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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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Also with us is Simon Potter, a regular attendee at CUSLI and an occasional speaker, I am told.

A partner at McCarthy Tétrault LLP in Montreal, Quebec's offices, and he is chair of his of his firm's International Trade and Investment Litigation Group. As President of the Canadian Bar Association, he presented Mr. Henry King with a lifetime achievement award in Montreal in 2003, for Henry's work in making Canadian issues known in America.

Simon represents the Quebec industry in the softwood lumber dispute. He is not looking forward to an agreement in 60 days, and represents several parties in Canada's grain corn case and has appeared in the past as a panelist on two chapter 19 panels.

Without further ado, Meredith, go ahead.

UNITED STATES SPEAKER

*Meredith Broadbent**

Great. Thank you, Don.

I wanted to express my appreciation to Henry King and my friend Dick Cunningham who invited me to participate in this important conference.

As Don said, I did grow up in Cleveland and am very proud to have lived here. My grandfather and father actually taught orthodontics for many years at Case, and they would admonish me to always call it Case Western Reserve because they wanted the three names together, I guess, from the old days of the merger.

And I have got to say, it is really reassuring, I came into the hotel, and I flipped on the TV, and Dick Goddard was on the TV giving the weather cast 30 years ago, is still on Channel 8 talking about the rain storms, and I thought this is really great. I really remember him.

* Meredith Broadbent, Assistant United States Trade Representative for Industry, Market Access and Telecommunications, is responsible for developing and coordinating U.S. trade policy as it affects U.S. business and manufacturing interests such as semiconductors, telecommunications, forest products, chemicals, steel, aircraft, and electronic commerce. She also coordinates industrial market access negotiations in bilateral and regional free trade agreement negotiations as well as in the World Trade Organization. Prior to joining USTR, she served as senior professional staff member for the House Ways and Means Trade Subcommittee. In this position she played a key role in drafting and passage of the Trade and Development Act of 2000, legislation to authorize normal trade relations with China, and the Trade Act of 2002, which includes trade promotion authority and the Andean Trade Promotion and Drug Eradication Act.

But despite the daily drama of the lumber dispute, the United States-Canada trade and security relationship is really the envy of the world and one that underpins the wellbeing of all citizens on both sides of the border.

This conference plays a key role in taking a look at these bilateral issues and common areas of cooperation in a way that really contributes to maintaining and preserving the very important relationship.

Today I would like to move away a little bit from the intellectual property topics you have been discussing and try to describe our trade agenda in Washington. I work for Ambassador Rob Portman, who comes from the State of Ohio, represented Cincinnati in Congress for about twelve years, and he has been at USTR about a year pursuing a very, very aggressive trade agenda and thought I would give some comments here specifically on the high tech products and what we are trying to do.

In many ways, high technology is creating the global marketplace. Innovations never cease. People exchange ideas faster. Consumer demand is created and adjusts almost overnight. This is a world where national barriers are harder to define and the very concept of distance is vanishing.

It is an exciting world because of the interplay between the global marketplace and the innovative products we produce, and it will continue to be largely unpredictable. AT&T in the 1980s predicted that the cell phone, which at that time was a car phone, was destined just to be a niche product, and that the market would soon be saturated.

I also recall equally profound and a certain statement by the CEO of Digital Corporation in 1977 when he said there is no reason for any individual to have a computer in their home.¹

But as exciting as the opportunities are in this sector, it is also a world of formidable challenges. Competition as we know is tougher than ever. Two billion workers have joined the global economy since the end of the Cold War and many of them are talented and hard working.²

Domestically, innovators have to overcome resistance from competitors, regulators, and sometimes even within their own companies so that their new ideas can be tested on the marketplace. Fortunately, however, we have had a success in allowing the market to work and helping to ensure the Government step out of the way.

¹ See, e.g., Chin Wong, *Pride Before the Fall*, MANILA STANDARD, Apr. 25, 2006, available at http://www.chinwong.com/index.php/site/comments/pride_before_the_fall/ (indicating that Ken Olsen, the former Digital Corp. CEO lacked vision and did not see a market for the personal computer).

² See generally Thomas M. Hoening, Chairman, Fed. Res. Bank Kan. City, *The Global Economy*, Address before the Northern Colorado Summit on National Economic Issues (Sept. 15, 2005) available at <http://www.frbkc.org/SPCH&BIO/GlobalEconomy091505.pdf> (indicating that workers from China, India and the former Soviet-block have joined the global economy).

