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THE FUTURE OF INTERNATIONAL TRADE

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I have been asked, as a private practitioner of international trade law, to assess the future of international trade, with particular consideration for the American elections and trade with China. I have never held any public office associated with trade, nor served in any international organization. Instead, I have been in the trenches, participating directly as an advocate in trade disputes and as an adviser in the negotiation of trade agreements, for companies, associations, and governments, in the United States, and on three other continents. Most recently, I have been counsel to the People's Republic of China in one of the subsidies disputes with the United States to which I will make some detailed reference.

Most people accept that international trade is inevitable and unavoidable, no matter what definition they attach to "globalization," but more and more people, most especially in the United States, don't like it. Last October, the Pew Research Centre in Washington released the results of a massive, global survey, entitled the "Pew Global

Attitudes Project." Over 150,000 people were interviewed in 54 countries. Only 14 percent of American respondents in the survey thought the growth of trade "very good," below almost every other country surveyed, and even the combined positive score, taking the United States to a cumulative 59 percent, left Americans less supportive of global trade than the citizens of any other of the 54 countries in the survey.

The presidential campaigns in the United States reflect this growing antipathy toward world trade. Comparing the 2007 results to a survey completed in 2002, American support for trade declined from 78 percent to 59 percent, a more precipitous fall than in other countries, but in general advanced industrial countries have become less enthusiastic, with more negative views expressed in roughly half of the thirty-five countries common to the two surveys.

When the Doha Round began, attitudes were closer to the 2002 survey results. The Round was undertaken to enable developing countries to become more engaged in global trade; its success depended upon the commitment of more developed countries to adjust and accommodate the needs and desires of the developing world, particularly as to agriculture. Attitudes in 2002 were generally supportive; arguably by 2007, they were not. It has been perilous for presidential candidates in the United States, sensitive as they are to popular opinion, to appear as champions of free trade in 2008. Public opinion and campaign rhetoric, however, only sometimes define policies.

The American elections played a central role in the collapse of talks in Geneva at the end of July. There appeared to be a general view, promoted aggressively by the Bush Administration, that a successful completion of the Doha Round would depend upon signatures before year end. The pretext was that President Bush was indispensable to the future of world trade. The subtext was that Senator Obama likely will succeed him and would not lend the same support. It did not matter that Senator Obama was having written into the Democratic Party platform a commitment to the successful completion of Doha. Instead, there was the conventional stereotype of Democrats as protectionists, Republicans as free traders, and there was unfortunate rhetoric from the campaign trail. The highly pressured round-the-clock efforts the last week of July in Geneva were driven, in my view, by irrational fears of possible electoral results in the United States.

The attempts to make President Bush the indispensable free trader, and subsequently to blame China and India, deflect the real cause of failure. President Bush was not the solution; he was the problem. Not the only one, but one important enough to question the Bush Administration's instant and contemporary shot at historical revisionism before history can even be made.

The Doha Round Failure

I am assuming the success of Doha would have been and may yet one day be a good thing for the world because it ought to assure greater food supplies for the world's hungry and poor, and it ought to increase the commerce that, as suggested by Thucydides, John Stuart Mill, Cordell Hull, and most recently and eloquently Jonathan Sacks, makes for world peace. We cannot assume that every trade negotiation necessarily will lead to a better and safer world, but that was the implication of the Doha Round's agenda.

When the talks collapsed on July 29, three main explanations were offered: that the WTO has too many members and the process is unmanageable; that, because the developing world now has leaders, particularly India, China, and Brazil, prepared to reject positions of the developed world, compromise is no longer possible; and that, because the expectations of the developing world were unreasonable, they could never be satisfied. I think all of these now popular attempts to explain the failure of the Doha Round are wrong.

Despite 153 WTO members, only about a dozen are real players making the decisions. Although there now are countries prepared to stand up to the United States and the European Union, the only reasonable conclusion to be drawn is that there are now genuine interlocutors in tougher negotiations, and a greater need for the developed world to take their concerns seriously. Finally, expectations that the prophets and proselytizers of free and open markets would reduce the subsidies they shower more than rain on their farmers were not unreasonable. The error, from the beginning in 2001, was in concentrating blame, at least as to the United States, entirely on Congress. Other countries negotiating the Round did it, and the Administration that effectively abdicated its responsibility for leadership and then encouraged a summer stampede in 2008 did it. Congress does merit blame, whether Republican or Democrat. It is constitutionally and institutionally reluctant about liberalizing trade (there was no effective impact on the Doha Round when party control changed during the decade), but the history of trade negotiations during the last century suggests that, every time, the key is not Congress, but presidential leadership.

Republicans And Democrats

The assumptions and stereotypes about political parties and international trade in the United States were proven wrong again during the Doha Round. Despite the expectation that a Republican Congress and a Republican President would assure a continuing commitment to free trade, leadership, not partisanship, made the big differences.

It was the 2002 Farm Bill that doomed the Doha Round. It was passed by a Republican Congress and signed by a Republican President. The Bush Administration might point to its unsuccessful vetos of the Farm Bill in May and June of this year, and Administration sympathizers may emphasize that by the summer of 2008 the President was so weakened for other reasons that he could not sustain a veto. They would argue that his policies and intentions were in the right place.

