



## The Honorable Dick Thornburgh William H. Lash, III

### The Issue: International Trade and Non-Tariff Barriers

This edition of Washington Legal Foundation's CONVERSATIONS WITH explores the troublesome expansion of regulatory and legal policies which impede international free trade. Former Attorney General of the United States Dick Thornburgh moderates an informative discussion with George Mason University School of Law Professor Bill Lash, who recently served for four years as Assistant Secretary for Market Access and Compliance in the U.S. Department of Commerce. Mr. Lash explains how foreign and U.S. regulatory and legal "non-tariff barriers" to trade, ranging from product standards to the protection of intellectual property, affect free enterprise and consumers, and what American trade officials are doing to combat these policies.

**Governor Thornburgh:** Bill, let's start out with a basic question — what does President Bush mean when he says that free trade is not only an economic opportunity, but a moral imperative?

**William Lash:** Ronald Reagan said that trade was a forward strategy to freedom. When President Bush called free trade a moral imperative, he was recognizing that trade creates opportunity for everyone, particularly our poorer trading partners. Like Reagan, he recognizes that when we export goods we also export values such as democracy. Countries that liberalize their economies grow faster. There are clear links between economic freedom and political freedom. This is the moral component.

**Governor Thornburgh:** From an economic perspective, how does trade benefit the average American? Why shouldn't they believe the vocal opponents of globalization?

**Mr. Lash:** Saying you are against globalization is akin to saying you are opposed to gravity. It is a reality, a force. In the United States and around the world people trade because it improves the quality of life. Most of us don't make our own clothing or cars, or even produce our daily bread; we trade domestically with automakers, farmers, and textile workers. On a global scale, the same pattern takes place. Trade allows us all to enjoy the comparative advantage of producers around the world. This lowers costs of goods and services to the average American. If you visit a Wal-Mart, Target, or Sears, you will find pants from Jordan, shoes from China, and computers from Malaysia next to software from California and furniture from North Carolina. The money you save can be invested in anything from your child's education in Missouri to a family vacation in Florida. Everyone wins.

**Governor Thornburgh:** Tell us a bit about your responsibilities at the Department of Commerce and how the President's trade philosophy influenced your former office's approach.

**Mr. Lash:** At the Department of Commerce, my unit — Market Access and Compliance — is the trade policy and enforcement arm for American workers and firms. Its mission is to obtain market access for American firms and workers, and to achieve compliance by foreign nations through trade agreements they sign with our



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country. America has approximately 300 trade agreements, ranging from the World Trade Organization obligations to bilateral agreements with a country like Japan or the European Union. The office ensures that U.S. firms are being charged the correct tariff on exports, protects their intellectual property, and deals with hundreds of non-tariff barriers. President Bush determined that for America to be able to negotiate new free trade agreements, the American people needed to have confidence that our existing trade agreements are working. That is why compliance became a top priority in the Bush administration’s first term.

**Governor Thornburgh:** In terms of impediments to overseas trade, everyone is familiar with tariffs, but you mentioned non-tariff barriers as well. Can you provide some examples of those types of trade barriers?

**Mr. Lash:** Non-tariff barriers are limited only by the creativity and conscience of the trading partner. For instance, a trading partner could adopt a new standard which would prohibit the sale of a particular type of pipe or tube despite years of successful performance. Onerous and arbitrary testing requirements can discriminate in favor of domestic interests, as can requirements that a product be produced locally. The use of shoddy science to justify restrictive domestic regulations is another example. Simply put, non-tariff barriers can disrupt billions of dollars of trade.

**Governor Thornburgh:** Why are non-tariff barriers particularly challenging for businesses and trade officials to address?

**Mr. Lash:** First, the biggest challenge is identifying the barrier before it becomes a problem. Those subject to regulation in the U.S. are familiar with the Federal Register system and the obligation to notify potentially affected groups and provide them with an opportunity for comment or court challenge. Despite WTO obligations to notify trading partners about similar changes in law or custom, many countries simply do not uphold

the practice. Trade ministers are obligated, but the information may be contained within the Standards Office, the environmental agency, etc. In many countries, their commerce department learns of a potential non-tariff barrier and has to inform and mobilize industry. Also, many companies are hopeful that a problem will go away without federal intervention. Typically, though, a situation will require bilateral discussions between the involved countries.

