worked on actually created value to the people who participate in our market. When we go through the crisis that we just went through, we realize that, almost no matter what we do, the loopholes we create or leave behind, or the bad legislation that we pass, leads to two or three other really bad results, or everybody is making a lot of money, but they're not really making a lot of money, and we never stop on that money-making path to realize what's going on until it fails in the end. So all that regulation that we're handicapping ourselves with isn't creating value. Several years ago there used to be a cotton company called Staley and Staley [which] was a merchandiser in the mid-South and it went bankrupt at some point when prices moved against it. It took a wrong position in the market and sort of left all the cotton producers in the mid-South, a lot of them, holding the bag. They had sown their crop and the price had moved, and now they had to go elsewhere, and they were kind of demanding, [saying] somebody has treated us unfairly, and the answer is: "Well tough luck, go sell your cotton." I was talking to a larger merchandising firm and was saying, "This is pretty bad, I wonder if we should be thinking about some reasonable kind of protection mechanism for producers when they have this kind of thing happen," and he exploded on me and said, "No, absolutely not! My company goes into these markets and it gets beat by one cent, one half cent, three quarters of a cent on bids, but my company stands behind the contracts; they do the things that are necessary to be able to stand behind these contracts. And then a year or so later when the market moves against the people who aren't taking those positions, they fail and here we are. So no, absolutely not! We

do it the way we do it because we want to be there tomorrow." I think, to some extent we can see it in the crisis that we just went through. We can't afford sometimes to let companies reap what they sow in terms of failing because they have gotten so big, but our regulatory process allows it to go on and we're not getting the value back. I think it's a good place to be, to have a regulatory structure and a way of doing business that is valuable and that adds value to your product out of the market. I think regulations and these other things can do that, but it's hard to strike it, particularly with Congress.

Mark Laplante: So the devil's advocate in me would go back to Mr. Sheppard's comments and say, well look, taxes are bad in the United States, we'll just locate some aspect of the firm in Ireland and we'll get around it. So why have the policy if firms just work their way around it? [It's] like corruption. Let's say, I'm supposed to be bound by the Foreign Corrupt Practices Act and I have to do all this compliance. For instance, Mr. Hunnicutt showed us all the compliance that goes along with ITAR and these others that's incredibly burdensome. But if firms are going to find a way to get around it anyway, why impose that deadweight loss on society and the firm?

Charles Hunnicutt: Besides the need to employ lawyers and . . .

Mark Laplante: Well that's it, but that's the deadweight loss, right? Sarbanes-Oxley is great for accountants. All the accountants were doing handstands down the aisle when Sarbanes-Oxley was passed, because it's the full employment act for auditors, but that's a deadweight loss to our economy. Those people are engaging in essentially a completely unproductive endeavor.

Charles Hunnicutt: Mr. Devil, I just have one thing, one slight response: Yes, they are burdensome, yes, they can be improved, but to the extent that not only the United States, but of course Europe and the other industrialized nations are in regimes with us (the United Nations has their own sanctions regime) . . . to the extent that the benefit to that cost is terrorist organizations that don't have access to nuclear material, biological, and chemical weapons, the benefit is incalculable. I think most of the government agencies around the world that work in this area will tell you that they understand that they are asking people to do a lot, but the benefit is almost incalculable, and there are benefits to it. So the question I come back to is: How do you strike a balance? How do you not restrain commerce in ways that are unnecessary, and continue to review that, so that you unleash as much price mechanism, market force as possible, but at the same time maintain essential governmental functions?

Audience Member: You talk about these regulations as if they were created because Congress and the lawyers who work with them and the business people who work with them had nothing better to do, but the reality is that a lot of these regulations are in place because business people did not have good ethics. You know you're concerned about . . .

Mark Laplante: . . . value maximizations . . .

Audience Member: . . . concerned about dollars, but when these accounting firms and the business they represented had bad ethical standards, a lot of people in this country lost money. So those regulations are also partially in place to protect me as a consumer and you as a consumer. So it's not all about profits, it also has to do with the manner in which those profits are generated. I don't think that needs to be something that is missed here.

Mark Laplante: I think the point of view of my alternative persona is that you have countries like China that are moving workers from inefficient, state industries to competitive, private industries, and exports are the number one priority for China in achieving that goal. In Germany, the number one goal is to have export-led growth, period. My alternative persona is [of the opinion that] the United States does not seem to have any export policy. It is inconsistent, fractured, costly, and it does not appear to me that anybody makes a calculation on the impact of GDP for any regulation. If these other firms are growing and benefiting the citizenry with less regulation than we are, for whom should our government be working? For the benefit of its own citizenry?

Audience Member: I think the government works for the people and part of those people are consumers and some of them are business people, but the bottom line is that ethics drive regulations. If, as a business person, you do everything you can to undermine an ethical perspective, and you hurt the people who are trying to do business, as well as the people who are benefiting from those businesses, then you have issues. You have a bunch of regulations, many of which, as the attorney from Troutman [Charles Hunnicutt] said, may not be the best solution, but given our situation, that's what happens. We keep talking about this crisis that happened in 2008 and that crisis was a result of people not having morals and standards in a lot of ways, and then we pay for it as consumers. There is a balance here; my point is that there is a balance. I get concerned when the gentleman in the textile business [William Gillon] talks about refining coming back to this hemisphere, but no mention was made of the fact that farmers in the U.S. are not really supported by the government.

Mark Laplante: I hate to say this, I'm probably going to make enemies here, but the last statistics I saw were that the U.S. Federal Government subsidizes the cotton industry to the tune of $3 billion a year.

William Gillon: But those are old numbers!

Mark Laplante: So when you say, the government doesn't support farmers, the data indicates . . .

William Gillon: Those are extremely old numbers!

Mark Laplante: Okay, well, if prices are going up every day, they probably shouldn't be subsidized.

William Gillon: And also, if prices are going up every day, that $3 billion is a long time gone.

Mark Laplante: I know, I'm just addressing her point where she was saying the government is not helping farmers, and I would also say, . . . well, I won't say this, . . . I won't say it.

William Gillon: There is no question: The United States supports its agricultural industry. There is also no question that, just like with all these other regulations, those policies go awry at times. But the $3 billion number was back in about 2002, but there is no reason to continue to cite it as if it is in fact there every day, because as we look at international policy, particularly in the WTO, and a lot of other places, that is a lot of times what we do. We get one or two things that grab the headlines and that's it—that becomes the reality no matter how many years go by, no matter how many things change. So we find ourselves five years down the road trying to do something about what was there eight years ago, as opposed to looking at what's coming two years down the road. We had about five years of really depressed commodity prices, pretty much worldwide, no great alternatives and, yes, the United States supported its sector during that period of low prices. What happened to cotton production in the United States? You probably don't know.

Mark Laplante: I don't.

William Gillon: It dropped dramatically, particularly the three years prior to last [year]. The mid-South grows maybe more corn now than it does cotton, because of those price moves. Where are we now today? We're at a stock situation where the people that want to buy products don't know where they are going to get them from. Yeah, that's a completely different situation from [one] where we're subsidizing. So why do we subsidize agriculture sometimes, if we get it right? Hopefully to keep those producers there. So we stop those short supply situations when they are coming, and I think Mr. Sheppard could talk a lot about sugar policy in the world, having to deal with that from the European perspective, and a lot of other areas. We didn't get it wrong a lot. But it is kind of symptomatic that you bring the $3 billion number out, since it's almost eight or nine years old, but that is kind of the way we do it, and it's unfortunate. It does lead to disjointed policy that doesn't make a lot of sense.

Charles Hunnicutt: Can I take us back just a little bit from that, because I think that was an eloquent defense of the cotton industry, to the point that you were raising, Mark, [namely] export-led economic recovery? Maybe Chris would like to weigh in on this, because I'm not an economist, but I know everybody can't export themselves into recovery at the same time. What you can do is have a trade policy that says: Increased trade leads to increased value and increased efficiencies and increased recoveries for us and our partners. Because if your policy is to export to generate income and revenue for your own capital development, whatever it is, that can't last, it's unsustainable. If the policy in Germany and China is purely to export themselves out of this—and I think we saw that it's not because they are investing in their trade partners—they are

making a huge mistake. They are creating their own conundrum that they won't be able to get out of eventually. Whereas, if we adopt a national policy that says we support trade and the development of trade regimes that allow for appropriate regulation, so that companies from different countries competing against each other know what the rules are, the rules are relatively fair, and they can either work around them or not. Depending on what happens, we get the most economic activity and the benefit for everybody. That's why I think it's important to continue to work in the WTO. I agree that for the last couple of years, particularly in the Obama Administration, it hasn't been clear what trade policy is, for political reasons. We haven't moved the South Korean agreement, or the Colombian agreement, or the Panama agreement, or Fast Track Authority, or tried really to reignite the Doha Round. There is a lot that remains to be done in terms of setting that international regime, and the international regime really is as important to us as what our domestic laws are, because it's not just [about] exporting—maybe we do want to export our value-added, but it's also [about] importing. We want our trade partners to be able to sell to us; we want the low price.

Mark Laplante: I will conclude by saying, Ricardo would be completely happy with your comment. I think we are about out of time. Gentlemen, thank you again for sharing your perspectives through your presentations, as well as the moderated discussion. I think we have a short break and then we'll come back with the next panel. Thank you all very much.

The Future of International Trade: An American Perspective

Panel 2: Challenges for the Future of International Trade

Moderator: Marisa Pagnattaro

Panelists: John Cobau, Audrey Winter, Ted Kassinger

Marisa Pagnattaro: Good morning. Let's go ahead and get started with our second panel. I am Marisa Pagnattaro. I teach at the Terry College in Legal Studies and I am happy to welcome our panelists this morning, who will talk about the challenges for the future of international trade. We will start the panel this morning with John Cobau, who is chief counsel for international commerce at the Department of Commerce, and he will give us sort of an introduction to how the Administration has worked with Congress over the last thirty years. We will go on to Audrey Winter, who is deputy assistant to the USTR in China, who will talk about China-related trade issues, including enforcement at the WTO and using those tools. And we will round it out with Ted Kassinger, who is a partner at O'Melveny and Meyers and former general counsel at the Department of Commerce, and he will sort of fill in the gaps and also provide current perspectives about trade. So, welcome them and please be thinking about your questions along the way because we are going to be opening it up for questions after they give their remarks. Thank you.

John Cobau: Good morning everybody. I would like to thank the university and the business school for their kind invitation. Don Johnson is a long-time colleague of mine, and the law school and the Dean Rusk Center are very lucky to have him. I am also honored to be on a panel with Ted Kassinger, who was my boss when he was general counsel at the Department of Commerce, and Audrey Winter, whom I have the good fortune to be able to work with now. We work together in promoting transparency in the Chinese government. I'd also like to thank Professor Pagnattaro for moderating our panel.

Our panel today is focused on the challenges of international trade and, as I think we saw from the last panel, there are a whole lot of them. I am going to start with one challenge that people talk about a lot—the trade deficit. The 2010 U.S. trade deficit was about $500 billion. That is up from $375 billion in 2009. That is a lot of money, and it is an important factor in the U.S. trade discussions. The trade deficit matters, at least in part, because it gives many Americans the impression that the United States is losing in international trade, a perception that makes them reluctant to support a robust international trade agenda. Last year, in his State of the Union Address, President

Obama launched the National Export Initiative with the goal of doubling U.S. exports over the next five years. Doubling U.S. exports will help address the trade deficit and will help correct the erroneous impression that U.S. companies are unable to compete successfully internationally. At the Department of Commerce, we are committed to doing everything we can to help U.S. companies meet the President's goal of doubling U.S. exports, and we are utilizing all the tools at our disposal to do so. We support U.S. companies through trade advocacy, that is, by encouraging foreign governments to buy U.S. goods in their procurements. We lead trade missions made up of U.S. companies on visits to foreign countries to promote their goods and services there. We promote U.S. trade fairs that bring foreign buyers to the United States to buy U.S. goods and services. We are opening up new markets by enforcing existing trade agreements and supporting new ones. Expanding U.S. exports will help address the trade deficit, not by decreasing imports, which is one side of the equation, but instead by increasing U.S. exports, the other side of the equation.

Another major challenge going forward is establishing a successful process for the President and the Congress to work together on the negotiation and implementation of new trade agreements. Trade agreements are one of the key ways that the United States opens foreign markets for U.S. exports. Under trade agreements, partner countries commit to providing duty-free access for U.S. goods and to allowing U.S. companies to export services to their markets. One key way to expand U.S. exports is through an active trade agreements program.

Trade agreements require the United States to open up the U.S. market, to reduce U.S. tariffs (though these are in most cases already quite low) and commit to opening up a U.S. services market to foreign competition (though these markets are already open for the most part). Market openings raise public concerns about people losing their jobs, about the loss of manufacturing, and skeptics point to U.S. industries that have largely moved offshore, like the footwear and apparel industries. In the face of these large, and sometimes devastating, market changes, it is easy to miss the success stories that come along with trade agreements. One benefit is the increased ability of U.S. companies to export their goods and services. For example, Boeing, a huge U.S. exporter, and companies like it bring millions of jobs to the United States through exports. Another advantage of market openings, and of trade agreements, is the reduced cost of U.S. goods, particularly consumer goods. Clothing prices, for example, have dropped dramatically over the last decade. We have access to fruits and vegetables from the Southern Hemisphere in a way that is a radical change from twenty years ago. These are some of the benefits of international trade.

So what are the challenges? Why aren't we negotiating more trade agreements? A lot of it has to do with the nature of the competing interests and groups in the Unites States. The most obvious competing groups are the Democratic and the Republican parties, a dynamic that is further complicated by differences within those two parties. Two other players that have different interests, different priorities, are the executive and the legislature. A third set of competing interests is non-governmental organizations, particularly labor and environmental groups, and the business community. There is

tension between and within these competing groups and it is extremely difficult to get those groups to come together and decide what it is that we want in a trade agreement (or if we want new trade agreements at all). The constitutional structure of the United States plays a key role in how these differences are, or are not, bridged. Under that structure, the President, who is the voice of the United States in international affairs, is responsible for negotiating trade agreements. On the other hand, the Constitution provides that it is up to Congress to regulate the foreign trade of the United States. Any trade agreement that changes U.S. trade law has to be approved by Congress. As a result, trade agreements require joint activity on the part of the President (to negotiate) and Congress (to enact implementing legislation).

A related problem is that bills to implement trade agreements, because they affect tariffs, are considered under congressional rules to be revenue measures. As such, members of Congress may seek to amend the bill to add other unrelated revenue provisions. Further complicating things, in any international negotiation the United States doesn't get everything we want. We have to give a little. And it's not surprising that members of Congress are going to second-guess these concessions. What I see as the core issue is how to get the President to negotiate deals the Congress wants to implement and how to get Congress to implement the agreements the President has negotiated. There are two sides to the equation.

So how have we solved these dilemmas? And we have solved them on a number of occasions. It's like the guy explaining how difficult it is to quit smoking, and you respond that quitting smoking is easy, you've done it six or seven times! Well, fixing the trade agreement problem is also something that we have fixed several times. Back in the '30s, the '40s, the '50s, and going into the '60s, the way we fixed it was that Congress granted the President the authority to negotiate lower tariffs. So he could, and did, go out and negotiate decreases in tariffs through what we call negotiating rounds under the old General Agreement on Tariffs and Trade (GATT). There were several GATT rounds in which the United States and major trading partners significantly decreased tariffs. This was successful in what it was trying to do, the fairly narrow task of lowering tariffs imposed by a relatively small group of mostly industrial countries. In these tariff negotiations, the President was operating under authority that was granted before he began to negotiate, so there was no implementing legislation, and the implementation, which did not require legislation, only executive action, was fairly easy. In the '60s, the President came back from one of the negotiating rounds, the Kennedy Round, with an agreement that went beyond tariff concessions. He negotiated some changes to U.S. unfair trade law and some changes to how the United States valued imports for customs purposes. The President submitted implementing legislation, and Congress never considered it. And that resulted in a lot of hand-wringing in the United States based on concerns that our trading partners would decline to make future deals with the United States because we had shown ourselves to be unable to deliver on what we promised.

So what did we do? The President and the Congress got together and enacted the Trade Act of 1974, which included trade agreement provisions everybody calls Fast Track.

Fast Track reflected a deal between the President and Congress. Congress enacted legislation that set forth expressly what Congress wanted in a trade deal and how Congress wanted to be consulted before, during, and after the trade deal was negotiated. It also provided that if the President brought back a deal that had those elements, and if the Congress had been consulted in the manner specified, then Congress would consider the trade deal, and would vote on it under expedited procedures, giving it an up or down vote without amendments. This was clearly a response to the failure of the legislation implementing the Kennedy Round.