And we in the United States and Canada are technology leaders in a market of over two billion consumers. For example, on the United States side, we recently had discussions with Japan on allowing an innovative technology that a United States company pioneered called broadband over power line, which deals with accessing the internet through electrical connections.³

The Japanese Government was reluctant to allow our technology into the country based on a prediction there was going to be little demand for the service.⁴ We at the U.S. Government had to disagree saying we did not know, but there is a reason to allow these innovators the opportunity to try in that marketplace.

So the United States Administration's high tech trade agenda is about furthering America's leading role in this sector by breaking down obstacles to trade.⁵ This includes both tariff barriers and then the more complicated non-tariff barriers that present real impediments to trade of United States goods and services that are based on innovation.⁶

I wanted to give you an overview of the critical role that high technology and innovation play in the United States economy and how the administration has shaped our trade agenda to respond to it. United States leads the world in the information and communications technology sector (or ICT, which is the new word).⁷

Almost 35 percent of capital investment in the United States goes into this sector, compared to less than 20 percent for other advanced countries.⁸ About 20 percent of the U.S. workers are directly or indirectly employed in the ICT sector and direct expenditure of ICT accounts for about 8 percent of our GDP.⁹

³ George Leopold, *FCC to Prove Broadband Access Over Power Lines*, ELECTRONIC ENG. TIMES, Apr. 28, 2003, at 16; See generally Thomas Bleha, *Down to the Wire*, FOREIGN AFF., May/June 2005, available at <http://www.foreignaffairs.org/20050501faessay84311/thomas-bleha/down-to-the-wire.html> (indicating the fast pace of broadband innovation in Japan with support from both government and industry).

⁴ Bleha, *supra* note 3.

⁵ See generally ROBERT J. PORTMAN, U.S. TRADE REPRESENTATIVE, THE PRESIDENT'S TRADE POL'Y AGENDA 1 (Mar. 1, 2006), available at http://www.ustr.gov/assets/Document_Library/Reports_Publications/2006/2006_Trade_Policy_Agenda/asset_upload_file151_9073.pdf (indicating that the United States continues to work towards global free trade).

⁶ *Id.*

⁷ See generally INT'L TELECOMM. UNION, WORLD TELECOMMUNICATION/ICT DEVELOPMENT REPORT 5 (2006), available at http://www.itu.int/dms_pub/itu-d/opb/ind/D-IND-WTDR-2006-SUM-PDF-E.pdf (indicating the United States leads the world in ICT).

⁸ See CTR. FOR THE STUDY OF LIVING STANDARDS, WHAT EXPLAINS THE CANADA-U.S. ICT INTENSITY GAP? (2006), available at <http://www.csls.ca/reports/csls2005-06.pdf>.

⁹ Ian Brinkley, Neil Lee, THE WORK FOUNDATION, THE KNOWLEDGE ECON. IN EUROPE 10 (2006), available at http://www.theworkfoundation.com/Assets/PDFs/KE_Europe.pdf; see also OECD, ICT EXPENDITURES AS PERCENTAGE OF GDP (1997), available at <http://www.oecd.org/dataoecd/44/10/1894575.pdf>.

Although the high tech sector suffered in the '90s, the late '90s, it is now rebounding.¹⁰ Production of high technology goods is up on average 95 percent since 2000.¹¹ Computers are up 28 percent.¹² Communications equipment is up 68 percent,¹³ and semiconductor and related electronic component production is up about 141 percent.¹⁴

Exports of these goods amounted to about \$150 billion dollars from the United States in 2004,¹⁵ which comprises about 22 percent of all United States merchandise exports.¹⁶ Here, too, we are seeing a rebound with a growth of almost 13 percent overall since 2002.¹⁷

According to the Federal Reserve, high technology goods production registered annual productivity growth of over ten percent between 1998 and 2003 with computers and electronic goods over 25 percent a year between 1998 and 2003.¹⁸

This contrast was the average annual productivity increase in the United States of about 2.8 percent, so there is really a stark contrast there.¹⁹ What is the reason for our success?

I guess the answer is the opportunity and the challenge of the competition that we face. The United States has always been among the most open, dynamic major markets in the world. We have gotten used to and even flourished in a dynamic economy.