There are two critical errors in this defense of the Administration. First, prior to the Farm Bill of 2008, President Bush hadn't perceived a need to exercise a veto but once in more than seven years. The Administration simply assigned the 2008 Farm Bill lower priority than virtually all other legislation. Second, however, and surely more important: by the time the 2008 Farm Bill came around, the Doha Round already had been mortally wounded by the Farm Bill in 2002.

Immediately after 9/11, when supposedly free-trading Republicans controlled both Congress and the White House and the President legislatively could have almost anything he wanted as a "wartime" President, President Bush signed into law subsidies for agriculture that effectively reversed the 1996 Farm Bill. The 1996 Farm Bill, the handiwork of Democratic President Bill Clinton, itself had reversed earlier massive agricultural subsidies produced in the Reagan and first Bush Administrations of the 1980s.

The 1996 Farm Bill had subjected the production of food in the United States to market forces. According to Robert L. Thompson, Chairman of the International Food and Agriculture Trade Policy Council and Gardner Professor of Agricultural Policy at the University of Illinois, passage of the 2002 Farm Bill made "it difficult for the United States to play a leadership role in the early stages of the Doha Development Round." That difficulty never ameliorated during the Round. The United States was never able to extol credibly the virtues of free agricultural trade when it was leading the world, along with the Europeans, in farm subsidies.

There are two points I want to make here, the first regarding partisanship, and the second regarding agricultural subsidies. First, the history of partisanship in the United States on free trade, agricultural or otherwise, is not what seems to be imagined conventionally today. The Smoot-Hawley Tariff of 1930 that crippled world trade was a Republican response to the Stock Market crash of 1929. It was not the first Republican bid to raise tariffs and protect U.S. markets. In the twentieth century, the policy and practice is traceable at least to Warren G. Harding's tariff bill in 1922. The gradual reversal of Republican protectionism was authored by Cordell Hull, Franklin Roosevelt's Secretary of State, beginning with the Reciprocal Trade Agreements Act of 1934 and progressing under his leadership to the General Agreement on Tariffs and Trade after World War II.

Douglas Irwin, in a paper he wrote for the Council on Foreign Relations at the end of July, describes not only Hull's achievement, but also the eternal contest between a Congress promoting narrow interests and a presidency, at least from time to time, recognizing the virtues of freer trade. According to Irwin, even a majority Democratic Congress was reluctant to entrust a popular Democratic President trade negotiating authority in 1945, but the President did prevail. A year later, in 1946, Republicans recaptured control of Congress and tried to stop formation of the GATT. President Truman, determined to move forward with free trade, compromised: on the insistence of the Republican Congress, legislation empowered domestic industries to petition for trade relief when claiming injury from negotiated tariff reductions. But on a larger scale, a Democratic President defeated a Republican Congress in moving the country toward freer trade.

The Republican Congress, even with Truman's concession, did not easily accept the GATT. Republicans legislated restrictions on wool imports that led to a British Commonwealth threat, triggered by Australia, to walk out of the GATT negotiations. As Irwin recounts, Truman vetoed the bill and, for good measure, used his presidential authority to reduce the tariff on wool twenty-five percent.

There was no significant trade liberalization in the eight years of the Eisenhower Administration. To the contrary, in 1955 the United States got a waiver from GATT obligations for agriculture. According to Irwin, it was this U.S. waiver that opened the door for the European Community's Common Agricultural Policy.

The first major breakthrough in liberalizing trade, after Truman completed FDR's work on the GATT, was completed by Lyndon Johnson and was appropriately called the "Kennedy Round" because of when and how it started. Yet, President Kennedy got his trade negotiating authority only with major concessions for tariffs and import quotas on textiles and apparel. As is often the case, Europe imitated the restrictive American measures, eventually leading to the 1974 Multifiber Arrangement that has bedeviled this area of trade ever since. It was President Nixon, a Republican, who endorsed that restrictive agreement. And although Kennedy wanted to reduce tariffs on agriculture, the Europeans would not agree. No progress on agriculture was made, largely because of the waiver Eisenhower originally had obtained and the political comfort it had created for Europe. Still, it was the Kennedy Round, not an Eisenhower Round, that liberalized world trade, as would be the case a decade later with the passage of the Trade Agreements Act by President Carter, another Democrat, albeit for completion of the Tokyo Round launched by Nixon.

Voluntary export restraints on steel followed the Kennedy Round – principally in the Nixon Administration. Ronald Reagan, a decade later, would introduce a new round of them, and add automobiles to steel. Nixon bargained for renewed trade negotiation authority in 1974 by enhancing domestic industry access to trade remedies for alleged dumping, subsidies, and surges. It was this legal change, under Nixon, that effectively created the international trade bar and a later explosion, following completion of the Tokyo Round, of trade litigation. The second George Bush similarly negotiated with Congress for trade negotiating authority by giving away trade restraints, on softwood lumber from Canada – with an unspoken and underappreciated but devastating effect on housing and hence on the whole economy. Every one of these trade restrictive developments came about with the blessing of Republican Presidents. The negotiating rounds that liberalized trade – the GATT, the Kennedy Round, the Uruguay Round – were all launched or completed by Democrats.

There are at least two lessons in this history of presumed partisanship and congressional domination: White House leadership matters and can overcome congressional resistance, of whatever party; Democrats, especially Democratic Presidents, are not more likely to be protectionist than Republicans. The Bush Administration may have been pressing for legacy when it encouraged the world to believe that the Doha Round had to be completed before the Administration's mandate would expire. The world should not have believed it, and should not succumb to it before there is a new President.

