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FATCA FACT FINDING FORUM

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James Jatras
How FATCA Can Be Defeated

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Mr. John Richardson: Okay. We'll it's been a lot of work putting this together and we have been incredibly fortunate to have speakers who are willing to come a long distance. And Montréal was far, but Washington, DC, is further.

10 I'd like to introduce you to Mr. James Jatras, who is a specialist in international relations. He, I guess, is still a lawyer by profession.

Comment (off microphone): (inaudible).

15

Mr. John Richardson: Yeah, yeah, okay.

Comment (off microphone): He doesn't like to admit it.

20 **Mr. John Richardson:** Yeah, well, nobody likes to admit that anymore. Sooner or later there's going to be a special tax on the lawyers, you know.

--- **LAUGHTER**

25 **Mr. John Richardson:** In any case, in communicating with him over the last few weeks, I mean I've gotten e-mails from Bosnia, and I think he was in Kiev as recently as Thursday. And I asked him if he ever sleeps, and he gave me in the impression that no, not if there's anything important to do.

In any case, he actually, I emphasise again, is from Washington, DC, and created the site
30 Repeal FATCA.com, and I think that the opening line says it all, "Repeal is a website dedicated to getting rid of the worst law most Americans have never heard of."

Join me in welcoming Mr. James Jatras.

--- **APPLAUSE**

5 **Mr. James Jatras:** Most schoolyard bullies don't get a reception like that, but I appreciate it. I want to ---

Comment (off microphone): (inaudible) joking.

10 **Mr. James Jatras:** Yes, it's no joke, pal. (laughter) Unfortunately it's real.

I want to thank the Honourable Sinclair Stevens and the Most Reverend Dorian Baxter and the Progressive Canadian Party for asking me here. Also Petros Dunn and John Richardson and all the Brockers out there.

15

I'd like to start with agreeing with one point that was made about the big threshold this represents, that this is a historic time, that we'll look back on this as something quite momentous in the history of not only the relations between the United States and Canada but in world history.

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But I'd like to put it another way. I don't think we're going to look at this as the day the empire came and swept everything into its maw. I think quite the opposite really. We've got to stop saying "will" when we talk about FATCA: "It will do this, it will do that." Let's say, "It would do this, it would do that" if it happens. But I think there's very good reason to
25 think it will not happen if some fairly minimal things are done.

One of the big advantages the FATCA proponents have is a kind of a psychological warfare really. "Resistance is futile. You will be assimilated. We're so big. We're so bad. We're

going to do mean things to you if you don't comply." And it appears on some level to be working, that the little countries come crawling on their hands and knees and beg to sign an intergovernmental agreement, an IGA, with us. And that's what needs to happen from the point of view of the FATCA proponents.

5

Let's be clear about something. FATCA is not like the World Trade Organisation. It's not like NAFTA. It's not like the Convention on the Law of the Sea. It's not like any bilateral or multilateral international agreement where the various parties sit across the table as at least formal equals, even if they're not equal in terms of their bargaining power if one side gets a better deal out of it than the other. It's not like that at all.

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It is a unilateral decision on the part of the United States. And even that needs a qualification, by the way, because you would be shocked to know how few people in America have even heard of FATCA. You know, there's a sense the rest of the world has that, "Well, the Americans have decided. What can we do?"

15

Well, what Americans? Probably fewer than a hundred Americans are really that involved in the process at all. I don't think one in a thousand Americans has heard of FATCA. Even earlier this summer, I was talking to the chief of staff of one of the senators on the Finance Committee, the committee of jurisdiction of FATCA, and he said, "Well, Jim, what are you working on these days?" "Well, I'm trying to kill this FATCA thing." "What's that?" He never heard of it. And this is not an ignoramus. This is one of the most intelligent plugged-in people there. And to think – as you know, I'm not going to go into all the details. You've heard the details – it was slipped into the dead of night in this jobs bill and nobody has really ever heard of the thing.