In a typical year, the U.S. economy destroys 15 million jobs but creates 17 million new jobs.²⁰ Meanwhile, our open market policy creates a vibrant

¹⁰ See generally Brinkley, *supra* note 9 (indicating that the United States ICT employment grew by 21% from 1995 to 2005).

¹¹ See generally EDWARD C. WHITE, SEMICONDUCTOR CAPITAL EQUIPMENT, LEHMAN BROTHERS GLOBAL EQUITY RESEARCH -UNITED STATES, SEMICONDUCTOR EQUIPMENT CAPITAL BUDGET SURVEY (Jun. 30, 2003), available at [http://downloads.semi.org/pubs/SEMIPUBS.NSF/0e1ca8bd8a591878882565a3007891d9/c0be6d9fed67cf6688256516007bdef2/\\$FILE/303v13n2rev1.pdf](http://downloads.semi.org/pubs/SEMIPUBS.NSF/0e1ca8bd8a591878882565a3007891d9/c0be6d9fed67cf6688256516007bdef2/$FILE/303v13n2rev1.pdf) (indicating that spending on high-tech goods is increasing).

¹² See Nat'l Sci. Foundation, Sci. and Engineering Indicators - High Tech. Ind. and Dom. Prod. 6-5 (2006), available at <http://nsf.gov/statistics/seind06/pdf/c06.pdf>.

¹³ *Id.*

¹⁴ See White, *supra* note 11 (indicating that spending and production of semiconductors is increasing).

¹⁵ See generally Tom Abate, *California Shines in High Tech*, S.F. CHRON., Aug. 19, 2006, at C1 (discussing the growth and strength of the American high-tech export economy).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See generally Susan Schmidt Bies, Remarks at the Tech Council of Maryland's Financial Executive Forum: Productivity and Economic Outlook (Jan. 18, 2006), available at <http://www.federalreserve.gov/boarddocs/speeches/2006/20060118/default.htm> (discussing the increasing capacity of United States manufacturing industries to produce high-tech equipment).

¹⁹ See generally Roger W. Ferguson, Jr., Remarks at the New York Association for Business Economics Meeting: Productivity: Past, Present, and Future (Jul. 7, 2004), available at <http://www.federalreserve.gov/boarddocs/speeches/2004/20040707/default.htm>.

sense of competition that leads to the creation of so many new jobs. As a result, U.S. workers are among the most productive in the world, and our wages are on average about 40 percent higher than other highly industrialized countries.²¹

Our U.S. trade agenda is aimed at preserving this advantage. Reaching the 95 percent of the world that lives outside of U.S. borders is front and center to what we do at USTR; expanding trade will expand prosperity everywhere. This means new consumers for our products and new competition, which the United States will meet as it always had by coming up with the next innovation.

Turning a minute to sort of our larger trade agenda at USTR, we are working very, very hard for a successful conclusion of the World Trade Organization's DOHA development round by the end of this year so that we can get it to Congress before next spring when our negotiating authority is going to expire.

It is pretty tough, and we are pushing hard. Sticking with it because of the potential gain of a multilateral agreement to raise living standards is extraordinarily large so it is extraordinarily tough and extraordinarily a big gain if we can get to a conclusion, so there is a lot of effort, particularly in these couple of months being put on that negotiation.

But we are also equally active on the bilateral front with free trade agreements, with over 15 countries in every part of the globe, and we just recently launched a Free Trade Agreement with the major markets of Korea and Malaysia.²²

But the exciting world of technology has created an unusual challenge for us, and that is to craft a comprehensive trade policy that fosters free trades of goods and services but many of which were not in existence when the existing trade rules were written, and you will see if you look at the WTO trade agreements, we have goods agreements, and we have services agreements.

And the goods agreements tend to be much tougher and ensure a lot more fair trade than the services agreements, and as products that are delivered over the internet, the disciplines and the insurance that you are going to get for your treatment is much less sound and is an area of the WTO that has to be improved.

²⁰ See generally Ben S. Bernanke, Remarks at the Distinguished Speaker Series, Fuqua School of Business, Duke University: Trade and Jobs (Mar. 30, 2004), available at <http://www.federalreserve.gov/boarddocs/Speeches/2004/20040330/default.htm> (discussing the loss of 15 million jobs per year and the creation of 17 millions jobs per year in the United States).

²¹ See generally *id.* (comparing the wages of software developers and telephone operators in the United States and India).

