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International Trade Issues Related to Technology: Technology and Intellectual Property in Recent/ Current Bilateral and Multilateral Trade Negotiations

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Government is not to create wealth; the role of our Government is to create an environment in which the entrepreneur can flourish, which minds can expand, and which technologies can reach new frontiers.³⁹

The high tech sector is at the heart of our trade agenda. High technology proves the competition leads to innovation, higher paying jobs, and rising price prosperity. High technology is where the United States has a comprehensive advantage, a comparative advantage, and where we see some of our greatest future opportunities.⁴⁰

And with that I can see that Henry is about to lunge for his bell. So I will close now.

MR. CAMERON: Thanks Meredith. Simon?

CANADIAN SPEAKER

Simon V. Potter[†]

Is there an accountant in the house? None? Good. It turns out doing my reading for this technology seminar, I found out something that I believed was absolutely true turns out to be false. A study, which examined a total of 616 tables and other services in offices in Tucson, Arizona, and in Washington, found that the bacteria levels in accountants' offices were nearly seven times higher than in lawyers' offices.⁴¹ I had thought that we were the filthy ones but, no, the accountants are perfectly unclean, and this to me ranks up

<http://www.whitehouse.gov/stateoftheunion/2006/index.html>.

³⁹ *Id.*

⁴⁰ SCIENCE AND ENGINEERING INDICATORS 2006, Chapter 6: Industry, Technology and the Global Marketplace (National Science Foundation's Division of Science Resources Statistics, 2006), available at <http://www.nsf.gov/statistics/seind06/c6/c6i.htm>.

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⁴¹ *Is Your Job Making You Sick: New Study Compares Professions Germ by Germ to Determine "Germiest" Job*, Feb. 15, 2006, available at http://www.clorox.com/pdf/office_study.pdf.

there with the day when I read a few years ago that 666 – we're sorry, it was a mistake they told us.

Do you remember this, about a year ago, they had redone the translations and the arithmetic, and 666 did not stand for the beast or Lucifer.⁴² It was some other number that stands for it, and we have had it wrong these many, many thousands of years. We can now safely put 666 on our license plates, but there is some other number, which is there on the license plate, which is attracting the wrong kind of influence.

Now, this week we found out that Judas is not a traitor. It turned out he was acting on Jesus' instructions and not only was he not a bad apostle, he was perhaps the preferred apostle.⁴³ So now we can start calling our children Judas, and this is going to be the theme of my talk on technology.

What we thought was true, what we all believed to be the case is not necessarily right. We always thought, for example, that patents, intellectual property, were to reward and encourage innovation, encourage the bringing of things to market; to make sure that we, the consumers, would always have the best of everything, that we would live in constant modernity.

We always thought that technology was for world betterment, as you said, Meredith, to raise our living standards, and that technology was to be shared. It was going to be good for relations. And we have always been told that technological development was good for competition, and that that, in turn, was going to be good for us.

And the point I want to make with you today is not that that is all necessarily wrong, but it is not all necessarily true, either.

First of all, let us spend a few minutes on the part where we all say to each other what we believe it is true. The WTO, of course, has a directorate for science, technology, and industry. Out of that came a world summit on sustainable development, and out of that came something called a Johannesburg Plan.

We read there that the importance of science and technology was affirmed as "an enabler." There is another thing I always thought was an enabler, a wife who allowed you to drive drunk, but we learned that science and technology is an enabler for sustainable development.

We learn about the importance of transfer of technology for developing countries. At the OECD, we read the same thing. Just in January, a few months ago, we read of the importance of international cooperation in science and technology to sustainable development, notably by transferring knowledge and technology among member countries and to less developed –

⁴² JONATHON KIRSCH, *A History of the End of the World* (Harper San Francisco 2006).

⁴³ Stefan Lovgren, *Lost Gospel Revealed; Says Jesus Asked Judas to Betray Him*, NATIONAL GEOGRAPHIC NEWS, Apr. 6, 2006, available at http://news.nationalgeographic.com/news/2006/04/0406_060406_judas.html.

and we know that this is put on a pedestal of some high nobility in many, many quarters, and not only for the enhanced living standards, but to spread the American way. The article in your materials by Melvin Simburg concludes – page 6 – that this is good because it promotes American idealism.

Technology is somehow American to this person; the technology transfer is also going to also lighten the U.S. military mission because it is going to make the world a more and more welcoming environment for American business interests, he says.⁴⁴

It is also going to enhance the United States' ability to deal with terrorism and enhance the United States' ability to perform police enforcement in the world. So, all in all, this technology is a very good thing. The fact is, I have to say as a parenthesis, Melvin Simburg is a little bit right.