25

But anyway, we in the United States, in our infinite wisdom, have decided we are going to do this. And it's a unilateral decision on our part. It's extraterritorial and we're going to impose it on you. We have decided you will obey. And if you don't obey, you will be punished.

5 It's fairly simple. And you see this in the words of – let me quote from a Canadian news report from the 28th of November.

10 “Canadian Finance Minister Jim Flaherty has said Ottawa is nearing a conclusion on the issue of an IGA with the United States, suggesting a similar arrangement as reach by the UK is in the offing. ‘An agreement with the US to share information on a government-to-government basis within prescribed limits will bring certainty to the application of a FATCA regime to Canadians and will also facilitate compliance by our financial institutions,’” he said in a statement.

15 “Canadian Bank Association President Terry Campbell said, ‘[Canadian] financial institutions have no choice but to comply with the US law because the penalties can be onerous – a 30% tax on US source income ... But short of having the US authority change their law and short of having the world financial system radically restructured, neither
20 of which is going to happen, authorities around the world have come to the conclusion they must deal with the United States to make this as administratively feasible as possible.’”

25 In other words, they see the world exactly as the way I just described it. “The Americans have made a demand. We must agree to the demand because if we don't, they will punish us. But if we agree with it, the punishment will be somewhat lighter.”

And it's a demand on, again, I am rather fond of the word sovereignty. It's a demand against Canadian sovereignty. It's a demand against Canadian institutions. It's a demand against Canadian citizens.

5 And I'm not going to get into all the details of how this would work if it happens, how you sort out the dual citizens and the spouses of – you know, that's an enforcement and application regime, which god forbid ever should come to pass, but my job is to figure out how to keep it from happening.

10 Again, its based on a threat that's based on what is essentially sanctions for non-compliance. The United States is threatening sanctions against Canada, one of our closest allies, trade partners, bla bla bla, but we are threatening a hostile act against this friendly country if they do not comply with the enforcement of an extraterritorial unilateral law. And that's where we get, as Mr. Campbell said, "We have no choice but to comply."

15 To avoid direct extraterritorial enforcement by the US on Canadian institutions, Canada instead can enforce this US law on itself. We'll just put a Canadian glove on the American hand, or fist as the case may be. There's no nice way to call the IGA anything but a capitulation.

20 So, what this means in practice is if an IGA is signed, that Canada would then enact domestic legislation, a kind of a FACTAoid law, where under, not American law, but Canadian law, would require Canadian institutions to supply basically all the information demanded by the IRS so they can just then scoot it over to their buddies in Washington.

25 I would disagree with one point of Professor Christians because she said under FATCA itself, Canadian institutions, which are FFIs, have the decision whether or not they will be PFFIs, whether they will participate in FATCA.

In fact, they don't have that decision because under Canadian law it would be illegal for them to do this. And unless an IGA is signed and unless domestic legislation is enacted to enforce it, a Canadian institution has a dilemma, "Do I observe US law or Canadian law?" Well, there's only one law they can follow, unless there's an IGA, and that's Canadian law. It would be a violation of Canadian law. So, as things stand, they cannot comply. There is no decision to be made unless your government capitulates, as it has shown every indication it wishes to do.

10 So, what this means is that the government is essentially engaged in a collusion with financial institutions against the rights of Canadian citizens under Canadian law.

For example, we're talking about the *Personal Information Protection and Electronic Documents Act* that would be violated if the institution were to supply this information.

15 What the United States is essentially saying to Canada is, "Look, we're reasonable people. We understand that you cannot comply with FATCA because it would violate your law. So, we will generously allow you to change your law. In fact, we will generously allow you to change your law not to permit compliance with our unilateral demand but to require compliance with our unilateral demand. We're reasonable people."