**Governor Thornburgh:** Which of America’s major trading partners use non-tariff barriers most pervasively and effectively?

**Mr. Lash:** Annually, the federal government publishes the National Trade Estimate on Foreign Trade Barriers. The trading partners that utilize such trade barriers most pervasively are China, Japan, India and the European Union.

**Governor Thornburgh:** With Europe, one area that comes immediately to mind is its policy toward genetically enhanced crops. What barriers exist, and why has the EU clung to them in the face of clear scientific evidence?

**Mr. Lash:** Genetically enhanced crops have fallen victim to the abuse of science and therein have become the whipping boy for a variety of non-governmental, activist organizations. Such products, however, are the best chance we have to feed the world’s poor. In Europe, we see political pressure from Green Parties to block both the use of these products and further testing of them. We face labeling requirements which American agribusiness cannot meet. Europe also suffers from a lack of confidence in their own regulators. A variety of food scares have undermined confidence in their health ministries. One member of the European Parliament pointed out to me that “Our regulators have failed us (referring to Mad Cow disease.) In the U.S. you move more quickly.”

**Governor Thornburgh:** There’s a moral issue

here too, isn't there, considering the impact EU policies have had in Africa and other countries?

**Mr. Lash:** Absolutely there is a moral issue, and former Secretary of Commerce Don Evans was always passionate about this point. When he was in Africa, he learned of a woman in Zambia who was forced to sell some of her children to buy food for the others. She had to make this horrible choice even though there was a ship full of free grain that her country refused to accept because it was genetically enhanced. Farmers can't accept free genetically enhanced seed to plant because doing so would deny them access to European products. It is an obscene situation.

**Governor Thornburgh:** Do you expect the administration will push forward aggressively against these barriers? What is the status of the U.S. challenge to the EU policies before the World Trade Organization?

**Mr. Lash:** Challenges by the U.S. and several other countries to these barriers at the WTO are proceeding. I am confident that these efforts will succeed. The next step is achieving compliance of the member states of the European Union after a (hopefully) successful outcome.

**Governor Thornburgh:** Another area of concern is the regulation of chemicals in the EU, namely through a program known as Registration, Evaluation and Authorization of Chemicals, or "REACH." Tell us about that and how it will affect U.S. companies.

**Mr. Lash:** REACH would impose costly new testing requirements on 30,000 chemicals and shift the responsibility from government to industry. Estimates from Europe are that the testing alone will cost \$1.8 billion euros.

The U.S. exports some \$200 billion of chemicals to Europe. There is a real risk that REACH may drive some smaller exporters out of this market entirely and impose higher costs on those who remain. The current version of

REACH also requires manufacturers to shift production to the least toxic substance where possible. Some EU analysts estimate this will shift production of many substances to Japan and the U.S. and cost Europe over 1 million jobs.

**Governor Thornburgh:** Will this REACH regime be enacted and applied in its current form? If so, what actions do you expect U.S. companies and trade officials will take?

**Mr. Lash:** The European Parliament will vote on REACH in November. A final version of REACH is not anticipated to be approved until late 2006. Companies in Europe and in the U.S. as well as trade officials continue to engage the EU on REACH.

**Governor Thornburgh:** Focusing on another key U.S. market, is China erecting some of the same regulatory barriers to trade? How is the administration approaching those issues?

**Mr. Lash:** The administration has pursued a strategy of constant engagement with China. Through the Joint Commission on Commerce and Trade, cabinet officers of both countries can address a host of trade barriers. Educating American firms on how to do business in China is another key element of the China strategy. It is also vitally important that we maintain our expectation that China lives up to its obligations as a member of the WTO. This means establishing meaningful protection of intellectual property.