There are things happening in trade now for which we must have technological tools to deal with it. The fact is, for example, we do have a terrorist threat, but we must keep the goods and the people moving across the borders. To do that, we must have technological tools, and we must absolutely find a way to share those tools and use them efficiently.

Similarly, as we read in the Cartagena Protocol on bio-safety, we now have a requirement, a treaty requirement, which starts in 2012, that any shipment which goes across the border, which contains live modified organisms – you will be hearing about them over the next decade, LMOs – is going to have to be accompanied with paperwork, which not only identifies these organisms but quantifies them.⁴⁵

However, today we do not have the technology to do that testing, so somehow we have got to get the technology to be able to do that and to do it cheaply.

In the WTO context, I am not turning to the hip crazy of things, the Judas of things. We started off thinking that maybe we could buy Brazil and India off by doing something for them on medicines and thinking that they would later be good to us on agriculture.

It has not worked out that way, but what we did do is adopt a DOHA declaration regarding medicines,⁴⁶ and there it was all right for everyone to impose compulsory licenses and hardly anyone blinked. Imagine patents stolen by compulsory licenses?

We will steal your patent right and do it under a treaty, which is designed to protect patents. We will allow the stealing of your patent right, though it is a saved right.

⁴⁴ See generally Melvyn J. Simburg et al., *International Legal Developments in Review: 2004 Corporate*, 39 Int'l Law. 333 (2005).

⁴⁵ Cartagena Protocol on Biodiversity, available at <http://www.biodiv.org/biosafety/protocol.shtml>.

⁴⁶ Declaration on the TRIPS Agreement and Public Health, Adopted Nov. 14, 2001.

Canada, by the way, has good experience with compulsory licenses. We tried it once with Anthrax medicine, and our Minister of Health at the time, Mr. Alan Rock, became frightened that we did not have enough of this medicine and issued a compulsory license, stole the patent from the patent holder without even asking the patent holder if the patent holder could produce the antidote to Anthrax, and awarded it to what looked to a lot of people like Alan's ex-client.⁴⁷

So it is not a really happy world this world of compulsory licenses, and I think we are going to be seeing more troubles along those lines. In the same treaty, there is a repetition of the need to protect test data; people submit their test data to governments to get their licenses and so on, that should be confidential.⁴⁸

In Canada, though, we have a wonderful hypocrisy, and it is to say, "Oh, yes, we protect the test data. Please don't worry about it. No one is going to see it." On the other hand, your competitor can ask for a marketing license in reliance on your test data, which everyone carefully never looks at.

In the telecoms – you mentioned this Meredith – and said that you were aggressively trying to open up markets, and it appears in the press releases that you have succeeded with the Canadian negotiators who apparently have gone and done something awful according to the Communications Energy and Paperworkers Union of Canada, which issued a press release on March 27th, just a couple weeks ago, and this is what they said: "If our trade bureaucrats at the GATS talks have decided on their own to use telecommunications as a bargaining chip, they should be ordered to stop. Nothing less than Canada's cultural sovereignty is at risk along with thousands of well paying, dues paying jobs."⁴⁹

I have to say this struck me as interesting for two reasons: First of all, imagine the person who really believes that trade bureaucrats have decided on their own to go and use something as a bargaining chip, and then imagine ordering them to stop since, of course, they have already been ordered to go ahead.

That was a bit funny to me, but the important thing is, that in this area, we still have people in Canada and in other countries who perform a perfect equation between the instrument of delivery, that is to say the telecommunications, and the content of it; that if we don't control the instrument of deliv-

⁴⁷ *Canada Builds Up Supplies of Anthrax, Smallpox Drugs*, CAN. BROADCASTING CO., Oct. 23, 2001, http://www.cbc.ca/canada/story/2001/10/22/rock_cipro011022.html (last visited Nov. 6, 2006).

⁴⁸ Agreement on Trade Related Aspects of Intellectual Property Rights, Art. 29.1.

⁴⁹ *Stop Secret Talks on Foreign Ownership of Telcos says CEP*, EXCHANGE MAG., Jan. – Mar. 2006 Archives, available at <http://www.exchangemagazine.com/XQuarterly/Archive-associations-15-May06.html> (last visited Nov. 6, 2006).

ery, we have lost our sovereignty, and that is a coming problem in this area, certainly in Canada.