Let me put a little bit of meat on those bones. The Trade Act of 1974 Fast Track procedures authorized negotiations, required consultations with the relevant committees before entering into the agreement, required the President to notify Congress ninety days before signing an agreement, required consultations with the private sector, and required the President to draft and submit to Congress proposed implementing legislation for the agreement along with a statement of what he was going to do to implement the agreement. Fast Track had very specific negotiating objectives. The key negotiating objective for trade agreements was to open up foreign markets to U.S. exports. That was what Congress wanted. They wanted to be able to get U.S. goods into Europe and Japan and the other industrialized countries. In return for following these procedures and obtaining that objective, Congress agreed to expedited procedures for any implementing legislation. Legislation would be introduced. The committee would only have a limited time to consider it; floor debate would be limited; and there would be an up or down vote. So Congress put extremely significant limits on the way that it considers legislation. Finally, the legislation made express that Fast Track procedures were an exercise in chamber rulemaking, and that the House or Senate could change the rules that applied to it at any time.

That worked pretty well for quite a while. We got the Tokyo Round, the U.S.-Israel Free Trade Agreement, the NAFTA, the Uruguay Round/WTO all implemented. And that was a big set of accomplishments between 1974 and 1994. And then Fast Track authority lapsed. Looking through the legislative debates, I came to the view that Fast Track lapsed because labor and the environment became major trade issues. When President Clinton brought the NAFTA forward, there was a lot of concern about how Mexico, in particular, handled labor and environment issues, and Congress was not happy with the way the NAFTA addressed those issues. President Clinton negotiated labor and environment side agreements and Congress implemented the NAFTA. From 1994 to 2002, there was no grant of negotiating authority. Eight years was an unprecedented gap in the trade negotiating authority for the President. I attribute the gap to the inability of the competing groups I mentioned earlier to come to a common view about how the United States should address labor and the environmental issues in U.S. trade policy.

After the events of September 11, 2001, Congress and the Executive, Democrats and Republicans, agreed that the United States needed to engage the Middle East in a positive way, and that one way to positively engage the Middle East was through trade agreements. Trade agreements were seen as a way that the United States could

engage the governments and peoples of the Middle East in a way that would promote democracy and economic development and discourage terrorism.

And the following year Congress enacted the Trade Act of 2002, which had the same Fast Track provisions that I talked about earlier, but also had much more elaborate trade negotiating objectives for the President. It was no longer just about market access. It was now about a whole lot of other issues, like do we have the right labor provisions? Do we have the right environmental provisions? Do we have the right anticorruption provisions? Do we have the right transparency provisions? Congress was much more specific and wide-ranging in what it wanted in a trade agreement.

The Trade Act of 2002 also set up something called the Congressional Oversight Group [COG]. The Congressional Oversight Group, which is made up of members of both the Senate and House of Representatives, is to advise the President and the U.S. trade representative on objectives, negotiating strategies, and the development and implementation of trade agreements. USTR was required to develop written guidelines to promote the exchange of information with the COG, to allow, in essence, greater Congressional oversight regarding how the President was using his new trade negotiating authority. Under the agreement between Congress and the President that was reflected in the 2002 Trade Act, we completed FTA negotiations with Singapore, Chile, Australia, Morocco, Bahrain, the Dominican Republic, CAFTA, Oman, Peru, and the three pending agreements—which are Korea, Panama, and Colombia.

In 2007, it appeared that the consensus underlying the Trade Act of 2002 had eroded. Four agreements (Peru, Korea, Colombia, and Panama) were all either done or nearly done, and Congress did not appear inclined to approve any of them. The President's negotiating authority expired in July, so Congress and the President set out to renegotiate the mandate and get additional guidance on what Congress would require to approve new trade agreements. The deal they struck is commonly referred to as the May 10th Agreement, and it addresses labor and the environment, treatment of pharmaceutical intellectual property rights, government procurement, port security, and investment. This was all in addition to what Congress and the President had agreed to under the Trade Act of 2002. What I think is interesting about this is that from 1974 to 1992, we had one set of fairly vague and simple terms about what was required in a U.S. trade agreement. The terms set out in the Trade Act of 2002 didn't last for even the five years prescribed by law. So Congress' expectations, what Congress believes is required in trade agreements, has started to evolve much more rapidly. And even though we have this May 10th Agreement, we have only managed to implement the Peru Agreement; Korea, Panama, and Colombia remain outstanding.

So what happened with the agreement between Congress and the President reflected in the Trade Act of 2002 and the May 10th Agreement? When the Bush Administration was in its final year, the tension between a largely Democratic Congress and the Republican President became very high. President Bush tried to use the procedures contained in the 2002 Trade Act to force Congress to bring the Colombia Agreement

to a vote, and the House of Representatives said "No." A majority of House members voted not to consider the implementing package the President had proposed, abrogating trade negotiating procedures for that bill. In doing so, they showed that the President doesn't have the ability to push a trade agreement to a vote, even if it has been entered into under trade negotiating procedures, without Congress' consent.

Why not? Because trade agreements require trust. They require the Congress to trust that the President is going to bring them an agreement that they can vote on, that they can pass, that will be in the national interest, and that won't be politically damaging for them to approve. And the President requires trust that when he brings an agreement forward, what happened with Colombia won't happen, that Congress will actually vote on the agreement. And trust in Washington is in scarce supply. I am not that optimistic that this will change in the near future, but I think if we are going to move forward with trade agreements, trust is what has to exist.

Audrey Winter: I am an alumna of this great university and the law school here and it is absolutely fantastic to be back in Athens. Thank you for having me. Thank you, Don, for inviting me, and to Blake and Anne Marie for all of the organizational challenges and hurdles you have faced to bring so many students together to this gathering. It's really a pleasure. I'd also like to thank the business school, where I had a few classes. I very much enjoyed my time here in Athens.

Driving in, I was thinking back to those days when I did the Jessup competition and Professor Wilner that year wrote the problem. And we all know that we unfortunately lost him too early last year. But the things he worked on then and tried to bring across are precisely the key issues that we face in China today. So I don't know whether that means we are doing our jobs well or not. The last panel had a lot to say about that. But the problems that he wrote about and that we argued about, including up in Washington, were on technology transfer, patent licensing, investors' rights, expropriation of investors' property, and property rights versus lack of property rights—and these are the central challenges that confront us today with China. And John, with whom I work closely back in Washington on transparency issues in particular, provided us with a good segue as to the legislative environment in China and in the United States, in terms of how we work through some of these problems.

One of the features that I would like to draw your attention to before we talk specifically about China, is USTR's statute. USTR basically has authority to make trade policy, but we also have to coordinate that trade policy throughout the U.S. government before we decide to make it. And we do that very carefully and under procedures that are proscribed. The difficulty comes in when you read this statute, which has been revised most recently in 1979. It's old and it reads like it's old. And trade agreements actually have difficulty solving today's world problems—those same problems of technology transfer, licensing, and investor rights. These are the core weaknesses in our trade agreements today, and it is in that Bermuda Triangle of weaknesses where we have our regulatory market distortions inside country borders, where our regulatory relationship with China becomes difficult. And so I think it is really important when we focus on

what trade isn't getting right, that we recognize that the rules, both under the USTR statute and the rules we have agreed on multilaterally and bilaterally, are no longer really the gold standard and they require some rethinking. I hope when Ambassador Marantis comes, he will have some things to say about these deficiencies, because I think that we are recognizing it and we are starting to work on it.

So, to China. John mentioned the trade deficit. And I became a lawyer because people said I was dangerous with a calculator and I'd better stick to words instead of numbers, so I won't go into the numbers, but basically a good chunk of the trade deficit of the United States is in goods and services with China. And there are some interesting facts to think about, because it creates a lot of publicity. But when you look at what is produced in China and what is exported to the United States, huge amounts are in computers and electronics and basic products, where the value added in China is actually quite minimal. In other words—and studies show this (there was a recent study at the University of California in this area)—what goes into what gets assembled in China is maybe Japanese components, United States components, and maybe a very small part of the amount of value that stays in China is actually enjoyed by the workers there. So from China's perspective for a moment, they want to stop being the assembler for the world and stop assembling other people's things. And I think it is important. Take the iPod, for example. Maybe an iPod is selling for, let's say, $300 and its factory costs are maybe $150, and 110 of those dollars are Japanese components. Much of the rest of the remaining $40 is U.S. components, and, according to research done, $3 stays in China. So that is China's problem. They don't really have the technology that we do and they want to have it. And so their paradigm is to move up the technology ladder and do so in a way that is in many ways not covered by the trade or regulatory agreements that we have today.

So what do we do to protect our guys in this scenario? And that is sort of what I do for a living: ensure that our markets abroad, and in particular China, are open to competition, real consumer competition, consumer welfare-driven competition. The United States exports a lot of high value to China and our exports are increasing. In fact, they are increasing at twice the rate to China that they are increasing to other countries. Now, it is still much less than what China exports to us, but the high value of our exports to China is an important point to make.

China has started, for a long period of time now, to adopt what goes by the name of Indigenous Innovation Policies. These are policies that basically swim around in this Bermuda Triangle of weaknesses in our trade agreements. First of all, you can't invest in China without getting the approval of the government. So you have basically a tollbooth you have to go through; whether or not you are producing chairs or toys or high tech stuff, it doesn't matter—you still have to get approvals. And so at that tollbooth is where negotiations take place, often with the Chinese government and often subject to non-transparent procedures that are very difficult for companies to navigate. So you have investment restrictions and then you have these tolls essentially, these rents that are extracted. Not always, but it happens. For example, China does not want to pay for the technology that will be licensed to the Chinese joint venture

partner, because part of the investment situation is that you can't just start a company in China. You might have to have a joint venture with a Chinese partner, and often those partners are state-owned enterprises.

So you end up being asked to, or rather being required to, license your technology, license your patents to the joint venture, and then at some point down the road—and this happened with notable examples with German companies doing this in the energy space and in other areas—the joint venture partner ultimately absorbs all of that information and then uses it to make products in another place across the street, and then wants to dissolve the joint venture. So, these are difficult things because our trade agreements really don't give us much to go on. There are a few sentences in China's accession agreement that could maybe give guidance, but it would be very difficult to litigate those particular types of practices in the WTO.

So, what do we do to confront this situation? Well first, as John just described, we do have a successful export policy and that is really giving the United States an advantage with respect to China. We also, where we can, have been very aggressive about bringing WTO cases against policies where they actually violate WTO rules. So, for example, we recently started a case against China's electronic payment systems measures that are designed to protect a sole monopoly in the country, China Union Pay. These are the back office systems and services that process credit cards and debit cards in ATMs. For currency transactions in China's local currency, these processes have to be done by this state monopolist that China wants to protect from competition. Well it just so happens, in China's services schedule in the WTO they did make commitments—at least we alleged that they made commitments—in this area.

So, we have challenged this protection [given] to a state monopoly in China, so that U.S. providers of those services can establish and provide those services for those transactions in China. That would be a good example of where the rules work very well, hopefully. And I mean, we just filed the case. It hasn't even been agreed to be heard by the Dispute Settlement Body, but we filed our consultation recently. There are many other WTO cases that we have brought against China and against industrial policies that affect U.S. firms' ability to either export to China or compete in China or compete in third markets with or against Chinese competitors.

Another particular thing that we have done is successfully defend the United States in the WTO when China has challenged us. In a recent case, China challenged our antidumping and countervailing duty decisions in some steel cases and one of the key industrial policy-related arguments was that China argued that state enterprises should not be considered a public body within the meaning of the WTO subsidies and countervailing measures agreement, that they are not more or less the equivalent to governments. The panel found—and it is now on appeal—that yes, it is reasonable to consider Chinese state-owned enterprises as providers of subsidies.

This is an important decision in that China does provide a lot of subsidies to its producers or to its widget makers and others, and so it is important that these

subsidies can be challenged when they are provided by the government through an SOE (state-owned enterprise). And this appeal will be very important to the United States. It was just argued recently before the Appellate Body. A decision usually comes out pretty quickly from the Appellate Body, but at the panel level this was an important victory. Another area where we are taking action in this subsidies area resulted from a filing by a number of unions of a Section 301 petition, which is a special USTR procedure that gives USTR the authority to go after the practices of foreign governments when they harm the United States. As a result of this petition, USTR filed a case against a particular export subsidy of China, and then we sought to and successfully did use basically bilateral negotiations, where we asked China to take certain actions to remove these, either restrictions or these sorts of investment tollbooths that I described earlier, against U.S. businesses so that they can do business in China more readily.

So with respect to this particular subsidy, we filed the WTO case and we also used these bilateral negotiations. There are various different kinds of them and there are probably ten or twenty we could go through, so I won't bore you with all the acronyms and details, but there are two key ones. One is the Strategic Economic Dialogue, as it became known in the Obama Administration, and the [other is the] Joint Commission on Commerce and Trade. The Joint Commission on Commerce and Trade is something that is led by USTR. Commerce, the State Department, and the Treasury Department lead the Strategic Economic Dialogue. Both of these are heavily coordinated in the U.S. government, interagency, and we use them in turn to try to discuss particular issues with our Chinese counterparts which are coming up. So for the 301 case, for example, there was concern about how China's energy policies were not taking into account the experience abroad of foreign firms in allowing them to apply to be equipment suppliers in major energy projects. And we persuaded China, in the Joint Commission on Commerce and Trade which occurred last December (it occurs annually), to in fact consider experience internationally, including in the United States, because there is no reason to discriminate [or] make that the sort of thing you require to be in China, when that experience in the United States can be just as important in terms of qualification for China to supply the equipment.

So the Chinese agreed to change their practice here, so that U.S. firms could indeed supply this type of equipment to these projects in China. That is a good example where there may be a policy that would be difficult to challenge in the WTO, but where we use other settings, other negotiations and settings between our governments, to discuss industrial policy issues that are very important but difficult to challenge. One aspect of how we work to resolve barriers to U.S. investors and U.S. exports is to work with our trading partners in other countries, like in the EU countries and in Japan.

Recently, we used the last fifteen months to discuss with China a very key aspect of its indigenous innovation policies. As part of the Bermuda Triangle I was discussing earlier with respect to government procurement, China had decided that its government procurement preferences would be based on products listed by the government that had, for example, Chinese intellectual property in them. So the requirement was for

the intellectual property in the product to be Chinese in order for that product or service to be procured by the Chinese government. As China's not yet a member of the WTO Government Procurement Agreement, it doesn't have international obligations in this area, and the challenge was: How do we discuss this type of issue with China when they are taking actions that may not be challengeable in the WTO, but which are having a negative impact on our trade and investment relationship?

So here we worked very hard with our colleagues in Brussels and in Tokyo and in other places to discuss the impact of this situation on their countries, and then we collectively—not at the same time, but we expressed our views to China in a very serious way in written comments that were very detailed—explained why we thought that this product accreditation system would not lead China to be a more innovative society, because it would prevent very innovative products from getting on the list just because, for example, they didn't have Chinese intellectual property in them. And so in an effort to become innovative, China was pulling against itself, and in the process of that, harming U.S. interests, and we were able effectively to communicate that to the Chinese government, and so far the Chinese government has not run forward with this product accreditation system and we hope that they will continue to examine it so that they will perhaps develop another system to look at how to be innovative through their procurement rules.

This is a very good example of how we used just simple policy discussions with the Chinese to explain why things can be win-win, why it can be good for them and good for us if they pursue things in a more openly consumer welfare-driven way. There are many other things that we do, challenges that we take on with respect to patent licensing and standard setting that also are difficult, difficult in respect to the rules that we have today, but where the Chinese government is very involved, and much more so than our own. One example is in the setting of industrial standards. They are working to set as many standards as they can that are Chinese national standards, and there may be international standards that they could and should use if they strictly were to follow the letter of the WTO—it's called the Technical Barriers to Trade Agreement, but most people refer to it as the Standards Agreement.

So we are trying to persuade China to use those processes, those international best practices, in a way that is more faithful. We are also trying to take care not to, for example, get involved in price negotiations. This is what we are trying to do, for example, with respect to patent holders. Standards rely on patented technology. When you are making a widget like an iPod, you have lots of pieces, and those pieces are patented and you set standards for those pieces and the participants have to license the technology to each other. In order for that process to be fair and pro-competitive, it is important that the government not get involved in these private party negotiations in order to drive the price of technology down so that Chinese users of technology have the better deal. But in fact, sometimes we see evidence that the Chinese government does get involved, working the price side of that equation in ways that would be basically unthinkable for the U.S. government.