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And this is done under the guise of partnership. As has been mentioned before, it's a completely one-way street. You know, this is a partnership in the same sense that a smaller guy in prison ends up as somebody's partner, that this is something that there's no benefit for the Canadian side, because again the difference between residence- and citizen-based

25 taxation.

On the face of it, if you look at article 2 of the IGA, the difference between what the “foreign partner” has to provide under (a) and what the United States has to provide under (b) are vastly different.

5 And in addition to that, in article 6, the United States makes a moral commitment that we will eventually bring those two things into line. But we know that no legislation like that will ever be passed.

Again, what we’re talking about is simply the promise of some pain relief for Canadian
10 institutions by basically transferring that pain to Canadian citizens, infringing against Canadian sovereignty and so forth.

In effect it’s a pre-emptive surrender. It calls to mind there’s a famous quotation by Otto von Bismarck that pre-emptive war is kind of like committing suicide out of fear of death. That
15 what they are doing is by agreeing to the IGA with the US. They are bringing about the very harm they seek to avoid, because the fact of the matter is – and this is probably the dirtiest little secret in the whole thing – these IGAs, which, by the way, are not in the FATCA law itself – there’s nothing in the FATCA law itself. What happened was is the law got passed, as I said, in sort of the dead of night there. The Treasury Department gets it, said, “Oh, my
20 god, what are we going to do with this? We cannot possibly enforce this thing against every financial institution in the world and kick off a financial and possibly trade war in the process. What are we going to do?”

They were supposed to have published the draft regulations by the end of 2011. They didn’t.
25 They held onto them until February 8th, when, by sheer coincidence on the very same day, they released the joint statement with the five EU countries, saying, “Oh, we’re gonna do this here partnership thing where they will enforce it on their own institutions and they don’t

have to report directly to the IRS at all,” because they know that this is the only thing that will make this work.

We simply do not have the – you know, we’re big, we’re bad, we’re, you know, everybody’s 5scared of us. We simply do not have the resources to actually enforce this against every institution in the world. The only way we can make this work is if we bamboozle enough foreign governments to go along with it themselves. And they know full well that they don’t benefit from the deal, but they can kid themselves that they are at least being relieved of some of the cost and regulatory burden. And worst of all, they’re being pushed by their own 10institutions to sign these IGAs.

The bottom line is no IGAs, no FATCA. And this is why Canada becomes so crucial here, because if Canada turns around and says, “No, we’re not going to sign an IGA with the US. We’re not going to allow FATCA to be enforced here in the Canada. And there are remedies 15we have if you try to enforce it on our institutions and we can talk about some of those,” this throws a monkey wrench into their plans. Because it’s one thing if, you know, some little tiny country, one that’s marginal to the US financial and economic global picture were to try to not comply with FATCA – China itself is not going to go along with FATCA. That is itself a major problem. I don’t think Brazil will be, will go along with it. What the Russians 20might do is another question. We could very well be looking at a kind of a BRICS versus Europe kind of thing, where there’s already going to be a split. But that’s why Canada comes down to being so crucial. If Canada were to say no, a lot of other countries would look at it and say, “Well, if the Yanks can’t even get them on board, that means this is not going to fly.” So, that’s why it is so crucial what happens up here.

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Let me shift gears a bit and talk about the situation back in the United States.

I've never seen a law that is so badly written, so vulnerable, so big, fat, dumb and happy, just waiting for somebody to punch a hole in it.

You know, let me back up. There are some classic catastrophes in American politics. The 5 *Catastrophic*, good name for it, the *Catastrophic Coverage Act* of 1988-89 was repealed seventeen months after it was enacted, when it turned out that the costs of implementing it were far in excess of the benefits that people were getting.

Now, in fact, under that law there were people who got benefits under that law. Under 10 FATCA, nobody gets nothing. The only benefit, if you want to call it that, to the United States, is according to the Joint Economic Committee scoring an additional eight hundred million dollars something – eight hundred million dollars (\$800,000,000) per year in the treasury that they think they will recover if they're lucky. That's enough to keep out government running for two hours. As opposed to estimates that worldwide costs for 15 implementing FATCA could run to a trillion dollars.