I would like to move back to patents a little bit, open a parenthesis and draw your attention to a case called *Voda v. Cordis Corporation*, which is before the Federal Circuit of the United States Court of Appeals.⁵⁰ We have no decision yet, but what is at issue there is this: The Plaintiff said "I have got a patent in the United States. Someone is infringing it. Would you please stop the infringement and give me many hundreds of millions of dollars? And oh, by the way, they are also infringing my sister company's patent in Japan, and we ask you, the American Court, to decide about the infringement of the Japanese patent in Japan."⁵¹

So that is a case in which we are going to see discussion of extraterritorial reach over the coming years, and I think it may change the landscape dramatically.

In patents, the USTR has placed Canada on the watch list a couple of times,⁵² now citing the data protection business that I told you about but also citing Canada's border laxity regarding pirated goods,⁵³ and I expect with our new Government, we can see that you might be successful, Meredith, in getting people to pay a bit more attention to that.

That is something to look forward to but something I look forward to even more in the United States is something actually requested now by the head of the Patent and Trademark Office in the United States, Mr. Jon Dudas, who on April 5th, 2006, just a week ago, urged Congress to move on getting reforms.⁵⁴

And imagine this is a man in charge of patents in the United States, and he is telling Congress we have got a problem in what he's responsible for.⁵⁵ "We must allow for early challenges of American patents without the Defendants having to wait to be sued and then sued under a theory that the injunction is presumed valid. Therefore, if there is going to be injunctions against a Defendant, we must," he says, "allow for arguments against the patent appli-

⁵⁰ *Voda v. Cordis Corp.*, 122 Fed. Appx. 515 (Fed. Cir. 2005).

⁵¹ *Id.*

⁵² *2004 Special 301 Report Watch List*, Office of the United States Trade Representative, available at http://www.ustr.gov/Document_Library/Reports_Publications/2004/2004_Special_301/2004_Special_301_Report_Watch_List.html.

⁵³ *Id.*

⁵⁴ Patent Quality Enhancement in the Information-Based Economy: Hearing Before Subcomm. On Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary, 109th Cong. (2006) (statement of Jon W. Dudas, Under Secretary of Commerce for Intellectual Prop. and Dir. of United States PTO) available at <http://www.ogc.doc.gov/ogc/legreg/testimon/109s/dudas0405.htm>.

⁵⁵ *See id.*

cation in the first place, and we must allow for judges to have discretion to refuse the injunctions.”⁵⁶

And I expect that the Blackberry case, which you have heard about here. Without wanting to spend too much time on that, the points I want to make is that the Plaintiffs in that case created a company and attracted investors to that company.

Why did those investors invest in that company? To cover litigation expenses. No investor in that company actually paid to develop anything. They paid to develop litigation. That's a bit amazing, isn't it?

Then using the Virginia Federal Court's rocket docket, they managed to get to Court within a year before things could be done in time with Mr. Dudas' Patent and Trademark Office, resulting in a situation in which there was going to be an injunction, an injunction so grave that the Department of Justice actually asked Judge Spencer to delay hearings in order to allow the PTO to rule on the legality and applicability and patents.⁵⁷

The Department of Defense said the Blackberry was essential to national security,⁵⁸ and nevertheless that judge was going to issue his injunction.⁵⁹ So RIM had to come to the rescue and save the day with \$612.5 million dollars to get that thing solved.⁶⁰ I have circulated around the room an editorial from the Financial Times of March 27th, drawing your attention to this.

What the Financial Times reminds everybody of is that there is no reason a judge must issue an injunction. What we need to do is put discretion back

⁵⁶ See generally *id.*; *Patent Quality Enhancement in the Information-Based Economy: Hearing Before Subcomm. On Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. (2006) available at http://commdocs.house.gov/committees/judiciary/hju26914.000/hju26914_0.HTM.

⁵⁷ Barrie McKenna, *Judge James Spencer*, *GLOBE & MAIL*, Feb. 23, 2006, available at <http://www.theglobeandmail.com/servlet/story/RTGAM.20060223.wjudge-rimhub23/BNSStory>.

⁵⁸ See Wikipedia, *NTP Inc.*, http://en.wikipedia.org/wiki/NTP,_Inc. (last visited Oct. 24, 2006) (stating “[o]n 9 February 2006, the United States Department of Defense filed a brief stating that an injunction shutting down the Blackberry service while excluding government users was unworkable. The DOD also stated that the Blackberry was crucial for national security given the large number of government users.”); See generally Yuki Noguchi, *Government Enters Fray Over BlackBerry Patents Agencies Depend on Devices, Lawyers Say*, *WASH. POST*, Nov. 12, 2005, at D01 available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/11/AR2005111101789.html> (explaining the ‘statement of interest’ filed by the Justice Department showing “the government is concerned ‘there may be a substantial public interest that may be impaired’ by shutting down the service.”).