These are just a variety of examples of how we try to discuss matters with China, in a very open and often very collaborative way, so that they are willing to discuss details with us. There was a time five or six years ago when I really felt like we weren't communicating, and I do see positive changes—where you go to meetings and there is goodwill to actually resolve problems. It doesn't happen for all problems, and in some cases we can use dispute settlement to put the problem over here and continue to go on and have good relations to resolve some of the more thorny problems that dispute settlement can't be used to address.

So I would like to leave you with a couple of thoughts for consideration as we go through the day and think about trade broadly and the challenges in the future of international trade, and that is, to consider whether trade in the old fashioned import/export sense needs to be rethought, reshaped, bettered, improved. If new rules need to be created, what might those rules be? Because we haven't solved all the problems yet and we need students to graduate and have great ideas so that a lot of these problems that don't find solutions easily can be grasped, understood, and solved in ways that both internationally and domestically, our political systems can agree upon.

Thank you very much for your attention and I look forward to a really good discussion on a lot of these China issues.

Ted Kassinger: Good morning. Let me first also add my thanks to Don and the other sponsors here of the program. I, too, am a proud alumnus of the Georgia law school, as well as a [former] Georgia undergraduate. I even taught in the Business Law program as a third-year law student, so I have fond memories of the business school as well.

When I looked at the title of the panel discussion today, my immediate thought was that our first "challenge" is how to identify the challenges—there are so many. You now have heard discussions from the first great panel this morning, as well as the presentations from John and Audrey covering myriad issues large and small that face the United States and its trading partners as we look forward to the future of the trading system.

What I want to do is to spend my time with you looking at four overarching themes. These cut across sectoral, political, and geographic boundaries. They are not unique to the United States. I will disclose that, as with the other panelists today, I am going to give you a U.S.-centric view, but these are matters with which every political leader in every country that is involved in the trading system grapples.

The four themes are: (1) the disparate impacts of the trading system on populations worldwide and, more generally, discontent with globalization; (2) the capacity of trade rules to address non-economic social concerns, particularly those involving labor, environment, and public health issues; (3) how to foster innovation in the face of poverty and disregard for intellectual property rights—maybe "indifference" is a

better word than "disregard"; and (4) the subversion of the trading system by state enterprises, state subsides, and state protection.

Now, I will tell you up front that there are two key takeaways. First, these are issues that every leader faces. We may define challenges from a U.S. perspective, but that means there is somebody else on the other side. What I hope to do is peel back some of these issues to show the complications of the politics of trade.

The second takeaway is that it's not just about China. Much of the discussion this morning has rightly focused on the challenges presented by U.S.-China trade, the position of China in the world as a trading partner. Just this past week it was announced that China has become the world's second largest economy. But who can tell me the percentage of U.S. trade, export/imports of goods together, that China accounted for last year? Fourteen percent. So, 86% of our trade is with somebody else. We have a whole world to consider when we think of challenges to the trading system, not just China.

Okay, let's go to theme number one: disparate impacts and the discontent with globalization. Another way of framing this theme is: trade politics. The old saw that "where you stand depends on where you sit" applies in the trade world perhaps better than in any other area of politics. It's much easier, as John Cobau mentioned earlier, to identify the negative impacts of a liberal trading system on one's friends and neighbors than it is to see the benefits. That has been true since 1791, or before; in the United States, the political debate has never stopped. I invite you to read Alexander Hamilton's *Report on Manufactures*. I do not invite our Chinese friends to read that report, because it is a blueprint for the mercantilist trade policy that China follows today! Hamilton was a great supporter of protectionist tariffs to promote manufactures, except when he needed innovation or inputs. In those cases, he supported lower tariffs. Anyway, the report is a blueprint for state participation in the economy.

From 1791 to roughly 1930, Congress every so often enacted tariff laws that were the main instrument of determining trade policy. In some years high tariffs were imposed, and in other years lower tariffs, depending upon the prevailing political sentiment. This seesaw culminated ultimately in the Smoot-Hawley Tariff Act of 1930. The key point, again as John described earlier, is that there has generally been a consensus in the political leadership over the last sixty years, at least since the 1940s Bretton Woods Agreements, shared by both major political parties in the United States, which has supported U.S. leadership in promoting a liberal trade system—reducing tariff and non-tariff barriers on a mutual, reciprocal basis. But underneath this consensus, the politics are always tenuous; it is frothy and it erupts every once in a while. This uncertainty makes it very difficult for leaders to set the course and drive ahead.

To demonstrate, let me ask you a few questions. This won't be a test, but it is a poll. I am going to put to you questions from recent polls on trade and trade policy.

- Here is the first one: What do you think foreign trade means for America? Do you see foreign trade more as an opportunity for economic growth through increased U.S. exports or as a threat to the economy from foreign imports? Okay, raise your hands. I will ask you a couple more before I tell you how out of step you are with your fellow Americans.

- Question number two: From what you know, do you think that free trade agreements between the United States and other countries help to create more jobs in the U.S. or do you think they cost the U.S. jobs? Raise your hands . . . I am going to do a very unscientific count.

- Third question: Do you think that free trade agreements between the United States and foreign countries have helped the United States, have hurt the United States, or have not made much of a difference either way?

- Okay. Last one: I am going to read a list of actions that Congress could take this year. This is a poll from January 2011, so we are talking about this Congress. Please say whether you strongly favor, favor, oppose, or strongly oppose Congress approving a free trade agreement with South Korea.

Alright. Survey says:

- The first question was: What do you think foreign trade means for America? Do you see it more as an opportunity for economic growth or a threat? In this audience, my rough estimate is 100% said that it was an opportunity for economic growth. In contrast, in late 2009, 47% of those polled said it was a threat to the economy, 44% said it was an opportunity for growth. Interestingly, in 1995 the same question resulted in 53% of those responding saying that trade was an opportunity for growth; 38% responded "threat." Those results are interesting for a number of reasons, one of which is that in 1995 . . . ring any bells? The WTO came into being in 1995, and NAFTA the following year. So, major international trade agreements were right in the forefront of public debate, yet people were supportive of trade. And by the way, on the threat to the economy, how many people think there was a significant difference between responses from Democrats, Republicans, and Independents? The answer is, none. In the 2009 poll, 48% of Democrats viewed free trade as a threat to the economy, while 50% of Republicans felt this way.

- Alright, on the second question: Do you think free trade agreements between the U.S. and other countries create more jobs, or do you think they cost jobs? We had a bit more diverse opinions in this room on that one. I would say roughly two-thirds voted here for "creates jobs," while one-third said trade agreements "cost" jobs. In a September 2010 poll, 18% of those responding thought that free trade agreements create jobs, while 69% said they cost jobs.

- The third question was: Do you generally think free trade agreements between the U.S. and foreign countries have helped the U.S., hurt the U.S., or not made much of a difference? All but one person here indicated their belief that agreements have helped the U.S. In a September 2010 poll, 17% of respondents stated they believed that free trade agreements have helped the U.S., while 53% said such agreements hurt the U.S.

- Finally, what is on the agenda for Congress? What should Congress be doing? Approve a free trade agreement with South Korea? One hundred percent of you, less one, think that is a good idea. But only 53% of those who were polled said it is a good idea. Thirty-five percent were opposed.

I give these numbers to point out that it is very difficult for a president, any president—President Bush, President Obama, their predecessors—to stick to the postwar consensus on pursuing liberal trade policies when a great many people don't support them.

I want to give you one other example of the debate. This is a statement, very shortened, from a national party platform in a presidential election: "This Administration has proved itself inept and weak in international trade negotiations. We support meaningful safeguards against irreparable injury resulting from imports and enactment of a clear requirement that foreign importers disclose their origin." The other political party, in the same presidential election year's platform said, "We encourage the expansion of economic ties with other nations, eliminating unjustifiable tariffs and more non-tariff barriers." Let me ask you two questions on those positions. Which of the following years do you think these presidential platforms were stated: 2008, 1992, or 1964? . . . It was 1964. Alright. Which party's platform said the Administration has proved itself inept? If you know it was 1964, you know the answer. This was the Republican Party in 1964.

In the year 2000 the major party platforms were indistinguishable on trade policy. But in 2008, for the first time in the postwar period, we had a presidential candidate, now the President, who affirmatively took the position that he would disavow an existing trade agreement—NAFTA—unless it was renegotiated. This debate was a driving force in the Democratic primaries and carried forward into the first two years of the Administration. There was uncertainty, as Charlie Hunnicutt described in the first panel this morning, as to where trade policy was headed. We now have a totally different situation, with President Obama having negotiated a final free trade agreement with South Korea. He is putting that agreement forward with support from the Republican leadership. But again, don't forget those polls. Republican party leaders are out in front of many of their constituents. They are pushing forward with a new liberal trade agenda, but against very recent polling that suggests that many people think this path is not a great idea.

To wrap up discussion of the first theme: Political leaders around the world face the same discontent with globalization and concern about the impact of trade. If you are

a politician in India, you may have a 400 million strong middle class that is very supportive of opening the Indian market and engaging with the world, but you have got more than 600 million people who largely don't think that way.

To repeat, trade issues are not just about China. The challenge is also India. It's Europe. It's elsewhere. There is a constant struggle between moving forward with the confidence of overall benefits, against the day-to-day politics of that policy. What do you do? In the end it takes leadership—strong leadership. And in the U.S. it helps if there is a consensus on policy among the political leadership.

Let's move on. The second challenge is the capacity of trade rules to address non-economic, social issues: labor, environment, and public health. There are other areas, but those are the big three. Let me start again with a question: How many of you have seen the movie *Manufactured Landscapes*? After you get through with your papers for Marisa this weekend, get a beer, download *Manufactured Landscapes* from Netflix, and watch it. It's quite an interesting movie, although not that many people other than I have seen it. On one level, it is a documentary about the work of a Canadian fine art photographer, Edward Burtynsky, whose work has focused on photographing industrial landscapes. On a second level, the film is a meditation on the impact of global trade and development on the planet. The film dwells first on the physical impact, but more importantly, it elicits the tension between the vital need for development in poverty stricken areas, the powerful desire of people to move up the economic chain, and the consequences of that compelling need.

The filmmakers go to the location of Burtynsky's photographs and with great cinematography show the full context. The opening scene is particularly stunning. They start by putting a camera on a dolly in an electronics assembly plant in China. This is a brand new plant. The dolly rolls down one side of the plant, showing the rows and rows of the assembly workers. It goes on and on and on, eventually panning back across the entire interior. You see the immensity of this one manufacturing facility. Then the scene moves outside into a scene of the factory town with all the workers pouring out into the streets. There follow other amazing scenes, including ones of sad environmental degradation.

Importantly, the film also shows workers who have pulled themselves up from nothing into great jobs. The film is not only set in China, it goes to Bangladesh and elsewhere. For me, it is a great portrait of the tension between the importance of trade as an economic development tool and the potential collateral consequences.

These are serious issues. How to deal with them is difficult. As John mentioned earlier, in the U.S. political dynamic you have, very broadly speaking, political party differences. I hope, however, that the polls I cited earlier gave you some indication that it's not really Democrat versus Republican so much as "where you stand, is where you sit." And institutionally, the debate is not simply the Administration versus Congress, non-governmental organizations versus the business community.

I want to give you a couple of quotes to provide a feel for the political challenge of resolving these kinds of issues. Here is the U.S. Chamber of Commerce:

> Trade agreements should treat American manufacturers, service providers, farmers and ranchers the same as their foreign competitors. . . . The good news is that America's trade agreements do a spectacular job creating a level playing field [with tremendous commercial gains]. . . . The results of [a recent] study are impressive. 17.7 million American jobs depend on trade with [14 particular countries involving FTAs]; of this total, 5.4 million U.S. jobs are supported by the increase in trade generated by FTAs.[2]

The Chamber of Commerce's view is not shared by the AFL-CIO: "Unfair trade deals such as the NAFTA and policies of the World Trade Organization (WTO) have caused our trade deficit to explode. Rising trade deficits caused by these deals have cost more than 3 million actual and potential U.S. jobs since 1994."[3]

Public Citizen, a well-known NGO, in a [preface to a] September 2010 report entitled *Lies, Damn Lies, and Export Statistics: How Corporate Lobbyists Distort the Record of Flawed Trade Deals* said:

> This report written by Public Citizen's Global Trade Launch reveals that the growth of U.S. exports to countries with which the United States does not have Free Trade Agreements (FTA) has outpaced the growth of exports to the 17 U.S. FTA partners. . . . The report also exposes the inconsistent methodology underlying reports by the U.S. Chamber of Commerce and the National Association of Manufacturers to show how the corporate lobby has produced data to support their demand for more FTAs.[4]

It is fair to say that these statements represent people who do not have a shared view of the world. The issues are difficult alone, and very difficult to squeeze within the framework of trade rules. The anxiety of the NGO community, in particular, has been exacerbated by various cases arising out of the GATT, WTO, and NAFTA that they interpret as The U.S.-Mexico tuna dispute, and NAFTA investment cases involving Ethyl Corporation and others are examples of such cases.

I only have time to say three things about this challenge. First, in the trade world, the so-called "May Accord" between Republican and Democratic congressional leadership in 2007, about how to deal with labor and environment issues in trade

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[2] "Level the Playing Field for Trade," U.S. Chamber of Commerce, accessed Oct. 20, 2011, http://www.uschamber.com/international/agenda/level-playing-field-trade.

[3] "Fact Sheet: Trade and Manufacturing Jobs," AFC-CIO, accessed Nov. 7, 2011, http://www.aflcio.org/issues/jobseconomy/manufacturing/inc/upload/trade-factsheet.pdf.

[4] "NEW! Report: Export Growth Slows under Unfair Trade Pacts," Public Citizen, accessed Oct. 12, 2011, http://www.citizen.org/Page.aspx?pid=4398.

agreements, remains the right framework. I haven't seen any better ideas. The U.S.-Peru Free Trade Agreement, to which John Cobau referred earlier, is an example of where the May Accord has been implemented.

Second, some of these issues must be addressed outside of the trading system, through specific multilateral agreements on environmental issues, labor rights, and other areas. And third, the rise of corporate responsibility codes of conduct and similar voluntary approaches to deal with these issues is an important phenomenon. This movement is growing and over time will do much to diminish the concerns giving rise to vigorous debate today.

Let me briefly touch on the last two themes, so that we leave time for questions. First, how does one promote an innovation economy in a world of poverty and indifference to intellectual property rights? In President Obama's State of the Union address, he said that the goal of U.S. economic policy is the goal of enabling U.S. businesses and workers to outcompete everyone. To do so, we must be the leading innovation economy. That is not a sentiment unique to this president. Both political parties have exactly the same view. There are differences about how to get there, but everyone agrees it is an imperative for the U.S. to continue to be the leader in innovation—to stay in front of the curve.

This is not to say that the United States no longer knows how to make and sell things. We do. The U.S. is both a huge manufacturer and exporter. People sometimes don't realize that. The U.S. exported roughly $1.4 trillion of goods last year. That's a lot of stuff. We don't need as many workers in the manufacturing sector as we used to in order to produce the same amount of goods. We are very productive. But U.S. companies still can make things. And sectors that had the biggest growth in exports last year included capital goods, automotive products—items not necessarily associated with U.S. manufacturing strength.

The U.S. knows how to make things, and we remain a major exporter because we innovate. But we are dealing with many countries that don't have our tradition of protecting intellectual property, which is so key to innovation. All of the issues that Audrey described earlier on the USTR agenda represent huge challenges. But again, it is not just China. India, within the last year, adopted its own innovation policy in the telecom area to force technology transfer. Basically, the policy was that if you want to do business in the telecom sector, you have to disclose how you do it. Fortunately, as a result of discussions held during the President's trip to India in January and later negotiations, India has pulled back. Still, that is one example of a country looking to the China model. It is a direct challenge to the United States. There is no more important ground on which the U.S. must fight.

In other situations, particularly in the global health area, the protection of patent rights for pharmaceuticals—medicines to fights disease, epidemics in particular—is a more divisive problem, pitting innovation and public welfare policies against one another.

I cannot take more time on these issues today, but put them down as another area of great challenge.

The fourth and last theme is the subversion of the trading system by state intervention, either through state enterprises and the way they are run, or subsidies and protection for others. The bigger question is: What is the proper role of the state in the economy? As I suggested by my reference to Alexander Hamilton earlier, this is not a new debate. The U.S. has had state enterprises and made decisions at various times, for public policy reasons, to provide support and protection for commercial companies, although not necessarily for trade reasons—think of Fannie Mae, Freddie Mac, or the bailouts of GM and Chrysler.