The Farm Bill And Doha

The proximate cause for the collapse of the Doha talks in Geneva was repudiation by India and China of a surge mechanism for agriculture. The developing world cannot afford the agricultural subsidies Europeans and Americans shower on their farmers. Those subsidies yield over-production and cheap products that could put farmers in the developing world out of business, also depriving poor countries of locally produced food. Because neither the United States nor Europe would reduce their agricultural subsidies, the developing world would have to find another way to protect their farmers from such heavily subsidized agriculture, particularly in a negotiating round opposed to any increases in trade barriers.

The surge mechanism was conceptualized as a final defense, permission for developing countries to raise their tariffs enough to keep out surging subsidized imports. There are many obvious problems with this idea, however. Market forces, even without a surge, would favor the subsidized products and jeopardize poor farmers in poor countries. They could expect to be barely hanging on by the time a surge might overwhelm them. Yet, the United States and Europe were determined to limit the barriers the developing countries might erect while prying open the markets of developing countries. The final dispute of the Round thus was over the percentage temporary tariff increase that might be permitted for the developing world to protect its farmers and peasants from the distorting and destructive effects of subsidized food from the developed world.

A cardinal principle of political and economic reasoning is that, when the causes of something with undesirable effects cannot be controlled, one must search for a way to reduce or eliminate the effects themselves. However, it is always preferable to control or eliminate the causes because they will inevitably and perpetually produce the effects. Eventually, the control of the effects will fail. In the Doha Round, the causes – European and American agricultural subsidies – were known to everyone. There was significant uncertainty and debate as to whether the last-minute surge mechanism proposal from WTO Chief Pascal Lamy could or would succeed in controlling the effects. Indian negotiator Kamal Nath concluded that uncertainty was too great. China agreed. Both countries were likely victims of causes beyond their control, and yet they found themselves, the day after, taking blame for distrusting a proposal that would do nothing more than attempt to control the effects.

The 2002 Farm Bill in the United States, as Professor Thompson had observed, deprived the United States of leadership in the negotiating Round. The situation in Europe was no better. Agricultural subsidies for French farmers were necessary to stop the Counter-Revolution, establish a Parliament, and restore peace after 1789. They were an indispensable element in the Treaty of Rome and in creating the European Union, a literal price Germany had to pay for reentry into the family of nations. As Irwin says, regarding creation of the CAP, the Europeans "followed the American example," which frequently is the case in matters of trade protectionism.

The expense of German unification far exceeded Chancellor Kohl's expectations and ought to have made the continuing rise in European agricultural subsidies financially impossible for Germany. In the 1990s, it looked in both Europe and the United States like the tide on agricultural subsidies was beginning to flow out. With the United States altering course, however, the Europeans remained in the subsidies race. In 2008, the United States is providing approximately $21 billion in agricultural subsidies; the Common Agricultural Policy is costing the European Union about 55 billion Euros, or about 40 percent of the entire EU budget. At approximately 2 euros every week for every European citizen, the EU claims on its website that, "This is hardly a high price to pay for a healthy supply of food and a living countryside." Hardly, except that it produces mountains of excess cheese, lakes of extra wine, and food no healthier than what the rest of the world can produce. Moreover, there is not a whisper about the impact on world food prices, or the consequences for the developing world. So, as damaging as is U.S. policy, particularly as the world looks to the United States for leadership, European subsidies remain even worse.

The Doha Round frequently looked more like a negotiation between the EU and the United States than a negotiation with and for the developing world because of the standoff on agricultural subsidies. And in both places, these extravagant policies serve the largest producers, not the small family farmers. Two-thirds of American farmers get none of the largesse; eighty percent of the European funds go to just twenty percent of the European Union's farmers.

The 2008 Farm Bill in the United States merely confirmed the obvious: that the United States would continue subsidizing agriculture, and moreover would not comply with a spectacular legal defeat at the WTO over cotton at the hands of Brazil. The

Europeans would continue on the American path, with increasing pressure from new members with significant agricultural populations, especially Poland and Greece. The proposed surge mechanism could not be expected to solve the problem.

Europe and the United States underestimated the tenacity of the developing countries this time around. India, in particular, said it would not accept the American and European subsidies without powerful constraints on their impact, although the rush the day after the collapse of the talks, at least in the United States, was to blame China. *The Washington Post,* for example, editorialized the morning after: "There is plenty of blame to go around," but then, "China's role in the demise of the Doha Round is particularly dismaying," and "U.S. supporters of Chinese inclusion in the WTO argued that drawing China into a system of multilateral give-and-take would mute its nationalistic tendencies. Evidently, the Chinese see the matter differently. They, and the world, will be poorer because of it." I will say more in a few minutes about the stunning hypocrisy contained in this criticism, in addition to the core issue of U.S. agricultural subsidies I have just described, but first I want to explain why the pattern of United States protectionism is so entrenched and incorrigible.

The Institutional Problem

The United States, on July 29, said its best offers were already on the negotiating table. The question I think most compelling is not the one many people asked -- why the United States did not do more at the negotiating table -- but, rather, whether it could have. For institutional reasons, I don't think the United States could have done more without leadership at home, from the White House, and by July 2008, it was too late.