⁵⁹ Sam Gustin, *Patent Pending - BlackBerry Judge Delays Shutdown, Urges Deal*, *N.Y. POST*, Feb. 25, 2006, at 19 (stating “[t]he judge made it clear that he is going forward with an injunction at some point in the near future.”); See also Stephanie Stoughton, *Judge May Soon Issue Injunction on BlackBerry Sales As Maker and Patent Holder Continue Dispute*, *CAN. BUS. ONLINE*, Feb. 19, 2006, http://www.canadianbusiness.com/markets/market_news/article.jsp?content=D8FSF4RO0 (last visited Oct. 29, 2006).

⁶⁰ Yuki Noguchi, *BlackBerry Patent Dispute Is Settled*, *WASH. POST*, Mar. 5, 2006, at A11.

in the minds of the judges and then concludes with the sentence that "This ought to be obvious after the near miss with Blackberry." Near miss? \$612.5 million dollars?

I mean, that is not a near miss. A couple of those and soon you are talking real money. Right?

However, the editorial also draws attention to another suit regarding E-Bay in which this is happening all over again,⁶¹ and this is a problem on which I think the trading partners of the United States would dearly wish there to be some movement in the United States.

Another problem, which is on the horizon, that is trade and arbitration related, is ITAR, the international traffic and arms regulations adopted under Section 38 of the Arms Export Control Act.⁶²

Even though both the Act and the regulations talk about arms, this trade restriction has nothing to do with arms. It has to do with satellites.⁶³ It has to do with any good of any kind, which can be used in space.⁶⁴ It also has to do with tanks and bullets and things like that, but it also has to do with information about these things.⁶⁵

When I learned about this, I had trouble believing it, but you now must get permission to export information about these things. You have to go to Washington and get permission to export it.⁶⁶ Even if you are in arbitration on a satellite case, you have to get permission.⁶⁷ You have to get a license, an

⁶¹ Editorial, *A patent injustice US court should draw right lessons from BlackBerry case*, FIN. TIMES (London), Mar. 27, 2006, at 16, available at <http://www.ft.com/cms/s/458bbf44-bd2d-11da-bdf6-0000779e2340.html>.

⁶² 22 C.F.R. §§ 120, et seq. (2006); Report, *State of the Space Industry 2005*, INT'L SPACE BUS. COUNCIL, Aug. 2005, at 56, available at http://www.researchandmarkets.com/reportinfo.asp?report_id=349726 (stating "export regulations under ITAR [as] 'the [space and satellite] industry's most serious issue' and, 'what initially was a nuisance to businesses has evolved into a serious problem for U.S. industry'").

⁶³ *Id.*; See also Michael A. Taverna & Douglas Barrie, *Sea of Red Tape*, AVIATION WEEK & SPACE TECH., May 26, 2003, at 72, available at <http://www.aviationweek.com/shownews/03paris/pre04.htm> (stating "[t]he Itar problem is particularly acute in the space industry [and with] satellite operators and insurers.").

⁶⁴ *Id.*

⁶⁵ See *id.* Compare 22 C.F.R. § 121 (2006) (providing the U.S. Munitions List), with 22 C.F.R. § 125 (2006) (providing licenses for the export of technical data).

⁶⁶ See *id.*

⁶⁷ See *id.*; See also Giovanna M. Cinelli, *Do You Need Export Authorization For That Litigation or Arbitration?*, at http://www.pattonboggs.com/files/News/75c8fbed-63e9-4d34-9eb3-d106ba339e9e/Presentation/NewsAttachment/9d5248d0-be2f-40d3-a663-d1377518de70/Litigation_Arbitration_Article.pdf (last visited Oct. 24, 2006) (stating "ITAR, due to their broad scope and lack of extensive license exemptions, should be of particular concern in the litigation or arbitration context."); Peter B. de Selding, *Space Insurance Underwriters' Compliance With ITAR Questioned*, SPACE NEWS, Apr. 25, 2005, at http://www.space.com/spacenews/archive05/underwriters_042505.html (last visited Oct. 24, 2006) (explaining "U.S. export law may distort an ongoing legal arbitration dispute between

authorization to send your exhibits to the arbitration panel, and when the arbitration panel sits and hears it, you have got to have someone from the American Government sitting there ready to raise his hand and stop the testimony in case the testimony gets into an area which is not permitted.⁶⁸

And this has nothing to do with classified information; this is any information. So this is going to cause a real problem and is, indeed, causing a real problem in the example of joint strike fighter, which is a project between the United States and the UK as well as several other countries, including Canada, to develop and build a new fighter plane, which will be vertical takeoff and so on.⁶⁹

Imagine you have a joint agreement, Canada, United States, Norway, several other countries, Turkey, England, and you say we are going to do this together, but when it comes time for the subcontractor in the UK to get information, they cannot get it or it takes three, four weeks to get it so that you have statements like this one.