Boeing is the largest single U.S. exporter, I believe, and aircraft manufacturing is one of the largest export sectors. This sector is a large one within the U.S. economy. Boeing is a great company and makes terrific airplanes. The United States has supported Boeing by initiating the WTO dispute over launch subsidies between the U.S and Europe. We think the Europeans subsidize the aircraft sector contrary to WTO rules, and they do, but a WTO panel recently found that the U.S. has provided significant subsidies to Boeing, not nearly as large as the Europeans have provided to Airbus, but not insignificant.

President Obama launched his national export initiative, building on similar programs of his predecessors. One centerpiece of that initiative is the expansion of loans and loan guarantees provided by the Export-Import Bank, effectively subsidizing U.S. exporters. Many of those transactions involve competition with foreign companies that receive similar backing. Still, 60% of the value of guarantees issued by ExIm Bank last year were for Boeing sales—one company. For this reason, ExIm is sometimes called "Boeing's Bank." So, the United States is not pristine when it comes to state aids to the private sector engaged in global trade. But ExIm guarantees are small potatoes compared to what else is going on in the world. My final point is that such issues cannot just be addressed by trade agreements. The bilateral investment treaty program and other agreements are also important means to address the increasingly important issue of how states support and protect their enterprises, and how state enterprises conduct business.

Let me conclude by quoting the words of a great philosopher, to guide us as we think about challenges to the international trading system. His name is Jackie Gleason. He said, "A lot of people say I like a challenge. I don't like challenges. Life is tough enough without challenges." That is true, but unfortunately, we can't avoid them in the trade area. Every day, people are buying and selling goods and services across borders. Someone is imposing a non-tariff barrier somewhere on U.S. exports. There is a built-in agenda of specific disputes and negotiations connected with trade agreements that already exist. Yet somehow, John, Audrey, and their colleagues will have to figure out how to address the challenges of the future.

Thank you very much. I look forward to your questions.

Marisa Pagnattaro: I just want to say thank you very much to all three speakers for your really interesting and provocative comments. I particularly appreciated the images from *Manufactured Landscapes*, which are helping to eclipse the *Atlas Shrugged* images from earlier this morning. And I would like to open it up for questions. Also, while you are answering questions, if you think there are certain books that you would recommend to us, we will come back to that at the very end. So you have a 'heads up' on that one. Questions for our panelists?

Audience Member: I just slipped out for about ten minutes and that is probably when my question was answered. It has to do with agricultural subsidies and the Doha Round. Currently, the Doha Round has been stalled for a couple of years. My understanding is primarily [about] unwillingness of the EU in particular, and the U.S., to budge on subsidies and I hadn't heard any talk about that. It seems to me a significant challenge, but I am not as plugged-in as you guys are, so if you have any comments on that I'd appreciate it.

John Cobau: I can tell you my understanding of the Administration's position on the Doha Round, which is that we are committed to a meaningful and balanced outcome. To the extent that there has been a lack of progress, it is because our trading partners have refused to offer meaningful new access to their markets in key sectors. Any agreement must include meaningful contributions from all major trading partners, including countries like Brazil, China, and India. I am going to leave it at that.

Don Johnson: I have a question for Ted and John, and of course Audrey can chime in on this as well. The reason why I mention Ted and John is that my question is about trade promotion authority, or Fast Track. We went six to eight years without any Fast Track Authority, and then in 2002 we had a vote on it when the Republicans were in charge and we had a Republican president and it passed by one vote after holding the vote open for two hours, but it was the longest in history and there were a lot of arms that were very sore after that vote took place. After this election last fall, where most of the moderates have been expunged from the Congress, is it possible to have another trade promotion authority get passed?

Ted Kassinger: John and Audrey are going to pass on that question. Before I offer an answer, perhaps we should first ensure the audience knows exactly what trade promotion authority, or "TPA" is. TPA refers to a type of legislative process more generally called Fast Track Authority. This process involves an agreement by each house of Congress to amend its own rules of debate regarding the consideration of certain trade agreements. The idea is to assure the President that if a trade agreement is negotiated that meets certain requirements and standards, that agreement will be put to an up or down vote within a short period of time. In turn, this assurance is intended to permit the President to go negotiate an agreement with the ability to tell trading partners: "If I cut a deal with you, at least I know that I will get an up or down vote and I will probably win when I get back." So that is the concept.

This concept first emerged in the 1974 Trade Act, because in 1967 Congress actually killed a trade agreement that the President had negotiated without sufficient consultation. It was an antidumping code. In any case, Fast Track Authority was in place more or less from 1974 until 1994, and then from 2002 to 2007. Then it lapsed, and Speaker Pelosi succeeded in defeating an attempt by President Bush to use the residual authority in 2008, in connection with the Colombia FTA.

Every president thinks it is important to have this authority, and it is. Don, I don't know whether Congress will ever vote to restrict itself on debate again, as it did during those periods with Fast Track. You must have much better perspective as a former member [of Congress] than I do on what it takes to give up the right to debate. Speaker Pelosi strongly opposed Fast Track. Now there has been a change in leadership. Has there has been enough change in sentiment to get a majority of both houses to amend their rules again? I hope so.

One of my takeaways, again from the first challenge I mentioned earlier, is the difficulty of navigating trade politics generally. At the end of the day, it takes really strong leadership and a consensus among the executive and legislative branch leadership. President Clinton demonstrated that when he got the NAFTA approved in 1996 with a minority of House Democrats supporting him, but in coalition with Republicans. I think President Obama is going to do the same thing with the Korea FTA. He will probably have a majority of Republicans and minority of Democrats supporting him, but he will get it done. And it is possible that if the President seeks more trade negotiating authority, again he would get the same kind of cross-party support and maybe get it through.

A last point: As you noted, President Bush did go to Congress and secure a renewal of the trade promotion authority, at least for five years. There were members who lost their seats as a result. Robin Gibbs is a notable example. He went back and forth while the vote was open in the House. Mr. Gibbs was a Congressman from North Carolina, from a heavily textile producing district, and he promptly got beaten. Members remember those things.

Marisa Pagnattaro: I am going to put the question back to you [Ambassador Johnson]. What do you think? I am curious to see what you would think.

Don Johnson: Well I think it is going to be very difficult to get trade promotion authority as we have known it passed. Frank Samolis, who works on those issues also, may have an idea or two. I always tell my students that I am sort of the Forrest Gump on international trade, because I was on the staff of the Ways and Means Committee when we passed the Trade Act of 1974, and then later had to vote on NAFTA, and also the Uruguay Round, the WTO Agreement in '93 and '94, and then Doha in 2001. So I have appeared at the critical moments in trade history over the last few years, but I am not sure I have learned very much from it in terms of how to get something passed through Congress! We need someone from the Political Science department to come tell us about that. I think the experience that President

Bush had, George W. Bush, when you were involved, Ted, on the Hill was very telling because I think that was the best opportunity to get it passed and you saw how difficult it was to get it passed. Our friends from North Carolina and other places were able to get a letter from the President on textiles before they agreed to vote for it, and that is one reason it took so long to get the vote passed in that two-hour session. But I think now, where we have the Tea Party and all of the Democrats in the South lost, where you just don't have as many moderates as you used to. . . . We were able to get NAFTA passed even when Dick Gephardt, who was a majority leader in the House, was working very hard against it, because we had a number of moderate Democrats at that time who would join forces with the moderate Republicans to get something like that passed. Now you have the far right and the far left who are not very likely to move on this subject. So I think it is very difficult issue. Do you want to add something Frank?

Frank Samolis: Thanks. I actually followed Don as trade counsel to the Ways and Means Trade Subcommittee and was there for the Trade Agreements Act of 1979, which was the first bill that actually implemented a GATT agreement, the Tokyo Round, pursuant to the '74 trade act that John mentioned. And back then it was a given that every committee of jurisdiction was of course going to cede to the Ways and Means Committee, the Finance Committee. This was what Fast Track was all about. There was no question about challenging the authority of the executive branch to negotiate these agreements.

Now the climate is completely different and I think the real big issue that changed the climate completely was the Columbia Free Trade Agreement. In the past, as a lot of the panel has known, there was a lot of consultation from the executive branch and the Congress before that implementing bill was ever introduced. Because it is not amendable, there was a lot of discussion between the executive branch and the Congress. For a number of political reasons, President Bush got so frustrated—and he was so much in support of the Columbia agreement—that he basically ignored the pre-consultation phase and came up with a bill and gave it to Congress and said: Here it is, vote it up or down. And as was mentioned before, Speaker Pelosi said: That is very nice, but our Rules Committee does not necessarily have to follow Fast Track. And that completely cratered what were years of cooperation between the executive branch and the Congress. So I think it is going to be very interesting.

As Don mentioned, you now have the Tea Party; you have a number of different factors that are going to influence whether or not Fast Track is even going to be in existence. The other thing that we learned from the Columbia Agreement is that you don't necessarily have to have Fast Track. That is not a requirement to implement any trade agreement. And as we learned in the House of Representatives the Senate, the Rules Committee can decide what rules they are going to follow. Forget about Fast Track. So it will be a brave new world.

Marisa Pagnattaro: Thank you very much for adding that.

Don Johnson: I want to add just one other point. And this goes back to '74, when Congress passed the 1974 Trade Act. That was right in the middle of Watergate. I will never forget, Wilber Mills, who was the Chairman of the Ways and Means Committee at the time, said: "You know this is not a good time to be asking for authority to give to the President." But they passed it anyway, because ultimately there was a strong feeling about trade amongst moderates at that time. And I think the further you get away from moderates in either party, the less likely it is that you will have continuance of that granting authority to the president.

Marisa Pagnattaro: I feel very uncertain about the future of trade, but very certain that lunch is probably ready. One more question.

Audience Member: I had a question for Audrey, and I am sorry I stepped out of the room as well for a call, so I hope you didn't already address this, but I am a customs attorney in Atlanta and I work a lot with the U.S. customs and border protection. There is a big emphasis, as you probably know, on intellectual property rights, which of course is on the receiving end when merchandise comes into the United States, if it is counterfeit or otherwise should not be admitted, and customs gets involved. But that doesn't address the sending end of the problem, and the sending end of the problem always seems to originate in China. I think it is something like 92% of all counterfeit goods that come into the United States are manufactured by Chinese state-run enterprises, factories, whatever you want to call them. So I was just wondering specifically: What is USTR doing, or what specific measures is USTR taking to address this problem of massive counterfeiting going on in China?

Audrey Winter: That is a very fair question. And the answers are multifaceted, because it is not just counterfeiting, but it is also piracy and use of the Internet to engage in counterfeiting and piracy. The short answer is that China has a lot of good laws on the books that they don't enforce. And we can't send our enforcement authorities to China to get them to enforce. And the international agreements, by and large, have these laws and enforce them accordingly. So what does "enforce them accordingly" mean? It is pretty hard to litigate those types of issues successfully. We really have an increasingly interactive relationship with the Chinese on specific problems, in terms of what they should do in a particular instance. For example, in U.S. software exports, if China reduced piracy by 50%, not even 100%, our estimates are that U.S. software exports would go up by $4 billion. So, there is a lot of money in this. And so we think of ways in which we will ask China to adopt solutions that are transparent so that we can see whether it is happening or not. And the more we do that and the more we work in a positive way together, the likelihood is that this will expose when they don't operate according to what we agreed. But of course these types of agreements aren't enforceable through dispute settlement, so what we are doing outside China is to negotiate agreements, like for example the Anti-Counterfeiting Trade Agreement, to in fact set the new way forward for better enforcement. Of course, that won't fix the China problem, but hopefully countries will move in a direction where enforcement has better rules, where countries that want to be innovative, including China, want to follow, whether

they are parties to the agreement or ever become parties to the agreement. The idea is to use international agreements to chart the way forward so that over time things improve. So that is our strategy. It is not going to fix the problem today, but it is a relentless engagement, involving probably fifteen U.S. agencies. It is not a kind of government at its worst, but I would say it's government, maybe not at its best, but pretty darn good. There is just no absolute magic bullet for the solution. The hope is that China will recognize, and I think it increasingly does, that intellectual property protection protects Chinese rights holders too.

Marisa Pagnattaro: Ted, do you have a book?

Ted Kassinger: No. Well, I can give you a couple of ideas. One is a book called *The Bottom Billion*, written by a retired World Bank economist [Paul Collier] about a year ago. It is a really interesting discussion of the bottom billion people in the world on the economic ladder, of what policies make sense in terms of raising those people who live on a dollar a day, as you often hear, out of poverty. Part of the solution is trade. But part of it is things those countries need to do themselves in terms of putting their house in order. It is a cold look at traditional developmental models as not being very productive. For those of you interested in international business and trade development, it is a really interesting book. Paired with that, I would recommend books by Hernando de Soto. He is a Peruvian who has written extensively on what it takes to create legal regimes that foster development.

Marisa Pagnattaro: Anything else you want to add? Thank you so much.

The Future of International Trade: An American Perspective

Keynote Speech

Ambassador Demetrios Marantis

Don Johnson: Well I hope everyone enjoyed their lunch and had a chance to get finished with it, although if you're still eating, don't stop for us. It's my pleasure to introduce to you our honored guest and keynote speaker, as well as an old friend of mine, who is the current deputy United States trade representative with jurisdiction over Africa and Asia, and a number of substantive issues like labor, the environment, and some others. He comes to this position highly qualified. He's a graduate of Princeton with a degree in Public and International Affairs and then he went to Harvard Law School, after which he worked for a number of years with the prominent law firm of Akin Gump, both in Washington and Brussels. We then had the fortune of having him join us at USTR—he may have gotten there a little bit before I did—where he was associate general counsel for a number of years and he had the distinct displeasure of being my lawyer for a while there. We had the relationship, I would say, that's similar to what F. Lee Bailey had with OJ Simpson. I always think of the time when I was in law school and Andrew Young came to speak to the law students. It was before he was elected to Congress and was ambassador to the UN and later mayor of Atlanta. He was still involved with civil rights work at that time and he told us law students that the legal profession was very important to the civil rights movement. What they would do is: They would decide what to do and take the action, and then go to the lawyers and say, "You make it legal." And that's kind of what I'd do with Demetrios.

I had another lawyer, too, John Cobau here, who was my lawyer on our trade negotiation trips, and I always said he got us into trouble and I had to go to Demetrios to get us out. He did a fine job there in that capacity and after I left, when the Clinton Administration was over, he still had to clean up my mess there for a couple of years at the WTO. After he left the USTR general counsel's office, for a time he went to Vietnam and was the chief trade counsel to the U.S.-China Trade Organization that was formed after we had our trade agreement with Vietnam. And then he moved to the Senate Finance Committee, where he was the chief international trade counsel for the Senate Finance Committee, where he advised Max Baucus, who was the chairman, as well as the members on the committee. He did a great job there through a difficult time. He is now at his current position, and we are delighted to have him come down and see what it's like down here at the University of Georgia. We appreciate all of you coming to listen to Demetrios, and so without further ado I'll call on Ambassador Demetrios Marantis.

Demetrios Marantis: Little did Don know that I was actually committing international trade malpractice behind his back, but we won't go into that here. I'm so happy to be here. It's really an honor to be here today. It's great to see Don and it's good to see a number of you whom I work with in Washington. We never see each other, so it's nice to have a reunion in Athens, Georgia.

What I wanted to talk about a little bit today was the future of international trade, but let me offer my apologies up front. While I may have a flair for the dramatic, I am not here to paint sensational pictures of tomorrow. There is no trade apocalypse upon us. No dark clouds and thunderbolts loom on the horizon as nations dig alligator-infested moats, create SPS barriers, and shed their trade obligations. Nor is the future all sunshine and light—birds chirping and flowers blooming as everyone holds hands and lowers their tariffs in unison, speaking one common language of free trade.

The future of trade is neither extreme. In fact, the future of international trade is no great mystery at all. We have been discussing it for years, and we know what awaits us.

In the future, we have been told that Asia's economies will drive global economic growth with increasingly competitive export industries and growing domestic consumption. In the future, the United States' historical ties to the Asia-Pacific will come under strain as regional economies grow more confident and pursue Asia-only trade agreements that exclude the United States.

In the future, it will not be enough to do more of the same trade policy—global and domestic developments will force the United States to do better and more creative trade policy. We will need new policies to increase our ambition and flexibility, anticipate future economic challenges, and better reflect our values.

In the future, people have been saying the United States will no longer be able to rely on the existing consensus on trade, which years of domestic skepticism have left shrunken and frayed. In the future, we will need to rebuild a more robust consensus, including by facing up to beliefs that trade is bad for American jobs, families, and economic growth.