Congress, as I will explain momentarily, will always seek to protect certain industries or sectors of the economy because it is institutionally organized for that purpose. There are, of course, contrary forces promoting free trade, but they are associated in the popular mind with multinational corporations, offshoring, and big business. It is not by chance that so few Americans now think more trade is "very good." It has always been, and will continue to be, the task of the President to lead, and history shows that, despite a more general inclination, driven by Congress, not to liberalize trade – regardless of political party control -- Presidents have persuaded Congress and the world of the benefits of free trade. Doha failed for a lot of reasons, in Europe and elsewhere, but it failed, especially, because of the incumbent President's failure to lead.

Since World War II, the United States has shaped the terms of world trade around its own domestic legislation, which was the product of the American interest group system of politics dating from the dawn of the Republic. Provisions were written to protect certain industries and unions, as we have seen, whether wool or steel or lumber or agriculture, whether textiles and apparel. Byzantine dumping laws were created to protect American domestic industries against foreign competition. No less an authority than Professor Kenneth Dam, former Deputy Secretary of State and Deputy Secretary of the Treasury in Republican Administrations (Reagan and the second Bush) has recognized how unfair they are. Theoretically, U.S. trade laws implement international agreements, but the truth is reversed. The rest of the world implements facsimiles of American domestic preferences and laws. The United States shaped the rules so that a domestic company could dump a product in the domestic market – sell off surplus at bargain prices, for example – while a foreign producer would be heavily taxed for doing the same thing.

At the WTO, the United States is a persistent sore loser, among the slowest and the last to accept adverse decisions, threatening to quit the international organization should the organization continue to reach decisions contrary to American interests. The cotton dispute with Brazil became a prominent example during the Doha negotiations.

So did “zeroing” in dumping cases, a favorite Commerce Department technique to inflate antidumping duties artificially: having lost the right to zero repeatedly at the WTO, the United States threatened that, unless it was restored by agreement, the United States would abandon the Doha Round. But we do not want to forget the European Union – be it bananas or GMOs, the European Union has not been particularly compliant, either. As with U.S. institutions shaping protectionist inclinations, so the WTO’s institutional design favors recalcitrance for the more economically powerful members.

The Constitution of the United States assigns Congress control of tariffs and trade. Congress assigns such control to the Committee on Ways and Means of the House of Representatives, and to the Finance Committee of the Senate. Those committees have the subcommittees that control U.S. policy on international trade.

Congressmen and Senators seek to serve on committees potentially most useful for their constituents because they are elected primarily not by party, as in Parliamentary systems, but by constituents, and the two most important things to politicians are to get elected and to get reelected. Manufacturing and large land-holding enterprises are most interested in taxes. Ways & Means in the House and Finance in the Senate are the committees that write the tax laws. The committees, therefore, are dominated by Congressmen and Senators from states or districts where there is either wide open land or there is a concentration of manufacturing. It is not surprising to find more than three-quarters of the Senate Trade Subcommittee coming from underpopulated, rural states such as Idaho and Montana, Arkansas and Oregon, Maine, New Mexico and West Virginia, complemented by Michigan and New York. Traditionally, these farm states are Republican, contradicting the popular perception of Republicans as free traders. The composition of the Senate Finance Committee explains, for example, the political success of the Coalition for Fair Lumber Imports, the

U.S. industry group that lost all of its legal proceedings seeking trade restrictions on competing Canadian lumber, but won a formidable trade deal through the efforts of the Bush Administration that cripples Canadian lumber exports to the United States. And, coincidentally, raised the price of housing in the United States to what we now know was benefitting mortgage lenders while destroying the economy.

This institutional reality pervades the American system. The distortions in food supply and prices caused by the rush to ethanol are a product of the Iowa caucuses leading off presidential sweepstakes every four years. So is the notorious Farm Bill in each iteration. The American political system, what Theodore Lowi has been calling “interest group liberalism” for the last forty years, enables narrow interests to be served instead of a more general public good. Consumers spread throughout society rarely prevail against more specific and narrow interests that magnify the clout of well-placed Congressmen or Senators. Montana Senator Max Baucus’ logging constituents will always be heard by the Senate Finance Committee before a generalized concern for the price of a home for the average American because the logging constituents fund the Senator’s campaigns and make their concerns and interests known constantly, while the consumers in Montana are not organized specifically to influence Senator Baucus. And Senator Baucus got his way in exchange for negotiating authority for the President, just as other Presidents compromised free trade principles when they needed Congress for the same purpose.

The trade laws reflect the institutions that write them and the interest groups who dictate the terms. Legal standing to participate in a trade case is conferred automatically on the manufacturer of a product in question; consumers have a right to be heard in the International Trade Commission proceedings, but they have no access to proprietary information and no right to submit briefs. The system is designed to give priority to the manufacturers seeking protection, not the consumers hoping for competition to make available cheaper goods.

The trade laws are highly discretionary. The United States International Trade Commission determines whether industries in the United States are materially injured or threatened with material injury by virtue of subsidized or dumped imports, but with no specific or consistent formula shared by the Commissioners. The Commission is created by and answers to Congress. By law it must have three Republican and three Democratic Party members, all named by the President, and traditionally it is a source of even-handed economic analysis. However, it has been more protectionist in recent years as Congress has been willing to pressure it with respect to high profile cases. The ITC's budget comes from Congress. Congressmen appear at the ITC's hearings on behalf of domestic industries, and write letters during proceedings telling the Commission how they expect the Commission to vote and what they expect the Commission to do. The Commission usually does not break, but it often bends.