The UK says, "We need data on size and weight." Imagine they cannot get data on the size and weight of this thing yet. You have people not able to get the information for their contract. You have James Arbuthnott, the chair of the UK House of Commons Committee, who has said that if things don't improve, we may have to scrap the investment.⁷⁰ You have statements from the UK saying, we may have to jump out of that and start developing our fighter with Europe rather than with the United States.⁷¹

This is hardly pushing things in the right direction. I hasten to add that Canada is the one country, which has a measure of waiver under those regulations,⁷² but it is very narrow, and you nevertheless, have to ask for permis-

Boeing and insurance underwriters over satellite defects").

⁶⁸ See generally *id.*; See also Symposium, *You're Telling Me the U.S. Government Is Going to Monitor My Arbitration Proceeding? The Intersection of U.S. Export Controls and International Dispute Resolution*, ABA SEC. INT'L. L., Apr. 6, 2006 (stating "Failure to fully appreciate the Department of State/Department of Defense process of authorizing transfers of ITAR-controlled information to non-U.S. persons, including foreign clients, counsel and/or members of an arbitral tribunal, can lead to substantial delays and increased costs").

⁶⁹ UK Warns USA Over ITAR Arms Restrictions, DEF. INDUS. DAILY, Dec. 1, 2005, <http://www.defenseindustrydaily.com/2005/12/uk-warns-usa-over-itar-arms-restrictions/index.php> (last visited Oct. 24, 2006) (explaining "[t]he problem is that complex ITAR rules force the UK and Australia to wade through a weeks-long process to get military export approvals").

⁷⁰ See *id.*; See also Peter Almond & Dominic O'Connell, *Britain in battle with US over fighter plane*, SUNDAY TIMES, Dec. 4, 2005, available at <http://www.timesonline.co.uk/article/0,,2095-1902806,00.html> (stating "Britain is now threatening to withdraw after rows over the Pentagon's reluctance to agree to the transfer of technology.").

⁷¹ Peter Almond and Dominic O'Connell, *Britain in Battle with US Over Fighter Plane*, THE SUNDAY TIMES, Dec. 4, 2005, <http://www.timesonline.co.uk/article/0,,2095-1902806,00.html>.

⁷² UK Warns USA over ITAR Restrictions, DEFENSE INDUSTRY DAILY, Dec. 1, 2005,

sion to move this information around. This is, I would say, hardly an accelerator of trade and investment, obviously not good for the procurement aspect of trade.

Do I have another minute?

MR. CAMERON: You sure do.

MR. POTTER: I would like to spend a bit of time on the competition, as we think technology is good for competition. What do we see? We actually see several cases in which the competition rules are used to do you out of your technology. The Microsoft episode in Europe is a staggering example of someone who has technology; has developed it; has what people actually want; is selling it.

But the competition rules are used by governments to squeeze that technology out of them, and with Microsoft that has been done on several occasions and is now – now, they are trying it again with Vista, on a third occasion, with Microsoft so that actually the consumers in Europe are being deprived of the Vista operating system in Europe.⁷³

And what did we read a month ago?

It is now happening with Apple because Apple is so successful with its iPod. We have the French Government deciding to pass legislation. It has not passed yet, but it is going through their institutions, legislation, which would require the iPods to be changed so as to play music formats of other people.

And the European Commission jumped into it, too, and decided to launch an investigation into whether Apple should be forced to actually give its iPod technology to other people.⁷⁴ I think I should just stop there in the interest of having time for questions, but my point is that there is tension in the land of technology, especially when seen in a trade context. It is not so that the old shibboleths apply without reserve.

There are anomalies in patent and intellectual property enforcement laws in both countries. There is hypocrisy in both countries, particularly at the interface with competition, which does not hold true to the idea that technology and technology transfer is a way to make us all better off through better competition.

Thank you.

<http://www.defenseindustrydaily.com/2005/12/uk-warns-usa-over-itar-arms-restrictions/index.php>.

⁷³ Michael Hickins, *Microsoft Hard-Balling EU Over Vista*, INTERNETNEWS.COM, Sept. 8, 2006, <http://www.internetnews.com/bus-news/article.php/3631041>.

⁷⁴ Arik Hesseldahl, *Apple vs. France*, BUS. WK. ONLINE, March 21, 2006, http://www.businessweek.com/technology/content/mar2006/tc20060321_144066.htm.