We have also been told that in the future, the United States will realize trade and exports must play a bigger role in the American economy. Trade will become part of a long-term, job-creating, sustainable growth agenda that relies less on domestic consumption and borrowing, and relies more on the 95% of consumers outside the United States.

Sound familiar? It should. Because while we have for years been loudly debating the future of international trade, the future has quietly arrived. The future is now.

This future is now and we must act to embrace it. As the President said in his State of the Union address, "The future is ours to win. But to get there, we can't just stand

still. . . . We know what it takes to compete for the jobs and industries of our time. We need to out-innovate, out-educate, and out-build the rest of the world."[5]

This is why I am pleased to be at the University of Georgia today, where I just finished learning about your exciting new science and technologies programs, and where students are surging forward in the fields that will fit our workforce for the future.

We must seize the future—in education, in innovation, and in trade. Right now, we have a once-in-a-generation opportunity to shape the future of a trade policy that maximizes U.S. exports, American jobs, and our engagement around the world.

The Obama Administration is implementing a robust and innovative trade agenda to embrace and shape each of the future challenges that are upon us. Let me take these challenges in turn—our engagement with Asia, our new approach to trade policy, our work to rebuild the domestic consensus on trade, and finally how we are putting trade at the center of our national economic agenda.

The Asia-Pacific has changed the global trade calculus. Accounting for 43% of global trade and home to 41% of the world's population and some of the most dynamic economies anywhere, the Asia-Pacific has come into its own. Intent to build on their successes and integrate regionally, Asia-Pacific economies now have more than 180 Asia-only preferential trade agreements in force. More are on the way, with over twenty agreements awaiting implementation and nearly seventy others under negotiation. Even as our exports to the region grow, our overall share of the Asia-Pacific import market has fallen from 13% to 7% over the past decade.

The future is here, the stakes are high, and the time for action is now—which is why this Administration has not hesitated to take bold action on trade, bilaterally and regionally.

Last December 3, the United States and Korea announced a package of measures to move forward Congressional approval of the United States-Korea Free Trade Agreement, or KORUS. The accompanying agreement we negotiated made KORUS better for America's auto industry and better for America's autoworkers. Within weeks, President Obama will submit to Congress legislation to approve and implement KORUS. Entry into force of KORUS will strengthen our ties with the world's twelfth largest economy and has the potential to increase annual American goods exports to Korea by over an estimated $10 billion and support over 70,000 additional American jobs.

We are also engaging the Asia-Pacific regionally. A little over a year ago, President Obama announced that the United States would join the Trans-Pacific Partnership Agreement (TPP), a key initiative to advance our trade and investment interests in

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[5] Report on the State of the Union, 157 Cong.Rec. S112 (Jan.25, 2011).

the region. This negotiation involves an initial group of nine like-minded countries—the United States, Australia, Brunei, Chile, Malaysia, New Zealand, Peru, Singapore, and Vietnam—and aims to create a platform for regional economic integration across the Asia-Pacific. In just over a year, TPP has become the biggest game in town, and additional Asia-Pacific economies are eager to join. This week, negotiators are in the fifth round of negotiations in Santiago, Chile and will continue talks at an intensive pace. We will welcome additional countries when they are ready, and seek to bring a swift conclusion to TPP that assures maximum benefits for American workers and exporters.

The United States is also leading the Asia-Pacific region by hosting, for the first time since 1993, the twenty-one economy Asia Pacific Economic Cooperation (APEC) forum. Our host year will give the United States the opportunity to drive APEC's trade and economic priorities, and we are intent to make the most of it. The President has said that the priority for APEC 2011 will be to build a seamless regional economy. We at USTR are already working hard to move forward specific proposals in each of these areas, including those related to innovation and trade in technology; improving supply chain performance in the region; eliminating barriers to trade in environmental goods and services; and tackling regulatory issues that prevent trade in emerging technologies. We will do all of this with the goal of making it cheaper, easier, and faster for American businesses to operate in the Asia-Pacific.

China is another pillar of our strengthening engagement with the Asia-Pacific. Last year, through our intense dialogues with China, including the Joint Commission on Commerce and Trade and the Strategic and Economic Dialogue, we achieved the best results we have seen in years, including commitments by China to increase purchases and use of legal software, crack down on internet piracy, and refrain from discriminating in government procurement based on where the intellectual property component of goods and services was developed. More recently, China committed to delink its innovation policy from the provision of government procurement preferences—a key concern for America's innovators and creative industries. We still have significant challenges with China, including ensuring that China implements the commitments it made this year.

But the future we live in today demands not just more trade policy, but that we do trade policy better and more creatively. The Obama Administration is doing exactly this across the board. TPP is a great example. For the first time in any trade negotiation, TPP is focusing on small- and medium-sized enterprises (SMEs). SMEs are major job-creators domestically, but minimally engaged in international trade. We are looking at trade and investment barriers that hit SMEs hardest—such as lack of transparency and complex legal frameworks—and finding ways to eliminate or minimize those barriers.

Other new areas of negotiation in TPP reflect recent international economic developments that aim to anticipate concerns beyond the horizon. We are looking at treatment of cross-border data flows, the increasingly common problem of "indigenous innovation" measures that disadvantage U.S. technology by forcing U.S. investors to

favor another country's domestic technology, and unfair advantages given to state-owned enterprises. We are also working on new and more creative ways to strengthen American innovation and creativity, while working with our trading partners to crack down on counterfeiting and piracy and fostering respect for the intellectual property rights.

We are also working to make sure TPP reflects our values, including worker rights and protection of the environment. We are engaging Congressional Democrats and Republicans to find a common way forward to incorporate strong labor and environmental provisions, including new obligations in TPP that address illegal trade in fisheries, wildlife, and logging.

All of these creative trade policies will be of little use unless a broad coalition of supporters backs them. That is why we must continue our work to rebuild our domestic trade consensus. To do so, we need to face the fact that more than half of Americans think trade agreements have harmed the United States, up from one-third a decade ago. Just nine percent of Americans believe that trade creates jobs, only eight percent think trade raises wages, and fully half believe trade actually slows national economic growth. Not only is trade skepticism real, it is increasingly bipartisan and prevalent among middle- and upper-income earners.

The Obama Administration has confronted this skepticism head-on. Unions, NGOs, and small businesses that have felt shut out of the trade policy process now have a seat at the table. Ambassador Kirk and I have also taken the time to travel to Ohio, Michigan, Pennsylvania, Missouri, Maine, and other states to speak directly with American workers and business owners, hear what is on their minds, and find a better way of working together on trade. Just yesterday I was in Atlanta meeting with local small businesses and state government officials to hear their priorities and concerns.

We have also revamped our communications strategy and rethought how we talk about trade, to make sure the facts are being heard.

We are making progress. The broad support for the KORUS trade agreement is unprecedented and historic. Thanks to the accompanying agreement we negotiated last year that improves our bargain with Korea, tireless outreach, and a transparent process, major labor unions, agriculture groups, businesses, Democratic and Republican leadership in Congress now stand shoulder-to-shoulder in support of KORUS. This coalition will be stronger and more diverse by the time Congress considers KORUS this spring.

We hope to make this kind of redoubled and reenergized coalition in support of trade the model for our initiatives that follow. Two such initiatives that we are working to advance are the trade agreements with Colombia and Panama. The President has instructed Ambassador Ron Kirk immediately to intensify engagement with Colombia and Panama, with the objective of addressing as soon as possible this year the outstanding issues related to these pending trade agreements. If we are successful,

we will bring those agreements to Congress for consideration immediately thereafter. Finally, success for the future demands we finally place trade at the center of our domestic economic growth agenda. The recent recession underscored how, for too long, U.S. economic growth was imbalanced and too dependent on consumer borrowing and spending. Today, and in the future, the United States and the global economy need more sustainable growth, driven by increased U.S. exports and increased consumer spending in markets abroad. Putting trade at the center of our domestic economic growth agenda will not only help ensure more sustainable economic growth, it will create good jobs that pay better than the national average.

To animate this goal, last spring President Obama created the National Export Initiative (NEI). The NEI is an across-the-government effort to double U.S. exports by the end of 2014 and support millions of additional American jobs. To reach this goal, the President's Export Promotion Cabinet developed, and has begun to implement, seventy recommendations on export assistance, increased trade finance, and assertive policies to expand trade opportunities.

The NEI is succeeding and we are moving toward the President's export target. Over the past five quarters of steady economic recovery, exports have contributed significantly to America's total economic output. Exports were up nearly 17% last year, supporting hundreds of thousands of additional American jobs. We have work left to do, but we are well on our way.

I began my remarks dismissing dark visions of the future of trade. But let me end on a note of caution. We know our challenges. I think we have the right policies at hand to embrace and help shape them. But we must follow through. In today's global economy, there are not many second chances. The stakes are high and the competition is real. If we do not get this right, future generations may look back at us today and say, "You had the chance to shape a better future. Why did you hesitate?"

We cannot hesitate, and we will not. The future is now and the future is ours to win. We must seize it. If we do it well, we will have a once-in-a-generation opportunity to shape the future of a trade policy that maximizes U.S. exports, American jobs, and our engagement around the world.

Thank you very much. Thanks, Don, for putting this together. I'm really happy to be here and I'm really happy to answer any questions if anyone has any.

Don Johnson: Any questions? That's Haidong; he's one of our LL.M. students.

Demetrios Marantis: Haidong warned me that he was going to have a question for me.

Audience Member: Last week, the Department of Commerce launched a new case against China in the WTO regarding electronic payment, and the U.S. side challenges the virtual monopoly on electronic payment processing granted to a Chinese state-

owned enterprise called Chinese Union Pay. In the environment of post-financial crisis, would you consider this case as a measure aiming to help the American financial industry revive in the huge China market? And could you tell us about your personal focus on the result of the case?

Demetrios Marantis: So, the EPS [Electronic Payment Services] case. The United States filed a WTO case on electronic payment systems and the purpose of this case is to confront market access barriers that U.S. providers of electronic payment services face in China's market. The entire purpose and point of China's WTO commitments was to ensure that there was competition in services for which China made commitments, and China-made commitments are in electronic payment services, but unfortunately, the way that the market has been structured, there is one monopoly, China Union Pay, that doesn't allow competition from U.S. providers of electronic payment services. So this case is aimed at ensuring that foreign providers of these services are able to compete on a level playing field with Chinese providers of those services, and I think the EPS case is sometimes emblematic of some of the concerns our exporters have faced in the Chinese market in other sectors as well. But what is also, I think, really important about the EPS case—as in all of our WTO cases with China and the rest of our trading partners—is that the WTO provides a forum to resolve disputes. The EPS issue was an issue we had with China for many years and we've tried to use various forums, like the JCCT (Joint Commission on Commerce and Trade) to resolve it, but where dialogue is unable to resolve the dispute, we have a neutral, third-party mechanism in the context of the WTO where we can take these claims and arbitrate them. The WTO has been a very successful arbiter of disputes that the U.S. and China have had in many areas, and has actually facilitated settlement of these cases.

Audience Member: You were talking about the NEI, National Export Initiative. While on its surface is seems like a great idea, with [the goal of] increasing exports by 50%, does it risk being a bubble that could pop, or what are the other negative long-term implications after the five years?

Demetrios Marantis: I think the whole point with the NEI is to put the United States on a trajectory of exporting more. Take small and medium-sized enterprises (SMEs), for instance: 1% of SMEs export. Imagine the potential if we're able to encourage small and medium-sized enterprises to export more, in terms of their ability to access markets and the jobs that they are able to create locally by doing so. Yesterday, I was in Atlanta and did a round table with a number of local businesses and one of the representatives from the Department of Commerce from the local USEAC (United States Export Assistance Center) had said that a company she had been working with, a small company that employed ten or fewer people, all of a sudden found a new export market in Chile for this particular product, and because of the opportunities that exist now for them to export to Chile, they were able to hire an additional ten people. It's that kind of opportunity that the NEI really hopes to foster. Our role in it at USTR is to help create the enabling environment for exports by trying to break down market access barriers in countries around the world by either negotiating trade agreements or enforcing them. But the other agencies—and this is what's unique about the NEI—that

are really working hand-in-glove with our sister agencies have key roles in this: the Commerce Department, through its export promotion programs; the Small Business Administration, by the work that it does with small businesses to help them export; the Agriculture Department, by what it does in helping farmers and ranchers develop export opportunities; and the Export-Import Bank, in terms of the provision of trade finance. So hopefully in the next five years, realizing the President's goal of doubling exports will help put us as an economy on a trajectory where we rely more on exports than we do now, as part of the effort of rebalancing the global economy. Hopefully, in the future China will rely more on domestic demand. We, in the future, should rely more on exports.

Ted Kassinger: The President set a very ambitious goal for completing the TPP (Trans-Pacific Partnership). Is it still on track for next November? Number one, and number two, what are the prospects for Japan being brought into the mix?

Demetrios Marantis: Let me start with the second question first. As I was saying earlier, TPP right now includes nine countries, but the whole goal of TPP is to serve as the platform of regional integration throughout the Asia-Pacific region, so that other countries can join. What the TPP countries have agreed in terms of new countries coming on board is: We will welcome them when they are ready to meet the high standards that we all expect of each other. Before the United States decided to join TPP, we spent an exhaustive amount of time with the other countries to make sure that we were all on the same page in terms of expectations, so that one country didn't decide to join that didn't have the same level of ambition in terms of the commitments that it was willing to make as part of the Trans-Pacific Partnership. Malaysia was the most recent country to join. They spent about a year with us and with the other TPP countries, going through what the expectations are going to be and how to handle areas that will be potentially sensitive for it.

So Japan has expressed an interest in the TPP and they are undergoing, I think right now, a really significant domestic process to decide whether or not the types of things that we and the other TPP members would expect of Japan are feasible, particularly in the agriculture sector, where, as we all know, Japan has maintained a fairly protective agriculture market over the years. To be part of TPP it is going to need to be willing to make significant commitments in the agriculture area. We are working with Japan bilaterally, in the context of our various bilateral dialogues with Japan, to make sure that Japan understands what will be expected of it as it makes its decision as to whether or not it will want to join TPP at some point in the future.

In terms of timing, the President is definitely pushing us to get the negotiations going as quickly as possible, but at the same time he recognizes that we need to have substance drive process and substance drive timing, rather than the other way around. So we have a very ambitious negotiating schedule this year. There was a round of negotiations, as I was saying, in Santiago this week. TPP countries are going to get together at the end of March in Singapore for the sixth round. There are a number of other rounds planned this year, and it would be great to make as much progress as we

can make by the time the President hosts APEC [Asia-Pacific Economic Cooperation] in November, but again, we are going to need to make sure that substance drives the process, rather than setting an artificial deadline.

Audience Member: Thank you for joining us here, first of all. My question deals with the U.S.-China relationship. It strikes me that it's incredibly important to our economic future, and to theirs, and to the global economy. Yet so many Americans view it as a zero sum game. You cited some statistics about how Americans view trade, and its costs and benefits, and I think, when it comes to China, Americans can become more critical. I'm wondering what the President and the Administration think about what they can do, or what kind of thinking and strategy is going on that can inform Americans about the win-win relationship in this important area.

Demetrios Marantis: I agree. It's so trite to say that the U.S.-China relationship is filled with opportunities and challenges, but that's the reality. The opportunities in China are incredible for our exporters, given the size of the market. The challenges are also pretty incredible as well. I was talking to my mother the other day, who around the time of the Hu visits said, "Well I hope President Obama is going to tell President Hu that China has to stop stealing our stuff." Thank you, Cleo Marantis. But, yesterday, when I was in Atlanta and whenever I'm with, particularly, small businesses, the number one concern that they cite is intellectual property theft in China and their fear of going into that market because of those and other concerns. So it is imperative for us to actually work hard with the Chinese government to address those concerns. I don't want to sound Pollyanna-ish, because the challenges are huge, but we've made a lot of progress with China over the past few years, particularly in this past year. I think it's in part, on the IP side, a recognition by China that protection and enforcement of intellectual property is in its long-term interests. If China wants to become an innovative society, if China wants to become the locus of research and development, it's going to need to protect and enforce IPR [intellectual property rights] protections. We have had a developing and deepening partnership with the Chinese on these issues that's actually yielded results. Now, again, the proof is going to be in the pudding. When China commits to say, okay, we are not going to provide government procurement preferences on the basis of where the intellectual property is developed, that's a huge victory, or a huge positive step. I don't want to call it a victory, because it's really win-win. But, again, we're going to have to work with China to make sure that a commitment like that is implemented, and isn't just implemented at the national level, but is also implemented at the provincial level and the municipal level. I think that, to be frank, our biggest challenge with China over the course of the next few years is going to be at the provincial level and the municipal level. The central government is doing a lot of work on these areas, but there are also other layers of government where we are going to face implementation issues and that's going to keep us very busy.