**Governor Thornburgh:** Can you elaborate on the concern over China's disregard for intellectual property?

**Mr. Lash:** In addition to being the fastest growing economy in the world, China is the leading producer of counterfeit goods ranging from DVDs of films before their theatrical release to auto brakes and other industrial products. To place the problem in perspective, damages to U.S. firms from Chinese piracy is estimated to be \$20-\$24 billion annually. The

next largest offender is Russia with damages of \$1 billion. The Japanese lose \$34 billion annually to Chinese piracy. But it is important to remember this goes beyond lost profits and investments. Lives are at risk due to pirated Chinese pharmaceuticals. Buy a fake Rolex you may lose some time. Buy pirated pharmaceuticals and you may lose your life.

**Governor Thornburgh:** Should the U.S. bring a case in the WTO against China for its failure to enforce IP rights?

**Mr. Lash:** I think that one must be brought. U.S. Trade Representative Portman is trying to gather the evidence needed for a potential case. Some of our largest, closest, and most similarly situated trading partners want to join us in a WTO case against China. With \$20-\$24 billion in damages at stake, only dramatic reduction of piracy can forestall a WTO dispute.

**Governor Thornburgh:** Are there problems in other countries with the counterfeiting of patented pharmaceutical products? How are trade officials approaching that?

**Mr. Lash:** There are problems in several countries involving counterfeit drugs including the U.S. For example, many Americans began buying pharmaceuticals from Canada either in person or online. In several cases, the drugs were counterfeit. A webpage may claim to be from a Canadian pharmacy but many have been found to be anything but Canadian. China supplies Canada with over \$73 million of pharmaceuticals each year. In Pakistan and Nigeria, 50% of the pharmaceuticals are counterfeit. In Russia, 12% of the pharmaceuticals are counterfeit. Globally, counterfeit pharmaceuticals are an estimated \$40 billion-a-year business. Trade officials work with their international counterparts as well as ministers of Health and Justice on piracy issues. I spent a lot of time making sure that innovative international industry and local officials had a dialogue, and that industry could provide training to law enforcement on how to spot counterfeits and prosecute pirates. We

also stressed the importance of a country establishing good laws on piracy and putting counterfeiters in prison.

The Department of Commerce is expanding the deployment of intellectual property attaches. There is already a man working in China. Russia, Brazil and India are also getting new IPR attaches at the embassies.

**Governor Thornburgh:** Drug patent issues have arisen recently with regard to Brazil and its desire to invalidate a U.S. company's patent on an AIDS drug. Can you comment on that, and the larger issue of countries invoking health "emergencies" as a justification for pulling patent protection?

**Mr. Lash:** The WTO recognizes that in cases of an epidemic a country may violate a patent. But the country must pay compensation to the rights holder. The challenge is when you have an epidemic in a country that lacks the infrastructure to produce a particular drug. It is wrong for a generic producer in another state to break the patent and supply the afflicted state. The U.S. government sent a horrible message when former Secretary of HHS Thompson threatened to break the patent of Cipro during the anthrax scare in 2001. We had no epidemic, yet we undermined our arguments to the developing world that you should only violate a patent in the case of an emergency.

Breaking drug patents will not solve the global AIDS crisis. Many firms are already giving the medicine away for free in Sub-Saharan Africa for example. The entire healthcare delivery system in many countries is broken or non-existent. Access to medicines is simply one of many problems.

**Governor Thornburgh:** Do U.S. trade officials consider price control policies imposed on drugs overseas to be non-tariff barriers to trade? What options are available for U.S. officials to deal with this and the effect those controls have on U.S. drug prices?

**Mr. Lash:** Price controls on pharmaceuticals are a serious non-tariff barrier to trade. In many cases, countries have national health systems, and therefore the government is the major and sometimes only purchaser of pharmaceuticals. They have tremendous bargaining power, and as Ministry of Health they can approve or decline to approve a particular pharmaceutical for reimbursement. Additionally, a foreign drug safety regulator controls which drugs can be sold in the country and how the drug is marketed (i.e. bans on advertising.) There is a great need for dialogue between industry and national governments. Governments are focused on budgetary crises and look at foreign owned drug companies as places to cut costs. In many instances, the health minister isn't a health care professional. They may be operating as financial managers primarily, with no true understanding that innovative pharmaceuticals are cost savers not cost drivers. The key is to develop a transparent process which considers medical efficacy, rewards innovation, and allows for appeals of unfair pricing decisions.