The Department of Commerce, which determines whether companies are dumping and whether governments are subsidizing, is a different matter entirely. The Department of Commerce, an agency of the Executive Branch, traditionally protects and speaks for U.S. industry. Note the difference: conventionally there is an assumption that Congress is protectionist but Presidents may be free traders, yet the agency created by Congress traditionally has been even-handed about free trade, or at least willing to resist congressional pressure, and the agency of the Executive Branch has been protectionist. This difference has been especially pronounced in the Bush Administration. In my twenty years of practice in international trade, no Commerce Department has been as protectionist as the Department during the last eight. The Secretary of Commerce may speak the language of free trade, but he and his

Department have executed the laws by maximizing their discretion to protect U.S. manufacturers.

There are numerous egregious examples of this conduct, the most visible (and most reversed by NAFTA panels and the courts) being the *Softwood Lumber* dispute with Canada. However, our forum is principally about Asia, so I will not elaborate on that example. Instead, I want to provide some examples from the recent subsidies cases involving China. They expose some of the hypocrisy of American trade policy, and may help with a broader understanding of U.S. trade policy generally.

U.S. Protectionism: Finding Subsidies In China

The Chinese Government has concentrated its trade diplomacy on being recognized as a market economy. There is more of politics and pride than economics and trade sense in this ordering of priorities. Not long after the United States and China, through their Joint Commission on Commerce and Trade, established a special working group to "provide a forum dedicated to the discussion of these issues [the agenda for market economy status]," to which "[t]he United States attaches great importance," the United States began investigating and applying countervailing duties to alleged government subsidies in China. Subsidies, by definition, are government infusions of capital that distort markets. As long as China is treated as a non-market economy, it cannot have a market to distort, and therefore cannot, as a legal matter, subsidize. This elementary understanding ought to have been easy to achieve in a forum co-chaired by the Assistant Secretary for Import Administration of the Department of Commerce and the corresponding Director General from China's Ministry of Commerce. The JCCT not only appears to have had no effect; the United States has adopted an attitude openly hostile to China.

Commerce is relying on a methodology in its subsidy investigations that it is justifying within the WTO framework, used in *Softwood Lumber from Canada,* even though WTO and NAFTA panels rejected it. The strategy of relying on this methodology would not be affected if China were recognized as a market economy. Therefore, for practical purposes, China's concern should be primarily on the allegations themselves, and the techniques and assumptions the United States is using to justify prohibitive countervailing duties. And it ought to insist more on results in the JCCT and the Strategic Economic Dialogue as diplomatic forums, while engaging more fully in the legal process of specific investigations.

There are four main themes in the U.S. approach to subsidy allegations in China: first, that Chinese Government officials cannot be trusted, nor in most cases can their counsel, and the United States is entitled to find countervailable subsidies whenever it believes that China has withheld evidence; second, that any state-owned enterprise in China, regardless of its charter to operate on market principles and make a profit, subsidizes in its provision of goods or services merely because it is state-owned; third, that planning, at whatever level of government, must mean the favoring of industries or sectors, and even though there may be no evidence connecting plans to implementation, their very existence means that loans from state-owned banks in sectors where there are plans are subsidized; fourth, anything the government owns and sells, such as land use rights, is subsidized, with the subsidy to be measured through surrogate values from other countries.

Perhaps the most pernicious, and surely the most offensive, of the U.S. themes is the allegation of Chinese dishonesty. In an official memorandum in June, Commerce officials complained that "a de facto problem with land supply in China which causes market distortions is that of local government corruption." The officials might have thought the Jack Nicholson movie *Chinatown* was about China, but it was about California. In various other decisions and determinations, the Commerce Department has written, for example, "The GOC purposefully made a decision to conceal how the information on ownership structure was derived." Of course, intent is not part of the trade law, nor is there any way to know what might have been purposeful. Nonetheless, on the same page, Commerce added, "We continue to find that the GOC misrepresented how the information was obtained, and have drawn adverse inferences accordingly." In another case, Commerce complained that "the GOC did not provide crucial information requested several times by the Department," even though arguably the information requested was irrelevant to the investigation. In that same case, when China asked to present an official witness during verification to explain why the information had not been available or provided, Commerce refused to hear him. And as to lawyers, in one case Commerce asserted that, "the GOC's legal counsel . . . misrepresented the source of the information." The United States surely would not tolerate assertions by Chinese investigators that American officials are corrupt, or that they do not cooperate or purposefully conceal or misrepresent, and so do their lawyers. This approach to resolving trade disputes is unseemly and contrary to the basic principles of comity among nations. It is at the heart, however, of American protectionism toward China.

Over and over the United States assumes that the existence of plans translates into market distortions, even as it has yet, in nearly a dozen cases, to show a direct link, and despite Chinese insistence that planning has become indicative and hortatory. The United States assumes that state-owned enterprises necessarily distort markets because they are state-owned, ignoring evidence of mandates to be profitable and market-based. Even though in most countries ultimate title to land belongs to the Government – throughout the British Commonwealth, for example – the United States asserts that, because the Chinese Government owns all land, there could not be a market in land transactions. Presumably Embassy and consular staff are not telling anyone in the Commerce Department about rents in Beijing or Shanghai.