Don Johnson: I have a follow–up to that point. We had a case against China on IP enforcement and the result was, I think it's fair to say, mixed. The Chinese claimed victory; we claimed victory. My question is: Is that the end of a WTO approach to

dispute settlement on IP? Have we reached the end and now we're working through negotiations and working with the provincial capitals and so forth? I just wondered if there are any legal remedies that we have on that point now?

Demetrios Marantis: I think, Don, the answer to that question is mixed. Where there is a WTO issue, we will not hesitate to use our WTO rights and pursue those in the context of dispute settlement. We have the JCCT, the Joint Commission on Commerce and Trade, and there is an IPR working group as part of that. When we originally brought the IP dispute in the WTO, we didn't have a lot of work in the JCCT IPR working group. It waned a bit. After the case, we have had a real uptick in, I think, enthusiasm from the Chinese side in working through issues with us on IP. I was talking a little bit about software and about Internet piracy, but we're working with China on IP issues, as they relate to standards, as they relate to the protection of copyrighted journals, as they relate to landlords who have trademark-infringing goods on their premises. So we really have seen an uptick of cooperation of China on these issues, which is great, because we are seeing incremental progress. And I'm hopeful that the good work that Audrey and others have been doing in the context of the JCCT IPR working group will continue. The more progress we make, hopefully that will obviate the need for WTO dispute settlement, but that's always out there as a recourse, should we not make progress.

Audience Member: At lunch we were talking at our table about what it is about the Chinese mindset or worldview that they don't value intellectual property. Where have they come from that this has developed in contrast to India, which does have a high respect for it? Then you read stories in the news certainly about the wins that you've spoken about, but also about Chinese hackers that are government sponsored. I think there was a story last week about a hacking event of a defense contractor. How do we know that this is something we can actually trust?

Demetrios Marantis: Again, I think on a lot of this stuff the proof is in implementation. We continue to make progress, but there continue to be huge challenges on IP. I think all of us collectively would be unrealistic to expect that the environment in China is going to change dramatically overnight. I don't want to call it incremental progress, because it's more than incremental progress, but the more that we can do, the better of an environment we will help China create. The other point, which I made a little bit earlier, is that I do think China has realized that this is in its interest. Innovation, being an innovative society, is a huge priority for the Chinese government. You can't be innovative, you can't foster creativity without protecting IP. As that realization sinks in, throughout the various levels of government, I think we'll have more success. We make progress, but we still face unbelievably high piracy rates in China for software, and for music, and film. It's discouraging that, after ten plus years of China being in the WTO, the piracy rates, for instance, haven't halved, but things are slowly moving in the right direction, and I think our role is to continue pushing, so that things can keep trending in the right way.

Audience Member: I guess the other point is the other half of the bargain: that people are buying it and they are probably people like here. Is there any effort to address that—the ethical considerations?

Demetrios Marantis: Part of it, too, is an awareness issue. It's spreading awareness as to what it means to buy a pirated CD or to buy counterfeit medicine, and the risks associated with that. China does, from time to time, campaigns against something. They have campaigns on promoting the legal use of product "X" and more of that would be welcome in China, because, I think, as you build awareness of why this is important and the risks inherent in buying pirated products or buying counterfeit products, you've raised awareness as to why actually spending some more money to buy the brand and to buy the real thing is actually in everybody's interests.

Audience Member: Hi, my name is Qianqian and I'm a first year MBA student. I was doing international trading for about five years and, compared to five years ago, two thirds of my suppliers are no longer in the market. They have for several reasons gotten out of the market: first of all, the raw material price, rising labor costs, rising concerns of environmental protection, and safety concerns. For the recent years, there are three special reasons. One is an unstable supply of power. There is also the increased control by the government. For certain products they have increased the licensing. So you have to reach a certain entry level, for example, [with] your registered capital and other stuff, to be able to enter the market. Also, a lot of my suppliers have been forced, or almost forced to sell their companies to the government, because they have failed in negotiations of the iron ore price in Australia and Brazil. So the government has more control and the private sector has been driven out of the market, and they are looking for new opportunities. Many of them are looking for opportunities in the U.S. because of the sustainable power supply and the industrial standards. People could easily sell their products back to China at a much higher price. I wonder what kind of initiative your government has to encourage this type of foreign direct investment from China?

Demetrios Marantis: It's an interesting question. That was a subject that we discussed with our Chinese counterparts in the context of President Hu's recent visit to Washington last month. The United States has among the most, if not the most, welcoming foreign investment regime in the world. We welcome investment from companies from countries around the world. Again this is a little bit along the lines of what I was answering with regard to IP. It's an awareness issue—becoming more aware of what investment opportunities exist in this market and in different states. I know states have investment promotion programs, where they try to attract foreign investment in their states, in particular sectors. I think what is good here is that we have an open investment regime, where we encourage companies to invest here and to employ Americans in the good jobs that foreign investment creates in the United States.

Don Johnson: I can't let you leave without asking you about Chinese currency.

Demetrios Marantis: Is there anyone from the Treasury Department here?

Don Johnson: You didn't let me get that far. I know it's the Treasury's jurisdiction, but of course it has a big impact on trade and we'd just like to have your comments about where we're going on the currency issue. Obviously, you have [Section] 301 petitions and other things, trying to create a WTO case on China for subsidy of their currency issue. Just a general comment on that issue.

Demetrios Marantis: Treasury has the lead on currency issues. I don't have a ton to add, other than what Secretary Geithner has already said, which is that it's the Treasury Department's view that the RMB is undervalued and that we continue working with China bilaterally, through mechanisms like the Strategic and Economic Dialogue, or multilaterally, through the G-20, to address this issue. But, taking a step back from there, this all comes into what I was talking about earlier, the effort to rebalance the global economy in terms of China doing more to stimulate domestic demand, while we do a better job saving and do a better job exporting. As China increases its domestic demand, it's going to create more opportunities for us to export. From the USTR perspective, it increases our need to do what USTR does, which is to work to break down the market access barriers that exist in markets that, in China in particular, impede the ability of our firms and farmers and ranchers to sell to China. I always end up back in terms of talking about market access, because it really is part of the large picture of what we need to do, to do a better job selling in China, and what China needs to do as well, in terms of creating and stimulating more domestic demand there.

Thanks, Don. Thanks, everyone.

The Future of International Trade: An American Perspective

Panel 3: Future of Multilateral Trade Negotiations and Dispute Settlement

Moderator: C. Donald Johnson

Panelists: Shanker Singham, Frank Samolis, Andrew Shoyer, and Ayesha Khanna

Don Johnson: The topic of the third panel is one that I think is very interesting and that is the future of multilateral trade negotiations and the future of dispute settlement. You could say this is the question about what the future of the WTO is, because those issues I think are at the forefront. We have some great experts on the topic. I will start first by introducing Ayesha Khanna. Ayesha is the international trade counsel for the Senate Finance Committee. She advises members of the Committee on issues related to international trade, but also helps draft legislation I am sure. So, she is heavily involved in all of these issues and is going to give us a perspective from the Congress.

Next is Frank Samolis. Frank is an old friend of mine. We were partners at Patton Boggs together. He is a partner at Patton Boggs and leads the international trade practice there. He actually started in international trade law more than thirty years ago. I am not going to try and date you too much, but he was on the staff of the Ways and Means Committee, trade counsel on the Subcommittee on Trade for the Ways and Means Committee. He is also heavily involved in all sorts of international trade law issues with the International Trade Commission, Court of International Trade, but what he is here today to talk about is international trade negotiations. He has actually been involved in the trade negotiations, all of the trade negotiations, since the Uruguay Round, maybe before. I don't think he goes back to the Kennedy Round, but at least since the Uruguay Round, and also of course the Caribbean Basin Initiative, CAFTA, NAFTA, all of those acronyms—he has been involved with them, and is heavily involved today on the current free trade agreements that we are going to talk about, so he will give a perspective on where we might be going in terms of regional and bilateral trade versus multilateral trade negotiations.

Next is Andy Shoyer. Andy is also an old friend of mine. He was at USTR for many years. His last assignment before he retired from there was legal advisor to the U.S. mission in Geneva. He has tried a number of cases in the WTO, both on panels and the Appellate Body, and he continues to do that with his firm, Sidley Austin, which is one of the most prominent firms in international trade, both in Washington and in

Geneva. He represents clients who are having WTO disputes. And so he is going to talk to us primarily about dispute resolution and the future at the WTO.

And then last, but certainly not least, is Shanker Singham. Shanker is a partner with the prominent law firm of Squire, Sanders, and Dempsey—an international firm, as all of these firms are. He has been focusing on antitrust law as it impacts international trade law. As some of you may know if you have read Adam Smith's seminal work, the *Wealth of Nations*, he talked a little bit about monopolies and the impact it has on the mercantile system, and of course during the Robber Baron era of the Gilded Age, people used to talk about the tariff being the mother of all trusts, meaning monopolies. So he is going to talk about market access issues as they pertain to international trade and the involvement also of competition law, or antitrust law as we call it in this country. Okay, we are going to start with Shanker and you can start with that subject.

Shanker Singham: Well, first of all, thank you to both the Dean Rusk Center and the Business School for hosting us here, and thank you to Anne Marie and Blake for taking care of us and being so efficient and organized about this conference. My remarks are basically going to be drawn from the paper that we distributed to you, and that paper is also based on a book about the interface between trade and completion that I wrote in 2007. We have talked a lot about China today and that is not surprising. China is the second biggest economy in the world and is slated to be the number one economy in the world in fairly short order. So it is not terribly surprising that we are spending a lot of time talking about China when we talk about the new world of trade and trade issues in the future. But what I want to say is that the paper is focused on China, but many of the comments that we make in the paper are applicable to many countries, and people have said earlier on today what is true of China is true of many other countries in the world, particularly the [other] BRIC countries—Russia, India, Brazil, but it is true generally across the board. I would also add that some of the types of trade barriers that I am going to talk about affect China itself. So China's exporters around the world are also affected by these same barriers. So they really are issues that affect the global trading system.

What I am going to talk about really comes out of the second part of the paper, those are what we have variously today called regulatory market distortions, regulatory overreach, anticompetitive market distortions, which is the way I prefer to describe them, largely because that answers one of the questions that was posed in the first panel today, which was: How do you find the regulatory balance? Well, generally, what you want to do in regulatory promulgation is have the least anticompetitive regulation consistent with whatever your regulatory goal is and how you get that is the test of how good a regulatory promulgation system you have.

So we are going to call them anticompetitive market distortions. What are they and why are they important? Well, you had in the morning a summary of how we got to the point that we are at, at least in terms of the various negotiating rounds and the GATT system and the WTO. That has systematically reduced trade tariffs and border

measures over the years. So, as those trade tariffs and border measures have gone down, what we have started to see is the impact of some of these behind the border measures—some of these regulatory systems; what Audrey [Winter] called the Bermuda Triangle of issues with respect to the trade world. Certainly these issues really fall between the worlds of competition and trade, but have an effect on both. So, as these tariffs and border measures have come down, what we have started to see is the impact of these regulatory systems and behind-the-border measures that distort markets.

When you are trying to get your product into a country and you are facing a 100% tariff, it doesn't really matter what is happening inside the market. When the tariff goes down 1% to 5%, and you can get your product into the market, then what happens inside the market becomes incredibly important. We started this morning with a quick analysis of Coca-Cola's operations inside Central and Eastern Europe, which is very interesting, because in the 1990s we really believed—in the early 1990s I spent a lot of my career opening up markets in Central and Eastern Europe in the former Soviet Union, drafting privatization laws in Russia, and so on—we made an assumption that we now know is not correct, but we made an assumption that if you opened up trade barriers and you privatized and you engaged in pure trade liberalization, that competitive markets would automatically follow. But we didn't really need to worry too much about what was happening inside the market, because the simple competition that would arise from trade liberalization would mean that competitive markets would follow. And, so if you look in the 1990s at Latin America, if you look at the Russian privatizations, there is not much focus on whether we are really creating competitive markets. And unfortunately what happened is that in the three-legged stool of economic development—which is trade liberalization, competitive markets, and property rights protections—we did pretty well on trade liberalization, you know relatively well with some exceptions on property rights protections, but not very well on building competitive markets, particularly in developing countries, and particularly with the BRIC countries. And now we are seeing the results of that lack of focus.

So, what are these anticompetitive market distortions? Well, in a recent *Wall Street Journal* survey of CEOs, the CEOs polled identified government overregulation as the single biggest threat to their businesses. Government overregulation outranked increased competition, currency fluctuations, price deflation, [and] global terrorism. So, this is a very serious issue and it has become a more serious issue as global competition has increased.

So, what are these types of restraints? Well, we had a lot of discussion this morning about state-owned enterprises and certainly there is a whole category of public sector restraints that are anticompetitive in the basket of state-owned enterprises. Now, there is nothing per se wrong from a competitive market standpoint in regard to the state-owned enterprise. The problem arises when that enterprise benefits from some kind of government privileged licensing system that is beneficial to the state-owned enterprise, where that state-owned enterprise is buying and selling goods in ways that it operates as a revenue maximizer. In other words, if you are in competition as a private firm with

this state-owned enterprise, be it Chinese, Indian, Italian, or wherever it comes from, and that enterprise is able to charge a price below cost, in an ordinary competitive environment that firm would go out of business. It would only not go out of business if it had basically a monopoly position. But a state-owned enterprise can do that and not go out of business. A state-owned enterprise can do that and continue to sustain losses much longer than private firms and win basically a war of attrition. Abusive regulatory process—this is where you have confusion between the role of the regulator and the role of the regulated company. So you may get situations where the company is also the regulator and you will have private firms competing against a state-owned firm that also has regulatory responsibilities. There was some mention of some cases today in that area.

There are a whole range of laws which are public sector restraints that affect competition and affect trade, particularly with respect to distribution, and market entry, and market access. These laws essentially force all competition at the distribution level. There are some very important cases in the WTO. The seminal case is the Kodak-Fuji case involving photographic film in Japan, where the Japanese government had significant distribution restraints. That case could have been an antitrust case. The U.S. has antitrust laws that enable the antitrust agencies to reach conduct that takes place in other countries which has an effect on U.S. commerce. But the problem with that case was that you had mixed private and public behavior. You had some actual private collusion, but you also had government toleration of private collusion, and you also had government laws that fostered a lack of competition in the distribution sector, distorting tax laws and policies

So again, there are WTO cases in the area of discriminatory tax laws that basically say that the goal is equality of competitive opportunity. That is how most of the Panel and the Appellate Body decisions have taken the body of discriminatory taxation.

Then you have a series of government actions that distort trade in ways that are anticompetitive and we have had a long discussion this morning about China's indigenous innovation policies, which are a whole range of rules and policies that basically knock out certain competitors from the government procurement market if you are not satisfying some of the requirements of this legislation, including indigenous Chinese intellectual property.

We also have actions by competition agencies. One of the things that has happened in the last twenty years is that we have far more competition agencies in the world than existed previously. This ought to be a good thing. Competition agencies' goal is to make markets competitive, and that ought to be a good thing. But in many countries, competition agencies have become a tool of government to gain through the actions of their competition agencies what they couldn't gain through legislation. So we have a number of decisions in many countries, China being one where the competition agency has basically acted in a perverse manner, in which the agency's rulings have made no economic sense. It's been about getting a particular regulatory result or steering a particular regulatory outcome. So the textbook case for this is the

Coca-Cola acquisition of the Huiyuan juice company in China, in which there was no real economic reason to block that action, but the Chinese antitrust agencies basically blocked the acquisition.

So, those are a few of what we might call, within a class, anticompetitive market distortions. You might also want to throw other things a government could do that damage overall welfare into that mix. You could include current fluctuations and so forth into that overall category.

If that is the issue and many of these behind the border barriers essentially are in that cluster of issues, what can you do about them? Well, what you want to do is sort of have a multifaceted approach, where you look domestically, and this applies also to the U.S., where you look domestically at your own regulatory promulgation system and you ensure that you have a regulatory promulgation process that basically encourages pro-competitive regulation and legislation. We do that in the U.S. through the part of the Office of Management and Budget, which does cost benefit analysis on new regulations. In Europe they have a similar kind of impact assessment and they are moving slowly towards a system where economic welfare considerations are taken into account with domestic regulatory promulgation.