²² See generally Charlene Barshefsky, *Trade Deals We Need to Close*, WASH. POST, Mar. 9, 2006, at A19 (discussing the free trade talks with Malaysia and South Korea).

But we are pursuing these high tech areas in a lot of different areas, and I will just mention a few because it is kind of interesting when you sort of sit down and look at the list of the different venues where we work. On the good side, for electronics and electrical products in the DOHA round, we are seeking zero for zero tariff initiatives on these products.

And this will build on a trade agreement called the Information Technology Agreement (ITA), which already ensures duty free treatment for a certain amount of high tech products, and this was an agreement that was written in 1996.²³ Actually, the product coverage is not evolving to the new product descriptions that we have now, and as the TVs merge into the computer monitors, some of these products are basically being reclassified out of this agreement or are not no longer being eligible for the duty free treatment and are being assessed tariffs again.²⁴

So the goal there is to broaden the ITA to include these more sophisticated products,²⁵ if we can get broader, much more general product coverage, we will have to limit then this problem with the evolving nature of products getting more sophisticated and no longer eligible for duty-free treatment.

To give a shot in the arm to these negotiations in the WTO, the United States recently concluded a tariff agreement with the U.S., the EU, Japan, Korea, and Taiwan that are major producers of semiconductors and multi-chip processing units, which are sophisticated semiconductors that are used in PDAs or cell phones or digital cameras.²⁶

Actually, it covers \$4.2 billion dollars of trade, which is more trade than a lot of the smaller FTAs (Free Trade Agreements) that we have been working on and is really a precedent setting sort of high tech trade agreement that we hope to expand further on in the WTO.²⁷

We are working in the WTO on non-tariff barriers, looking to standardize paperwork requirements, particularly trying to get more recognition for the suppliers' declaration of conformity. That is one area of a non-tariff barrier we are trying to streamline.

On the services side, our trade agenda is designed to ensure a level playing field for telecom and ICT services by seeking to aggressively open up

²³ See generally Edward Alden and Ben Bain, *Deal Reached to Scrap Tariffs on Trade in Multi-Chip Integrated Circuits*, FIN. TIMES (LONDON), Nov. 4, 2005, at 6 (discussing the Information Technology Agreement).

²⁴ See generally *Nations End MCP Tariffs*, ELECTRONIC NEWS, Apr. 3, 2006, at NO (explaining that since multi-chip processors are recent technological developments, they are not covered under the Information Technology Agreement and as a result were assessed duties).

²⁵ *Id.* (discussing the purpose of eliminating the customs duties on multi-chip processors).

²⁶ See generally Alden and Bain, *supra* note 23 (discussing the agreement between the United States, European Union, Japan, Korea and Taiwan that eliminates tariffs on multi-chip processors).

²⁷ See generally *id.* (discussing multi-chip processors as a \$4.2 billion dollar industry).

global services markets, both through the WTO and through our free trade agreements.²⁸

Many of our priority target markets are U.S. firms trying to supply services that cannot even enter [agreements] or have to do so as minority partners. We blast a particular emphasis on promoting competitive telecommunications markets, both to provide opportunities for U.S. firms to enter markets that have been plagued by legacy monopolies and to provide choices and lower cost that U.S. companies and other sectors such as those supplying financial services or data services can also use to exploit their comparative advantage.

Standards are a very important area. They have a profound impact on trade and high technology products. Governments attempt to pick and choose preferred standards through Governmental mandates or regulation often for industrial policy purposes, and it is one of the most serious impediments to high tech trade and often puts U.S. high tech equipment makers and service providers at a serious disadvantage.

The disciplines of the technical barriers to trade agreements are called DVT agreements in the WTO.²⁹ We also use these disciplines in our FTAs, and we try to incorporate those in the FTAs as well, and these are our primary tools to counteract trends, negative trends in the areas area of standards.

In the telecommunications sector, we are trying to supplement the TVT disciplines to further promote the concept of technology choice since countries often use telecommunications licensing requirements as a way to impose restrictions, which hurts both service and equipment suppliers.³⁰

Government procurement is another area that is a high priority, which we are trying to liberalize. On digital products, you know, with the broadband services flourishing globally more and more products are being digitized, software, music, videos, books, and trade it electronically.

As a result, we are faced with the need to ensure that this new activity benefits from the tariff reductions and prohibitions on discrimination that the traditional trade rules ensure for regular goods.