The Commerce Department has fashioned its objective – to find countervailable subsidies in China – into a concerted effort to ignore evidence and to put the entire Chinese economic system on trial. The objective is born of congressional pressure and popular complaint that China must be trading unfairly, negating comparative advantages of cheap and abundant labor and considerable skill and experience in manufacturing. Despite the Treasury Department's Strategic Economic Dialogue and deliberate engagement, the real action is in actual instances where American companies have filed petitions seeking restrictions on Chinese imports. It is very rare for such petitions to fail, not because of their relative merit, but because of the determination of the Commerce Department to favor them. The Commerce Secretary, of course, is a member of the President's cabinet, appointed by and answering to the President.

There is a further dimension to this protectionism. Many of the Commerce Department positions are legally indefensible. They ignore record evidence and expert testimony, they distort legal precedent. On appeal one can expect most of the determinations to be overturned by judges provided adequate record evidence has been developed. Commerce officials and lawyers surely know that they cannot defend most of what they are writing. However, by asserting so much bad faith and dishonesty, Commerce imposes "adverse inferences," a formula for magnifying and multiplying duty rates enough to close the market to the imported goods. Appeals then become futile. They take at least a year, and they are expensive. Most Chinese are abandoning the market rather than expend funds contesting Commerce determinations during extended periods when they cannot afford to compete. Commerce then turns to its own determinations and claims them for administrative practice and precedent, making it all the more difficult for subsequent products to challenge the emerging protectionist legal regime.

This protectionism will do no one any good. It makes the United States hypocritical when proclaiming itself a champion of free trade, just like with the 2002 and 2008 Farm Bills. And although this hypocrisy is visited upon most countries without discrimination, China seems to have been singled out for a more orchestrated and destructive effort. To be fair, China has done little to question this conduct effectively and systematically and it has responded to the strategic designs of U.S. protectionism with little or no strategic thinking of its own. But China did not enter the world trade system as the champion of free trade. That laurel is on the American head, sometimes for better, and lately for worse.

The United States, when things go wrong, often blames foreigners. China has become a particularly attractive target because the United States has such a huge and ever growing deficit in its trade relationship, and because China often handles delicate matters clumsily, whether frog-marching a contrite Mattel executive, or appearing indifferent to the apparent poisoning of American pets. And while other countries try to play by the legal rules when the United States protects its market illegally, China responds inconsistently and erratically, making few friends and seeming not to care. Neither the Government nor most Chinese companies defend themselves before the International Trade Commission, even though they can expect more sympathy, or at least more hard-headed economic analysis, there, rather than in the Commerce Department. The Commerce Department is systematically and deliberately, with the complete approval of Congress, shutting Chinese products, one by one, out of the U.S. market.

The Chinese seem not to understand the antipathy their government has generated, in the United States and elsewhere. Consequently, China fails to appreciate the politics and diplomacy required to obtain better treatment on trade. According to the Pew Global Attitudes Project in 2008, only 3 percent of surveyed

Chinese thought their economy was having a negative impact on the world, whereas 69 percent of Americans thought the contrary, that China is having a negative economic influence. Seventy-seven percent of surveyed Chinese thought China is generally liked in the world, yet only 39 percent of Americans, 26 percent of Germans --who enjoy a trade surplus with China -- agreed. Only 14 percent of Japanese, down from 55 percent in 2002, look favorably upon China.

For China to overcome the implied misunderstandings in these survey results, it will have to fully engage with much more subtlety and sensitivity and determination. It must participate in proceedings before the International Trade Commission. It must challenge the American willingness to question its veracity. It must plan and strategize its legal defense. It must commit serious resources. It must not only join the international legal system. It must believe in it. Only then will China and the United States be speaking the same language, and begin to truly understand each other. As long as Europeans follow American examples, the future of east-west international trade, which again is the fulcrum of world trade, depends on Sino-American relations, but none of these three – Europe, China, or the United States -- should have any illusions about going it alone.

The American Elections And The Future Of Trade

Obama, McCain, Pennsylvania And Ohio

No one attentive to the presidential campaign in the United States could escape discouragement about world trade. Rhetorically, Senator McCain is far more committed to free trade than any of the Democratic candidates had been during the primary elections, but Senator McCain, were he elected, would likely not be able to have his way. Senator Obama's position has softened since he clinched his party's nomination, but he remains on balance catering to perceptions about the electorate in critical states, particularly Ohio and Pennsylvania. Whatever the presidential outcome, the new Congress will be Democratic and likely veto-proof. A President Obama will be able to pursue whatever trade policy he chooses, provided he devotes himself fully to it. A President McCain will not.

Senator McCain, from the beginning, fearlessly defined himself a realistic free trader. Back in January, he told an audience in Michigan, "I've got to give you some straight talk. Some of the jobs that left the state of Michigan are not coming back. But I believe that we can develop a plan to take care of these workers who have lost their jobs my friends." In August he repeated in Iowa what he had said during the primaries: "My friends, we will disagree on a specific issue and that's healthy. I believe in renewable fuels. I don't believe in ethanol subsidies." Knowing how unpopular these views had made him in Iowa, he did not contest the caucuses there.

Many worry that, despite his evident commitment to free trade, Senator McCain also admits ignorance about economics, and the courage of statements in Michigan and Iowa often seems like doubtful political judgment: his most important statement supporting free trade after securing the nomination was delivered in Canada, not in the United States. For all the criticism of Senator Obama's celebrity appearances in Europe, it was passing strange for Senator McCain to declare his free trade commitment – "If I am elected president, have no doubt that America will honor its international commitments – and we will expect the same of others. We will strengthen and extend the open and rules-based international trading system" -- outside the country. Nor was this language the unequivocal commitment to free trade and the reduction of trade barriers one might have expected.