Now, where does that trillion dollars go? Does it go to the US Treasury? No, it doesn't. It goes into the pockets of tax lawyers, accountants, software providers and so forth, which unfortunately is where most of these firms, when FATCA was enacted, who'd they run to? 20 They ran to their lawyers, regulatory lawyers, consulting firms and so forth, who said to them, "Well, one thing we can say for sure. FATCA is not going away. We have to start to comply now." And meanwhile they've got dancing dollar signs in their eyes, knowing that, you know, they're going to send their kids to school and retire on this damn. So, basically there's a systematic error built into the perceptions of this.

25 One of the other great debacles in American legislative history was the Dubai ports thing, which I actually had a hand in in defeating. But that's another story I'll tell you sometime.

I talked to one lobbyist in Washington with one of the financial associations, who said that he does not expect that FATCA – by the way, they’re not doing anything to fight FATCA.

They are spending millions of dollars to start to comply with FATCA. But he told me that he does not expect FATCA to be around three years from now. He just figures it will go the trajectory of the *Catastrophic Coverage Act*. Once it turns into a multi-billion dollar disaster all around the world, then somebody will say, “Gee, we’d better try to do something to fix this.” Now, wouldn’t it make a lot of sense that until waiting ’til the train wreck occurs, we anticipate the train wreck and see what could be done to head it off?

I probably shouldn’t say this, especially since we’re being videotaped, so I won’t name the organisation. But let’s say there’s a Canadian financial association here, that the head of it has spoken very strongly against FATCA as has Minister Flaherty, and they would take umbrage at saying, “Oh, well, you haven’t tried to fight FATCA.” “Well, what have you done?” “Well, we’ve sent letters to the Treasury Department. We are so grateful for the opportunity of the Treasury Department to submit these comments on the proposed regulations and let us assure you we share fully the goals of this legislation, bla bla bla bla.” And then they give minute details, all the little tweaks and touches they could be put into the Regs, which (a) won’t be adopted, and (b) won’t fix the problem, rather than saying, “You know, instead of spending millions and millions of dollars to comply with FATCA, why don’t we spend 1% of that to try to get rid of FATCA?”

I am convinced, based on other legislative experience, if the facts of FATCA were better known, especially and obviously in Congress, but in many points of influence in Washington generally, I think – I’m guessing somewhere – if you had somewhere between \$50,000 and \$100,000 to work with for about a year, you could get FATCA repealed, which is a tiny fraction.

I mean, there's a methodology to this. You don't walk up to Congress. The Australians did this, "So, you think you might repeal FATCA, do you?" "No, don't think so." "Right, well, I guess that's it then."

5 You know, it's – that's not how you get laws repealed. You have to mount a campaign. You put ads in places like *Roll Call*, saying "What's the Worst Law Most Americans Have Never Heard Of?" You list the "Go to www.worstlawever.com -- and I've already reserved that url for that purpose.

10 It's, you know, Congress is like any other big dumb bureaucratic machine. You have to mount a serious effort to educate, to inform, to – you know, Timothy Geithner is leaving the Treasury Department. His successor will be named at some point. You know, you get to skin him alive during his confirmation hearings. I mean there's all sort of things you can do to extort embarrassing answers out to publicise how bad this law is, what it will cost
15 Americans in terms of withdrawn investment from the United States. I mean, you know, again I won't go into all the details. You can find it all in RepealFATCA.com anyway.

There's a way to do this, but it's not being done. The thing survives only because there is no organised effort to do it.

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Which brings us back to the IGAs. Treasury is in a race against time. They know that in order to continue the psychological impression that resistance is futile, they have to keep getting more of these signed as quickly as possible. And frankly, I don't think it's going as fast for them as they wanted to go. You know, we're getting close to the end of the year
25 here. They were supposed to have five EU agreement signed up, five – you know I'm not talking, not counting, Ireland, for goodness sake – you know, the five big boys signed up by the end of the year. Will they get one? Will they get two more by the end of the year? I don't know. They're not going to get all five.