**Governor Thornburgh:** How about bribery and other acts of corruption on the international stage? How have international bodies such as the Organization of American States and the Organization for Economic Cooperation and Development (OECD) addressed that and its impact on trade?

**Mr. Lash:** Prior to the OECD Antibribery Agreement, bribery in many states was not only legal but tax deductible. While we discuss bribery at a variety of international organizations, bribery is still a way of life in many countries. We have to do more to eliminate the supply side of the bribery equation. The U.S. is still one of the few industrialized states which punish bribery by companies domestically and internationally.

**Governor Thornburgh:** There seems to be a renewed interest at the SEC and the Justice Department to vigorously enforce America's own anti-corruption statute, the Foreign

Corrupt Practices Act (FCPA). Does that create a barrier of trade for U.S. companies abroad?

**Mr. Lash:** In my opinion, the FCPA doesn't create a barrier for firms. It reassures shareholders that the contracts a company has won cannot be challenged. The challenge is getting other countries, both the states of the bribe payers and the corrupt officials, to actively combat corruption.

**Governor Thornburgh:** We've talked mostly about foreign barriers to trade, but how about barriers to trade and investment for foreign companies in the U.S.? What regulatory or legal hurdles top your list of U.S. non-tariff barriers?

**Mr. Lash:** We are one of the most open economies in the world. Nonetheless, regulatory barriers are still confronting international investors in the U.S. Once I was having lunch with some leading Swiss Industrialists. Their firms had a combined market cap of \$3 trillion. They all invested heavily in the U.S. but said they were concerned about future investment due to tort liability. Our Exon-Florio law, which allows for executive review of foreign mergers and acquisitions on national security grounds, is taught in securities law classes in law schools as a "poison pill" for hostile takeover defense. Although our intellectual property piracy rates are lower, damages from piracy in the U.S. are among the highest in the world.

**Governor Thornburgh:** What are your thoughts on the merits of seeking country-to-country or regional trade agreements versus omnibus global agreements like the General Agreement on Tariffs and Trade? Should the U.S. pursue more regional agreements?

**Mr. Lash:** Absolutely. President Reagan advanced the U.S.-Canada FTA and laid the groundwork for NAFTA in the 1980s to jumpstart the floundering Uruguay Round of the GATT. This was important, because it showed that we could liberalize trade with vital trading partners, instead of waiting for the entire trading

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system to get with the program. While we are still working on the Doha round of the WTO we cannot put all of our trade eggs in this one important basket.

Another reason to move forward on regional FASs competition: the EU belongs to well over 20 FASs. When President Bush took office, the United States was a party to two: NAFTA and U.S.-Israel. Our competitors were able to receive preferential tariff treatment, better investment protection, better market access, and more transparency. To protect our workers and farmers, we had to play in the regional FTA game. That is why we have new FASs with Jordan, Chile, Singapore, Australia, Bahrain and Morocco. In keeping with our commitment that trade is a forward strategy for freedom, the President is striving to establish a Middle East Free Trade Agreement. Negotiators just completed an agreement with Oman and are working on an FTA with The United Arab Emirates.

**Governor Thornburgh:** One final question: generally speaking, should U.S. trade officials be doing anything differently regarding non-tariff barriers that impede U.S. companies' ability to innovate and sell their products overseas?

**Mr. Lash:** The basic strategy of aggressively seeking free trade partners and supporting the Doha Round of the WTO is still a wise approach. Our trade officials need to be more aggressive on compliance and dedicated to maintaining the trust of the American people and the global community. Public diplomacy efforts have to include candid discussions with the citizens of our trading partners about our common economic vision for a world that trades in peace and prosperity. Our democratic values remain our most important export.

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**William H. Lash, III** is a Professor of Law at George Mason University School of Law. Professor Lash served as Assistant Secretary for Market Access and Compliance in the U.S. Department of Commerce from 2001-2005. As Assistant Secretary, he was responsible for ensuring that foreign governments fully complied with more than 250 trade agreements signed by the United States. He is a member of Washington Legal Foundation's Legal Policy Advisory Board.