We might concur with the *National Post* cartoonist who reckoned Senator Obama really has not meant what he has said about trade, but we cannot discount the words entirely. Chasing votes in Philadelphia during the primaries, he said, "What I oppose—and what I have always opposed – are trade deals that put the interests of multinational corporations ahead of the interests of American workers—like NAFTA, and CAFTA, and permanent normal trade relations with China." He did promise, however, moments later in the same speech, to negotiate further trade deals, unlike the last remaining Democratic opponent at the time. And he elaborated two weeks later, in Pittsburgh: "I also don't oppose all trade deals. I voted for two of them because they have the worker and environmental agreements I believe in. Some of you disagreed with me on this but I did what I thought was right. That's the truth." He then attempted to explain his opposition to NAFTA, CAFTA, and PNTR. He was elaborate on China, but the NAFTA position was born of Senator Clinton's sudden reversal, from praising President Clinton's singular achievement in NAFTA to claiming she had always opposed it. So, we have, perhaps, more rhetoric than consideration.

I want to take a couple of minutes to give this episode – the Democratic Party candidates' assault on NAFTA – more attention, focusing on the places where the episode erupted and played itself out, in Pennsylvania and Ohio. Senator Obama said in Lorain, Ohio in February: "One million jobs have been lost because of NAFTA, including nearly 50,000 jobs here in Ohio. And yet, ten years after NAFTA passed, Senator Clinton said it was good for America. Well, I don't think NAFTA has been good for America – and I never have." Senator Clinton had baited him, saying she opposed NAFTA after praising it as one of her husband's crowning presidential achievements, but Senator Obama's declaration, as we shall see in a moment, is inexplicable. It is also, as former U.S. Trade Representative Charlene Barshefsky told the Senate Finance Committee on July 29, distressingly irrelevant: "To date, most argument over globalization has taken the form of defense or criticism of NAFTA. These both miss the point." She explained, "The fact is that NAFTA is not the source of technology-driven change in services, nor the source of logistics-driven decline in the cost of manufacturing trade, nor a factor in Asia's rising competitiveness. A trade debate focused upon it, therefore, misses the structural changes underway in the world economy, and is not likely to lead to policies that directly respond to our problems today." Ambassador Barshefsky could have been more blunt: the debate over NAFTA has been an intellectually dishonest political cabaret.

In the rhetorical sequence in the campaign, Senator Clinton called for a "timeout" on trade agreements, not a difficult demand following the expiration of trade negotiation authority for the President. Restoring that authority will not likely be the first thing on the agenda of a new Congress in January so, as a legal matter, the new President already faces a "time out." But Senator Clinton went further: she demanded a reassessment of all existing trade agreements and a renegotiation of NAFTA. Senator Obama, trailing in the polls in both rust-belt states, borrowed her hymnal. Both blamed NAFTA for job losses in Ohio and Pennsylvania, and both suggested that the environmental and labor provisions in the agreement were insufficient. Neither pointed to anything specific.

According to the Canadian Embassy in Washington, 276,500 jobs in Ohio are supported by Canada-U.S. trade, and the Department of Commerce reports that over 21 percent of all jobs in Ohio depend on exports. According to the Canadian Studies Center at Bowling Green State University, 8500 people in Ohio are employed by Canadian subsidiaries. In 2005, Ohio exported $16.9 billion in goods to Canada, tripling the pre-FTA total. Canada is Ohio's largest export market, receiving 41 percent of all the state's exports. As of August 2007, Ohio was running a trade surplus of $3.3 billion with Canada. Nor is Mexico hurting Ohio. It is Ohio's second largest trade partner at $3 billion, twice as much as the value of exports to the third-ranked Japan.

Two-way trade between Canada and Pennsylvania was at $20.4 billion in 2006, with one-third of all Pennsylvania's exports Canada-bound, supporting an estimated 292,250 jobs in Pennsylvania. In the Pittsburgh area alone, where Senator Obama was so critical of NAFTA, twenty-two Canadian-owned companies employ more than 5,000 people, emphasizing that NAFTA helps small and medium-sized enterprises. Job losses seem traceable almost entirely to productivity gains, with manufacturing output increasing 58 percent in the United States between 1993 and 2006. Pennsylvania, in particular, experienced job losses, especially in the first three years of this decade, but experienced a huge increase in exports, 136 percent to Canada and Mexico since the creation of NAFTA. It also experienced double and triple digit gains with other countries with which the United States has free trade agreements, including Chile, Singapore, Australia and Bahrain.

The facts have not been getting in the way, however, of the political campaigns. The Democratic Party platform calls for amending NAFTA because, as Senator Obama claimed in Ohio, it supposedly is costing Americans manufacturing jobs. The Obama campaign understands that the economy has claimed the center of the campaign debate, displacing the attention devoted to Iraq and other foreign and military concerns less than a year ago. A terrorist act in the United States between now and November 4 could refocus the debate again, but with unemployment in states such as Ohio and Pennsylvania climbing above 5 percent, home foreclosures spreading like an Asian flu, and credit tightening while energy costs generate inflation, the debate is about, in James Carville's infamous aphorism, "the economy, stupid."