²⁸ See generally *USTR Rob Portman Praises President's Nomination of Deputy US Trade Representative*, ST. NEWS SERVICE, Oct. 7, 2005 (discussing the general goal of the office of the United States Trade Representative to implement a trade agenda that helps open foreign markets and to level playing fields).

²⁹ See generally *Understanding the WTO: The Agreements, Standards of Safety*, http://www.wto.org/English/thewto_e/whatis_e/tif_e/agrm4_e.htm (last visited on Oct. 24, 2006) (providing general background information on technical barriers to trade or TBT agreements).

³⁰ See generally *USTR Issues 2005 '1377' Review of Telecommunications Trade Agreements*, ST. NEWS SERVICE, Mar. 21, 2005 (discussing how the United States Trade Representative's office is combating various barriers on telecommunications trade, including the limited choice of technology).

On the tariff side, we have negotiated a temporary moratorium on customs duties on electronic transmissions, or e-commerce.³¹ And looking to make this permanent in the DOHA round of negotiations and the WTO failure to make this permanent would be a major setback for what is really now a barrier free environment for an electronic mechanism.³²

In addition to raising costs through the tariff itself and the cost of any collection mechanism on e-commerce, it would slow down networks and undermine the very attributes, which have driven so much growth.³³ In addition, in our FTAs, we include nondiscrimination disciplines for products transmitted electronically.³⁴

This discipline has been part of every FTA we negotiated,³⁵ and it is really the first step that any country that I know of has taken to create a comprehensive framework of rules for digital trade.³⁶ In the WTO in December, we obtained an agreement to explore how to ensure more liberalized trade treatment for electronically delivered products.³⁷

And we are currently working with the industrial and with other WTP members to bring electronically-delivered products under the principles of the WTO more formally, but as I said, it is a new area and an area that is blurred between goods and services trade.

And as the products change, you have got to make sure that the rules are able to keep up with the fast nature of the change in this area. So in conclusion, our global economy where advancements and technology and networks blur national borders, innovation plays an essential role in ensuring our nation's continued technological leadership.

As President Bush acknowledged in his State of the Union Address, America's economic strength and global leadership depend on sustained technological progress.³⁸ The President has rightly stated that the role of the

³¹ See generally Electronic Commerce: Briefing Note, Work Continues on Issues Needing Clarification, http://www.wto.org/English/tratop_e/ecom_e/ecom_briefnote_e.htm (last visited on Oct. 24, 2006).

³² See generally Council for Trade in Services, *World Trade Organization Work Programme on Electronic Commerce* INTERNET BUS. LAW SERVICES, May 1, 2005, at NA (discussing the desire of members of the Council for Trade in Services to make the standstill on customs duties applied to electronic transmissions permanent).

³³ *Id.* (discussing the general problems of establishing duties on electronic transmissions).

³⁴ See generally, Understanding the WTO: The Basics, Principles of the Trading System, http://www.wto.org/English/thewto_e/whatis_e/tif_e/fact2_e.htm (describing that the Non-discrimination or the Most Favored Nation principle is all of the three main areas of trade handled by the WTO).

³⁵ *Id.*

³⁶ Foreign Affairs and International Trade Canada, *Global Electronic Commerce*, Jun. 1999, available at <http://www.dfait-maeci.gc.ca/tna-nac/discussion/ecom2-en.asp>.

³⁷ DOHA Work Programme, Ministerial Declaration Adopted Dec. 18, 2005, available at http://www.wto.org/English/thewto_e/minist_e/min05_e/final_text_e.pdf.

³⁸ President George W. Bush, State of the Union Address (Jan. 31, 2006), available at

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>.

[†] Simon Potter is a Partner in McCarthy Tétrault LLP Litigation Group in Montréal. In his commercial litigation practice, he has handled a variety of cases ranging from corporate contractual liability to competition issues and constitutional questions, including the challenge of the federal legislation banning the Canadian advertising of tobacco products, which resulted in the Supreme Court of Canada judgment striking down the principal parts of that legislation. Mr. Potter has participated in the bi-national panels created under Chapter 19 of the FTA and of the NAFTA to review determinations of dumping and of subsidizations, as well as on a bi-national panel formed under Chapter 20 of the FTA to hear a dispute between Canada and the United States as to American regulations imposing minimum sizes for lobster imported from Canada. He also has experience in handling major arbitrations, both at the national and international levels, either as counsel to a party or as an arbitrator. Mr. Potter is also past president of the Canadian Bar Association.

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.