So there is certainly an opportunity in China and in other countries so that we would want to encourage those countries to move down that same path, follow what has been agreed to now in the OECD. The OECD's regulatory tool kit essentially helps governments learn how to do regulation and to do regulation in a less damaging way. And you heard this morning, there are a litany of U.S. regulations that have arguably damaged the U.S.'s economic competitiveness, and so the U.S. does not have completely clean hands on this front either.

However, that on its own is certainly not going to have an effect. We live in the world of political reality, and in the world of political reality, many of these market distortions that benefit certain companies, certain state-owned companies, are there for reasons. They are not there by accident. They are there because they have been lobbied into place by the same vested interests and the groups that benefit from them. So no amount of new, good, modeled regulatory promulgation processes will forestall that.

You need to have some sticks as well as carrots. You would want to have more active competition agencies in the areas of public sector restraints. So this is the competition advocacy mandate of competition agencies. Many competition agencies around the world all have competition advocacy mandates. They are all required to look at sectors or regulations that damage the competitive playing field. In the U.S., a very good example of this is the Granholm case, which is a case involving Michigan, where Jennifer Granholm was the governor, and there was a law that provided that you could not buy wine on the Internet and the reason you couldn't buy it from producers who were outside the state of Michigan was because of that restriction. The reason for this was supposed to be a public health one—you didn't want children to have access to

this type of thing. Well, the FTC [Federal Trade Commission] issued a report on the anticompetitive nature of that regulation with that system. Now it didn't have much of an impact on that State of Michigan, but when this court case eventually came to the Supreme Court, the Supreme Court cited the FTC report twenty-five times, and eventually overturned the rule. So, you can have active competition agencies that can actually have an effect on regulation as it is promulgated.

You also need to use the tools in the multilateral trade tool box to effect these types of changes. So, for example, we talk in the paper about the need for a public sector restraint of trade agreements that actually looks at the impact of public sector restraints of trade that are anticompetitive in nature. Now, none of that is new. It is already in the WTO. It is in Article 9 of GATT, which deals with anticompetitive public restrictions. It's in the basic telecoms agreement. It is in the reference paper on telecoms, which is a competition document. It is called the reference paper on competition safeguards, and it deals with many of these types of competition issues. It is in Article 17 of the GATT on state trading enterprises, which tries to discipline state trading enterprises when they operate outside of commercial considerations, whatever that means. And we could have a big debate about what that means.

So nothing in such an international set of disciplines on public sector restraints of trade is particularly new. It is drawn from existing disciplines in the WTO and it is really the next stage of WTO discipline in this area. It recognizes the reality that we have really moved on from the time, let's say, of, as Audrey mentioned earlier today, USTR's statute. We have moved on. But that world was a world of: I make product A in country A and I sell it in country B. We are now in a world of competing global supply chains. And everyone is sort of vested in the same kind of sets of goals, which is to make those global supply chains more efficient. And our trade policy has to take that into account.

The old WTO system is very much built on MFN, Most Favored Nation, and nondiscrimination. Many of these problems in the Bermuda Triangle that Audrey referred to are not discriminatory in the classical WTO sense. They usually favor a particular enterprise and they may actually damage enterprises from that particular country as well, damaging U.S. and other countries' firms.

So, just in summary, we can move along a multifaceted track involving greater competition domestically, better regulatory promulgation domestically, trade disciplines that deal with anticompetitive market distortions, and clearly this is a long-haul process. Reference was made earlier to the Anti-Counterfeiting Trade Agreement, which is an agreement on anti-counterfeiting that involves countries and regions, such as the EU, Switzerland, Australia, and New Zealand. These are not the big counterfeiting countries, but it is done so that you can get a set of disciplines and perhaps add other countries to them and that could be a pathway forward.

I will conclude with a comment on the discussion this morning about the difficulty of the U.S. in dealing with the China situation where you have got these market

distortions. You have got these cost differentials, and what was characterized as foul play going on, but you also have low prices because of China's exports and because of China's entry into the market. And I don't actually think it is so difficult to reconcile those two. What we have to do, both to our trading partners and to our own domestic consumers and producers, is have a trade policy that differentiates between those two cases, where we encourage imports and import competition from efficient producers, but we also discourage imports from producers whose costs have been artificially reduced by government distortions in the market place. I will conclude there and am happy to take any questions after the others have spoken.

Don Johnson: Frank.

Frank Samolis: Good afternoon. I am here to talk primarily about the latest round of WTO trade negotiations. What I found interesting in Ambassador Marantis' speech were the specific questions and the answers that were posted afterwards. What were the topics raised? Number one was clearly China. We talked a little about the U.S.-Korea Free Trade Agreement, and a little about the TPP, the Trans-Pacific Partnership. I think there was one reference to dispute settlement at the WTO. But there wasn't a word about the Doha Round—the latest round of multilateral trade negotiations—which is really a sea change from ten or twenty years ago, when the multilateral forum was the action for international trade. It's really not happening now. We have the latest round, the Doha Round, which has been stuck for ten years, and what I would like to do is take a look at two very recent publications that talk about the WTO and the multilateral trade system. One copy has been handed out and hopefully you have all received that.

In November of last year, the heads of government of Germany, Great Britain, Indonesia, and Turkey created an Expert Group and asked that group to draft a report and a blueprint on the status of the Doha Round. About a month ago, on January 12th, they issued that report. The co-chairs were Peter Sutherland and Professor Bhagwati from Columbia University.

Also last month, coincidently, a new book came out, called *Outrageous Fortunes: The Twelve Surprising Trends that Will Reshape the Global Economy*. The author is Daniel Altman. He has written for the *Economist* and the *New York Times*. And he makes some interesting predictions for the next century; he talks about how China will get richer and then get poorer. America will become the world's sales force. Global warming will make rich countries cleaner and richer and poor countries dirtier and poorer. And one of the twelve predictions is—let me read it to you—basically the collapse of the WTO. At one point he speculates: "[T]he way things are going, the WTO could end up being the shortest-lived international institution set up to govern the global economy."[6]

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[6] Daniel Altman, *Outrageous Fortunes: The Twelve Surprising Trends that Will Reshape the Global Economy* (New York: Henry Holt & Co., 2011), 142.

He talks a little bit about the Doha Round, and here is what he says:

> The WTO had failed in its mission to open markets and it continued to operate mainly as a court system for trade disputes. In that area, wealthy countries had traditionally wielded a strong advantage. They had more money, more lawyers, more expertise, and more time to wage lengthy battles as each dispute moved from one ruling to another, through seemingly endless sessions of committees and appellate boards.[7]

He summarizes the first eight years of the Doha Round, and Demetrios referred to that. The author says that in that time the U.S. implemented one regional and eight bilateral Free Trade Agreements (FTAs), while the EU implemented ten such deals. And by 2010 this author concludes: "[T]he WTO could already hear the faint sound of its death knell."[8]

Instead of in multilateral systems like the WTO with a global consensus based system, Altman believes that future trade talks will only happen on a one-to-one or regional basis, stating: "In fact, it is very likely that more markets will be opened through talks between five or six big powers than through a system like the WTO."[9]

Now, as I mentioned, it's true that the Doha Round is the longest out of any of these prior negotiating trade rounds. It was launched by 142 countries in December 2001. If you go back to the earlier rounds, you will see that the Kennedy Round that Don mentioned was in the '60s and took four years to complete. Next came the Tokyo Round in the '70s—that took six years to complete. Right before Doha, we had the Uruguay Round—that took eight years of negotiations. And as I mentioned, in the Uruguay Round some of those concessions were not yet in force when they launched the Doha Round.

We are now surpassing the ten-year anniversary. There is a pattern here of longer times to complete trade negotiations. And the question is: What accounts for the stalled Doha negotiations? This is where we get into the interim reports of the WTO. They provide some explanations. They start out by saying that the multilateral setting has become more difficult in recent years, particularly with increased domestic media and political concerns. In addition, as the WTO has changed in nature, there is no more of what they call "systemic free riding" by the less-developed countries, the LDCs, while the developed countries have necessarily accept an asymmetrical outcome, even with respect to large trading countries such as China and Brazil. Specifically, in Doha,

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[7] Ibid., 144.

[8] Ibid., 146.

[9] Ibid., 148.

there has been a mandate to include what they call the "least developed developing countries," the LDDCs. All that they have to accept in Doha is binding their current tariff schedules at their applied rates—that is, the "Round for free." And they agree to modalities for tariff cuts—that is the broad framework of the Doha Agreement in terms of reductions of barriers, exceptions to the agreed cuts, timing, and flexibility. The *Interim Report* concludes that formula plus flexibility is Doha's greatest strength and its weakness.[10]

Going back to the Kennedy Round, it transformed what happens in the trade talks by introducing the liberalization formula instead of the old "request offer" approach for non-agricultural tariffs. The Hong Kong Ministerial of 2005 confirmed the Swiss Formula to liberalize trade, and that has the effect of cutting higher tariffs greater than lower tariffs, and reducing, therefore, the magnitude of tariff-generated distortions. One of those flexibilities, the special safeguard mechanism for agricultural exports, nearly caused the Doha Round to collapse in 2008.

In looking forward to the conclusion of the Doha Round, the *Interim Report* shares some of the pessimism of Mr. Altman, the author of the other book, stating at one point that: "Doha is dying of political neglect. It is impossible to overstate the fact that no incremental value will close the deal in the absence of political will."[11]

In contrast to that, the report gives four basic arguments for completing the Doha Round in an expeditious fashion. Namely, one: insurance against future protectionism, that is, to lock in Doha's unilateral liberalization that has been achieved since the Uruguay Round. Two: reform of agricultural farm trade, to lock in the EU's 2003 CAP (Common Agricultural Policy) reform and constrain any efforts by the United States to increase price supports in future farm bills. Three: new market access. The Doha package would constitute the most ambitious trade liberalization ever. They estimate $360 billion in new trade as a result of these negotiations. And finally, reinforcement of the WTO system, particularly in the wake of all of these regional and bilateral free trade agreements that we have been talking about all morning.

The report also makes the case for a specific deadline, which is the sort of punch line for this report. It states that at the G-20 level, political leaders should set the end of 2011 as a deadline, since deferred success is not enough.[12] It provides a broad outline for achieving a final package, which addresses the main issues, mainly agricultural and industrial goods and services. And it discusses sectoral agreements, treatment of LDCs and trade facilitation.

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[10] High Level Trade Experts Group (Co-Chairs Jagdish Bhagwati and Peter Sutherland), *The Doha Round: Setting a Deadline, Defining a Final Deal: Interim Report* (January 2011), 19.

[11] Ibid., 8.

[12] Ibid., 11.

Very quickly, agriculture has the greatest prospects for change. The report says under the current draft text, the EU will reduce its current MFN [Most Favored Nation] duties on agricultural imports by close to 60%, stating this is "the most radical opening of a market this size ever negotiated in GATT history. It would transform the EU's farm trade profile."[13]

Industrial goods among developed nations' tariffs would be virtually eliminated, with no tariffs above six percent. On sectoral agreements, the Doha negotiating text lists fourteen industrial sectors, seven of which have received substantial support. Three of those seven—chemicals, electronics, and industrial machinery—cover 50% of world trade in industrial products. Services offer some of the largest potential gains for developed and developing countries. The LDCs—there are forty-nine of them—have a privileged position. They are not expected to reduce tariffs at all, but merely bind tariffs at their currently applied rates. And finally, trade facilitation has been a clear success story of the Doha Round, with over seventy new trade proposals to improve trade logistics.

Trade estimates based on these trade facilitation improvements is for an increase of global trade of $130–$450 billion a year. In contrast to Mr. Altman's gloomy prognosis, the *Interim Report* concludes by stating that, compared to what the negotiations have already achieved, much of what needs to be is of relatively small size, including limited political pain.

But what I think the *Interim Report* fails to recognize are the enormous roadblocks that affect the principal players in the WTO based on domestic political considerations. For example, in the United States the emerging Tea Party movement has significantly colored traditional Republican free trade positions with skepticism of supranational economic, political, and security organizations. This, combined with the Democratic Party's historical alliance with organized labor, is by no means a guarantee of endorsement of multilateral negotiations.

Compounding this situation is the pressing need for job growth, and the fact that there has been no cohesive argument for extending the President's trade negotiating authority. We talked about that a little bit earlier today. Nor has there been any well-organized argument that the conclusion of the Doha Round is in the United States' longer-term economic interest.

The *Interim Report* suggests the deadline occurs [by] the end of this year, when the U.S. presidential campaign will be in full swing. I can't imagine that President Obama will want to expend more political capital with organized labor on trade issues at that time. If you look at the EU, they have similar problems with their agricultural reform and its effect on domestic politics. In Japan, Prime Minister Kan and the Democratic

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[13] Ibid., 12.

Party of Japan are running into very strong opposition in their desire for Japan to join the TPP and for broader trade reforms. And finally, what we call the BRIC countries have their own issues. China, India, and Brazil have all proven reluctant to assume full responsibilities in the Round, and Russia is still awaiting accession to the WTO after, I think it is, about fourteen years.

So, in conclusion, while I don't think Mr. Altman's prediction of the collapse of the WTO is likely to occur any time in the near future, I do believe that the WTO's *Interim Report* understates the importance of domestic politics in concluding the Doha Round. From an American perspective, trade issues have only recently gained visibility, and even then, as we heard from Demetrios' statement and the questions and answers, the emphasis has been on bilateral agreements, such as the U.S.-Korea Free Trade Agreement and the pending FTAs with Colombia and Panama. Even the political waters on those bilateral agreements have proven difficult to navigate for the Bush and Obama Administrations, although they are now finally closer to approving the Korea Agreement. Conclusion of the Trans-Pacific Partnership is another issue, and still there is no focus on the WTO.

Indeed, there is no universal law of nature that requires Doha to continue. In its ten-year lull, it has vanished from public recognition and, more importantly, from the recognition of world leaders. If you remember, the Free Trade Area of the Americas (FTAA) and the frantic bidding for headquarters in the Western Hemisphere—that has become a distant memory. But it indicates that these multilateral agreements don't necessarily have to have a successful conclusion.

In the meantime, of course, world trade is continuing. We have bilateral and regional trade agreements. They are being negotiated at a record pace. I think for many of the reasons mentioned in the report, the WTO does remain vital. It is needed now more than ever. Its international legal structure is essential to maintaining the rule of law in world trade. But for the Doha Round per se, there is no magic in its being. While it has undeniably made gains which need to be preserved and ultimately realized in a final agreement, we may well have to repackage the substance in a new and different format. That might be the only way to sell it to world political leaders, especially since none of the current world leaders have an ownership interest in the current round. That is a sad conclusion, which has no precedent, but it may be the only path forward which offers any hope.

Just last week, Peter Sutherland said in Geneva that the failure to complete the Doha Round Agreement would be a catastrophe for the WTO, and there is a compelling need to successfully complete the substance of the Doha Round. In my view, however, it will only happen with concerted, publicized and visible effort by the heads of state of the lead players—the U.S., the EU, Japan, Canada, and the BRIC countries—who have to be willing to experience rather significant short-term political pain to achieve those longer-term objectives. Whether that collective political will exists in the current global economic climate remains to be seen, but I hope they are successful. Thank you.

Andrew Shoyer: I will start by thanking Ambassador Johnson for the invitation. It really is a pleasure to be here. I particularly want to recognize Anne Marie and Blake as well, and Rishi who got up at an ungodly hour this morning to drive me from the airport. I very much appreciate that.

I wanted to focus on the likely future of dispute settlement, in particular in the World Trade Organization. Although there has been a proliferation of regional trade agreements, regional free trade agreements make really lousy places to try cases. There are several reasons for that, but I would simply observe that there is a relative lack of activity in dispute settlement in free trade agreements. So, most of the cases still come through the World Trade Organization. I really wanted to focus on one area where you are likely to see businesses being deeply affected by dispute settlement in the WTO, and that is where trade policy interacts with the regulation of the climate—climate change, clean tech, and clean energy.

Every few years in the now sixteen years that the WTO has been around, we see shifts in the types of cases that are being litigated. For example, in the last couple of years, we have seen important cases on food subsidies and agricultural subsidies. These include the cotton case against the United States and a case against Europe on sugar subsidies. But as we have heard, if commodity prices are up and are going to stay up substantially, you are not going to see a lot of food subsidy cases, because there aren't going to be a lot of subsidies being paid out. So instead what you may be seeing over the next couple of years are cases focusing on food safety rather than food subsidies, as food safety is going to be of critical importance. As prices go up, countries are going to be desperate to get food from various sources. We will see the pressure on safety issues under the Agreement on the Application of Sanitary and Phytosanitary Measures, the SPS Agreement.