It surely must seem odd from abroad that a nation of immigrants is inclined so much to xenophobia, but when the economy sours, Americans blame foreign pathogens. When productivity goes up, employment goes down, and Americans prefer to say that jobs left the country than to acknowledge that they are working harder, and producing more, with less. Even as unemployment everywhere else on the planet is perennially higher than in the United States, American tolerance for instability and unemployment is very limited. Objections to immigration, alleged currency manipulation, unfair trade and foreign subsidies are all about American insecurity, which in the last eight years has been promoted in a climate of fear serving well the executive aspirations of the Bush-Cheney Administration, and expanded by the economic convulsions of the last two. Americans know that countries such as China are financing their debts, which they resent more than they appreciate. So, as Obama adviser (and former Clinton official) Dan Tarullo said last month, “Trade has been a bigger part of the campaign so far this year, and I think it probably will continue to be. I think it does account for the rather more extensive attention paid to it in the platform compared to four years ago.”

The Future Of American Leadership And World Trade

I want to summarize for a moment before drawing a conclusion as to the future of world trade and American leadership. Trade liberalization in the twentieth century was led, every time, by the United States. It was led, almost every time, by Democrats, not Republicans. Nothing contributed more to global prosperity, and despite the deadliest and most violent century in world history, there is a case to be made that without liberalized trade, the death and violence, war and terror, could have been, if you can imagine it, even worse. Free trade promotes peace. That there was so much war in the last century may tell us mostly that we needed more trade.

The expectation and need for American leadership to promote free trade unfortunately means that, when such leadership fails, so does progress. I believe that it is as much an expression of disappointment as of anger that the United States is so exposed, and vulnerable, to criticism from other countries. Other countries, too, are hypocritical, self-serving, and often indifferent to the needs or suffering of others, but American ideals are universal and we all expect more of the United States than of any other country to contribute to global security, prosperity, and human rights.

With a weakened economy encouraging a politics of trade protectionism, will such leadership be manifest again? Is the Doha Round truly dead? Will jingoistic populists prevail? John McCain consistently has supported free trade, and he has become a champion of trade adjustment assistance who seems to recognize that the critics of trade display more fear than resolution. However, the uncertainties about the outcome in the presidential race are not applicable to the future of Congress. Congress will be in 2009 Democratic in both houses, and probably veto-proof. Presidential authority to negotiate trade agreements has expired. The Democratic Congress will not restore it to the incumbent Republican President, no more than the Republican Congress was willing to renew for the last years of the Clinton Administration. Trade liberalization, though led by Democrats, typically has been supported, ultimately, by both parties, but the granting of trade negotiation authority historically has been partisan and has produced very damaging compromises. In my view, a President McCain will have difficulty persuading a Democratic Congress to grant him authority to pursue a trade liberalizing agenda. I think he has the better of the debate on trade, but even were he elected he would stand little chance of implementing an affirmative program.

The Democratic Party platform is more equivocal than had been some of the campaign rhetoric leading up to it. Senator Obama is insistent that China is a currency manipulator, but the platform does not say so explicitly. He is carrying the union torch in criticizing Chinese labor practices. But he also told the Alliance for American Manufacturing last April, “America and the world can benefit from trade with China,” and “Seeing the living standards of the Chinese people improve is a good thing – good because we want a stable China, and good because China can be a powerful market for American exports.” These remarks, of course, were mixed with further criticism about product safety, intellectual property rights, and closed Chinese markets. It is a mixed and political message.

I want to conclude with a personal suggestion about how to interpret Senator Obama were he to be President Obama four months from now, not as the *National Post* cartoonist put it, and not as many of his campaign words imply, but as I think his biography indicates.

I do not think the United States has ever had a candidate for the presidency with family native to a developing country. I do not think any other candidate has ever lived, for any amount of time or at any age, in the environment and culture of a developing country (I discount colonial control of the Panama Canal Zone, U.S. naval or other military bases, and prisoner of war camps, however non-American; I also discount living in a bubble such as an Embassy, the foreign dwellings of Jefferson and the Adams family and George Herbert Walker Bush; they teach little or nothing about being part of a foreign culture). I do not believe that any other candidate has ever witnessed intensely and personally or experienced personally the poverty and futility wrought, not of war, as Herbert Hoover did, but of colonialism. The Doha Round was conceived, in effect, to help Barack Obama's extended families in Kenya and Indonesia, and their kin and the people of their worlds. No one has ever been more likely to understand the needs, to sympathize with them, and to devote himself to finding ways to address them. So, in my view, a President Obama is more likely to complete the Doha Round successfully – to display the leadership required and to bring Congress with him – to dismantle agricultural subsidies benefitting essentially rich agribusiness, just as the last Democratic President did – than anyone else who might have presented himself for leadership at this moment in history. The Democratic Congress will grant him negotiating authority without contest provided he seeks it within months of assuming office, and the Round could be back with more promise than ever less than a year from now. By contrast, the pressures of the last several weeks to renew talks immediately, even before ballots are cast in the United States, are, in my view, mistaken, even dangerous.

We can expect a restoration of American leadership on trade, but we will have to be patient for it. There will be no serious progress without it. We probably cannot expect more honest dealing from all agencies, such as the Department of Commerce; those problems are entrenched and institutionalized and I doubt a President Obama, or a President McCain, would have the interest or tenacity to do much about them. We will have to address the daily insults of protectionism in the trenches, with dedication and attention to detail that only conscientious clients can make possible. We will get back to the big picture when American leadership is more generally restored, which will require personal, political, and intellectual courage in the White House.