What I wanted to leave you with was the notion that dispute settlement may determine how, and how much, businesses gain or lose from regulation in these areas. In the interest of time, I will focus on conditions that governments put on government-funded projects.

What we have seen in the United States and around the world, coming out of the recession, is that governments are eager to combine industrial policy with clean tech and clean energy policy. That is, if you are going to grow your green economy, you want to create jobs in doing so. You want the benefits to be seen to be accruing largely to your domestic constituency, and that means trying to protect it for local jobs.

One story I wanted to tell you is what happened in Ontario. This is a case that I am working on now. Ontario, just over the border from the United States and a significant economy in Canada, decided to pass a clean energy law. One of the features was to create subsidies for the use of renewable energy, sources of electricity, wind and solar in particular. They introduced what is called a feed-in tariff program. We have seen this in Germany and a number of other markets, often called a FIT program. It tells a potential generator that, if you build a solar plant, then we, the government, will

guarantee you a twenty-year price of X dollars. That price is likely to be substantially higher than the market price to induce the generator to come in and to assure them that if they generate electricity (based on solar or wind), they will be able to sell into the grid and get that high price.

So far that is wonderful. Here is the problem though. The Ontario government was faced with a huge loss of jobs in Windsor, right across the border from Detroit, because of what happened with the auto sector and the recession. Looking for a way to create new jobs, the Ontario government said to potential generators, "Do you want this subsidy? Then you will have to use 60% local content." And this isn't just Canadian content; this is Ontario content. The way the formula is drafted, there is no way to satisfy the 60% requirement without using locally produced equipment.

Really what the Ontario government wants to do, through its program, is to incubate an industry producing solar panels and producing wind turbines in Ontario. It wants to use the program to develop the products and then sell them into the United States and other markets. But the problem is that that is inconsistent with trade rules. To be specific, it is inconsistent with trade rules if the Ontario program does not constitute government procurement.

I think Audrey [Winter] alluded to this earlier, and I want to provide an additional level of detail so that you can appreciate this issue in light of the American Recovery and Reinvestment (or "Stimulus") Act of 2009, and its introduction of "buy American" requirements. What you saw was a large amount of money now being available, but tied to "buy American" requirements. What the rules say is, and Audrey alluded to this, generally governments can't favor local goods over imported goods. That is a violation of national treatment. But there is an exception for government procurement, which means procurement by government agencies of products when those are purchased for government purposes and not with a view toward commercial resale. If you meet those conditions, then under Paragraph 8(a) of Article III of the GATT, you are excluded from that national treatment obligation, and you can impose a buy local requirement.

But think about what Ontario is doing, which frankly is the same thing various states are doing, and lots of other governments around the world. Is that government procurement? If the government of Ontario is buying pens for its employees to use to do their work, that is government procurement. That is clearly a purchase of a product for use in the government. But the government is not buying the electricity. It is facilitating, through a financing mechanism, the creation of generation capacity so that the electricity may be sold into the grid for the benefit of lots of people. True, when you turn the switch on in the government office building, you are using the electricity, but the electricity produced as a result of the FIT program is being used for general purposes. It is not for government purposes. And so it really doesn't fall under the government exception.

But nobody explained this distinction to the Ontario government authorities. They were sure that they were in the clear and indeed lots of people in Canada figured

that Ontario's FIT program was safe under international trade rules. This government procurement exception isn't well enough understood. In addition, officials might have felt that, if they were creating support, not through procurement, but simply through grants, they could impose local content requirements. But for purposes of international trade rules, those grants are subsidies, and if they are tied to local content requirements, they are inconsistent with the national treatment requirement. They are probably inconsistent with the WTO Subsidies Agreement as well.

In light of these concerns, the government of Japan has brought a case against Canada in the WTO. This is likely to be the first of a number of cases that will establish ground rules in the clean energy space, because there is so much money involved and so many governments are so eager to mix industrial policy with environmental or energy policy. I think you will want to watch carefully to see how the WTO resolves it. As is often the case, the WTO gets stuck with these difficult "trade and____" problems: trade and *the environment*, trade and *whatever else*. This is going to be one of the next waves. We will have to see how quickly this case moves. It is clear that producers in Japan are looking at this problem, not just because of the Ontario market, but because they are concerned about India, and Indonesia, and China adopting similar provisions. The office in which Audrey works has also been looking at the problem and, as a result, the U.S. government has initiated a similar case in the WTO dealing with some very similar clean energy policies in China. The case against Canada started first, but whether it will be litigated more quickly in Geneva I don't know.

There is a related issue affecting the regulation of climate change to which I wanted to alert you, and [I wanted] to explain the requirements that WTO rules impose. Let's say that governments, in order to deal with climate change related mandates, impose new product standards. In effect, government regulators tell producers: "If you want to still sell steel into our market going forward, you have to show us that the steel that you made was produced in a way that emitted no more than X quantum of greenhouse gases." This is what is called a "process or production method" standard. It is based not on the product itself, but rather how the steel, or aluminum, or any other carbon intensive good is made.

International trade rules provide certain protections when a government imposes that kind of standard. One is the same nondiscrimination requirement that applies to any other type of regulation. The scenario to watch for is one in which the government sets the maximum quantum of greenhouse gas emissions at exactly the level at which its domestic industry has been operating for the last three years. In this way, the government is setting its product standard based on what its domestic industry can already meet and what foreign producers presumably could not do or would have more difficulty doing. That kind of hidden discrimination is addressed by national treatment protections.

The other type of protection is found in Article 2.2 of the Agreement on Technical Barriers to Trade, or TBT Agreement. It says that when governments create these kinds of product standards, not only must they avoid discrimination in favor of domestic

products or between products of different foreign origins, but they can't regulate in a way that is more trade-restrictive than necessary to meet their legitimate policy objective, whatever that might be, for example to ensure clean air or clean water.

The discipline provided in TBT Agreement Article 2.2 has not yet been litigated. We are just now seeing these issues presented in new cases that are coming to the WTO. Exactly how far can you really push this obligation? When you think about it, Article 2.2 is a really intrusive discipline for government regulation. I am currently working on the application of Article 2.2 in a case involving food safety. My impression is that most food safety regulators never heard of the WTO and wouldn't know that they would have to meet this type of discipline.

I think all of these issues are likely to come up, particularly in the clean energy and climate change context. WTO dispute settlement, in parallel with the negotiations of new international trade rules that Frank [Samolis] described, will serve to move the goalposts. That is exactly what happened with the U.S. cotton case and the EU sugar case, These disputes often have a tremendous influence on what is going on in the negotiations as well. As I have explained, these climate change and clean energy cases will likely determine winners and losers going forward. Thank you.

Ayesha Khanna: [*Comments kept off the record*]

Don Johnson: With four people on the panel we used up a little more time than we normally do and we don't have very much time left for questions, but I will begin with one quick question. In the 2008 election, Dennis Kucinich used to always say in the presidential debates that the first thing he would do if he got elected President would be to cancel NAFTA and cancel the WTO, like he was cancelling a magazine subscription or something.

But it is not that farfetched. I guess they still do this: Every five years Congress votes whether to pull out of the WTO. And I remember in 2005, when that vote took place, it still was an overwhelming number who voted not to pull out. It was less than the previous time in 2000, but in 2005 the remarkable thing for me was that the majority of the Georgia delegation, which was a bipartisan group at that time (it is less bipartisan now), voted to pull out, including a number of my friends who I know are smart. They didn't even know anything about the WTO and what the benefits are. But there were Republicans and Democrats who voted to pull out. People like John Lewis, who is generally very pro-labor and not the best friend of trade, voted not to pull out. So you had to think there was a very political reason that goes back to the statistics that Ted [Kassinger] was talking about earlier and other people had talked about. So, I think it is a very specific threat that we could have. As Mr. Altman says in his book, it may be the shortest-lived institution that we have.

But what I wanted to ask you was, just to get a summary, . . . Tell us where you think the WTO might be going, and I would like to know where you think it might be going in terms of what we can expect in continued support in the Congress. Is it going to just

be a dispute settlement body? Are we through with multilateral trade negotiations? And what is acceptable to this very volatile public and political atmosphere that we have, where you have the Tea Party on one side and the anticommunist on one side, and then on the left, it is pro-labor and they do whatever labor wants. Where do we end up, let's say, ten years from now?

Ayesha Khanna: [*Comments kept off the record*]

Frank Samolis: I think I would basically agree. I doubt very much whether the legal mechanism of the WTO is in any jeopardy of disappearing, but I do think we may have reached our limits in terms of the ambitions of what a WTO multilateral round can do. We have evolved. In the old days we had the Smoot-Hawley tariffs. You negotiated huge tariffs down and it was pretty mechanical and pretty easy. The tariffs now really aren't that big of a deal. We are starting to get into things in TRIPS, services, all sorts of areas that may not be necessarily attractive to being resolved in a multilateral fashion. As I said, trade goes on. The WTO collapsing is not going to be the end of the world. I think the legal mechanism is in pretty good shape for continuing. But I worry a little bit that it may be easier now for these regional agreements and bilateral agreements to be negotiated and to have the WTO really as sort of a legal fallback more than anything else.

Andrew Shoyer: The strongest argument for multilateral negotiations has always been the need to address agricultural subsides. You can't fix agricultural subsidies in a regional trade agreement or a free trade agreement. You can't do it bilaterally, since you are competing in a global marketplace. If, as I said before, we are now facing a sustained period of high commodity prices, I don't know whether for ten years or longer, if Malthus was right and we aren't going to produce enough food, then maybe the pressures will be so substantial anyway that the European Union will have to introduce common agricultural policy reform and the U.S. Congress will reduce agricultural subsidies. If all that occurs, then I suppose that there is less of a need for multilateral negotiations. I think that agricultural subsidy reform has always been the one thing that only the WTO could accomplish. To the extent that we need to negotiate international disciplines on subsidies, we will need to have a WTO.

Shanker Singham: I think that we have been hit before and we have seen this kind of dynamic many, many times before. I mean, after the Kennedy Round, which was a very substantial round, you had the Tokyo Round, and I think we are very much in a Tokyo kind of moment here, which is a very plurilateral kind of moment, which really is: We are going to do agreements like this with a relatively small cast of characters and try to get other countries to accede to them, which is kind of what we are doing with the FT [Free Trade] agenda anyway. If you take out the U.S. and the EU and you look at all the other countries that are negotiating free trade agreements, you have about 300 in the world. So regardless of what is happening in the WTO, we are already in a plurilateral type of world. The only thing is, and I agree with what Andy [Andrew Shoyer] just said about that, there has to be some sort of motivating force, and the only motivating force that you might actually see now, you might have, is the impact of

some of these distortions that I talked about on third-country markets. Where you can do a deal with the architect of some of those distortions that won't actually help you, or won't actually help other countries, and you may see some increased pressure to try to deal with that issue.

Don Johnson: A final point about the plurilateral agreements. You know it has been said—and I don't think Demetrios said this in his remarks—one of the reasons that we are doing TPP is because it is sort of an antidote to all of the agreements that China is putting together in the same region. And I just wonder what impact that has—competing plurilateral agreements and therefore a need for the WTO multilateral—because in the past we thought that a lot of the trade agreements, the bilaterals and regional trade agreements we do, [are done] to sort of up the ante for the other people in the WTO, to say: Okay, here is what we are doing here in NAFTA, for example, and how about joining us and we will do it up all over the world. And I think this TPP issue may be one of those that forces everybody else back to the WTO.

Shanker Singham: I think also, just on that point, if you look at the regional trade agreements that other countries are negotiating, they are not like the U.S. agreements. They are not like, to some extent, the EU agreements. These are agreements in which all of these FTA's are illegal basically under the GATT. Unless they are trade-created and cover substantially all trade and are subject to Article 24, which is honored in the breach, no one brings a case on this. But if you look at all of these other trade agreements around the world, the other two hundred or so, many of them are very sector specific. There is a China-India Agreement that covers only one little area. Many of these are very trade-distortive and I think that at some point that issue will rise up, but actually we have a massively trade-distortive world because of these FTAs.

Donald Johnson: We can take one question if anybody wants to ask from the floor here. We are really over time, but does anybody want to?

Audrey Winter: I am just wondering—because it keeps coming up throughout the whole course of the day—[about] the word commercial and how it is defined. We talked about the IPR case, and commercial-scale counterfeiting and piracy. And it is like self-judging. Commercial: What is government procurement and procurement for commercial purposes? And what are services supplied in the exercise of governmental authority? And what is a service supplied that is not in the exercise of governmental authority? And you could go on and on. What are commercial considerations if you are a state trading enterprise? And every time a panel has come to decide this, since it is not defined, it is whatever the market will bear. It is self-judging. And this tension between state and commercial, state-determined and commercially-determined . . . China can hardly come into the government procurement agreement without answering this question. We are totally stymied in terms of even knowing really how they should come to the government procurement agreement. And listing SOEs whose names change the next day in Annex 3 is really not a solution. It is not a solution for China either. It doesn't give them real certainty in the future.

So, I am just wondering what your impressions are. I think Andy's absolutely right about "least trade restrictive." That is not dissimilar to our own U.S. Constitution, Article I, Section 8, Commerce Clause power, and how our Supreme Court determines what is no less trade restrictive than necessary. And the EU has a similar test under the four freedoms and its rules. So unless we see litigation along the same lines—and the United States is going to have to drive that litigation—we might get results we don't want. So I am just wondering what your impressions are of how to define commercial, and how it fits into "no less trade restrictive than necessary," and what the United States should do with that aspect of jurisprudence internationally.

Shanker Singham: Well, you referenced a couple of cases. And obviously the Canadian Wheat Board case is one such case that looked at commercial considerations and what that actually means. If you look at the case and the arguments that were filed by the EU, the U.S., and Canada, they are very, very instructive, because the U.S. basically took the line that commercial considerations mean profit maximizing behavior. And the EU took the sort of middle path that the EU often takes, but it was just sort of between profit maximizing and sort of revenue maximizing. The Canadians took the view that it wasn't anything that wasn't overtly political. Those are the lines of demarcation of where this debate ultimately ends up, and I agree with you that the U.S. is going to have to bring cases on that point.

But the problem that you have is the panel. In the WTO, panels are not ideally positioned to answer that question. Ultimately that question is more of a competition question. It is more of a question and [involves] the European jurisprudence under European state aids law. The language, the phrasing that is used is that you look at services in the general economic interest, and whether you have got entities (be they government-owned or [with] some aspect of government ownership) that are operating as commercial enterprises at that particular moment. So in Andy's Ontario example, the entity is operating as a commercial enterprise. We have to focus more on effects, rather than the actual entity itself that is engaged in this behavior. If we focus on the entity, then you are right, the entity will just change its description. We have to focus on the actual effects and we have to have definitions. And there are plenty of definitions that are drawn from the competition world that could be instructive here.

Don Johnson: Well I think with that we had probably better close. I want to thank all of the participants on this panel. You did a great job.

The Future of International Trade: An American Perspective

February 18, 2011

About the Speakers

Keynote Speaker

Demetrios Marantis has served as Deputy U.S. Trade Representative since 2009. He is responsible for U.S. trade negotiations and enforcement in Asia and Africa. He also leads Office of the U.S. Trade Representative (USTR) global initiatives on trade and development, labor, and the environment. He recently served as Chief International Trade Counsel (Majority) for the Senate Finance Committee, and previously served as Associate General Counsel at USTR, where he negotiated provisions of international trade agreements and represented the United States in WTO dispute settlement proceedings.

Panelists

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John Sheppard is an executive with over 25 years of senior leadership experience with some of the world's largest consumer goods companies, including Coca-Cola and Cott Corporation. Most recently, he was CEO, President and a member of the Board of Directors of Cott Corp. He joined Cott in December 2001 as President and under his leadership Cott recorded significantly accelerated sales growth and posted record earnings. He left Cott after 5 years to work in the private equity arena and is currently an Operating Partner at Advent International.

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Moderators

C. Donald "Don" Johnson is Director of the Dean Rusk Center. Previously, he specialized in international trade and foreign policy issues as a Partner at Patton Boggs. From 1998-2000, he served as Ambassador and Chief Textile Negotiator at USTR. His tenure included the U.S.-China WTO agreement, the U.S.-Cambodia Textile Agreement, several WTO dispute cases and the Trade Act of 2000. He previously served as a Member of Congress for the 10th District of Georgia, were he concentrated on national security issues and on international trade, including NAFTA and WTO implementing legislation.

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