And meanwhile, what they want to do is get that sewed up before any kind of serious repeal measure can get any ground in the United States. That's why Canada is so crucial.

5 If Canada rushes this process through and signs an IGA with the United States, it will be very damaging. Frankly, it will be small comfort if we say, "Yeah, but they might be able to defeat it in Parliament later."

Frankly, I don't know how great the odds of that are. You know, where are the New
10 Democrats? Where are the Liberals? Where the PQ? Where are our, you know, more Libertarian-minded members of the Conservative Party? Where is the damn media in this country? Why is the media acting like bulletin boards for government statements, which is just as bad as what we do in the United States?

15 It's part of the problem here is that, you know, we're all individuals who are basically talking to each other, but we're getting frozen out by the system of what constitutes a real issue. And I don't know if anybody has a good answer for this. Because I know that not only my own messages, but many of the people in this room, sent things to people in the media and said, "Look, Canada's sovereignty, billions and billions of dollars of Canadian wealth are at
20 stake here and you guys are not covering the story." What's going on?

Now, I don't have a good answer to that. But there was some discussion earlier on of things Canada could do. You know, things having to do with NAFTA and so forth. I think also there are WTO remedies. There are many other things. I mean on the face of it, for example,
25 this is a trade violation. This is a discriminatory trade practice because, remember, FATCA only applies to FFIs. You're saying in so many words, "Only non-US institutions have to bear this discriminatory burden and US institutions do not," That's a trade action right there.

What would be important is not what the many, many things there are that could be done, but rather your government needs to decide it's not going to accept this, because in my mind, that would be sufficient.

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If the Canadian government said: "(a) no IGA; (b) we will not allow FATCA to be enforced in Canada because it's an American law not a Canadian law; (c) we will not allow Canadian FFIs to comply with FATCA because it would violate Canadian laws; and, (d) fourthly, if you do it, if you try to enforce this American law against our institutions, hit them with 30 percent withholding, we will hit you with a whole raft of remedies, including domestic lawsuits in the United States from aggrieved Canadian institutions as well as from the Canadian government, trade actions, and anything else we can think of to retaliate," I can guarantee they will not pull that trigger.

15 But what it takes is, you know, you've heard of the famous saying that "A liberal is somebody who won't take his own side in a fight." And unfortunately you have a government in Canada that seems to talk a good game. And, you know, Minister Flaherty said some very good things about this. So has Mr. Campbell. And then they turn around and point toward a capitulation. And I don't say this to insult them, but to appeal to them, say, 20 "Look, why don't you pay attention to your own words and do what you said, instead of saying one thing and then doing another?"

You know, by the way, there seems to be some kind of an odd pro-American bias, especially among Conservative Parties, or at least parties that carry a Conservative label, "Oh, well, you 25 know, the Americans are our good friends et cetera et cetera, and you know, we really owe them a lot. I don't know what it is exactly, but we owe them a lot, and so we should go along with this," even when the thing you're going along with, it's not Conservative, it's not Progressive. It's just dumb.

You know, is that the way a friend behaves? I mean if I'm drunk and I say, "Hey, let's get in the car and go somewhere!" does the friend jump in the car for a joyride or does he take my keys away? A real friend says no under some circumstances.

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So, I'm asking, as a Yank – well, I guess I'm not exactly a Yank. I live in Virginia.

--- **LAUGHTER**

10 But, in any case, I was born a Yank – I'm asking as a friend that Canada should say no to the United States and just protect its own self-interest with the legal means necessary to it.

The other side to this is as much as the efforts of individuals to try to fight this are important, what is really needed is institutional support. Somebody – and it's not going to be banks, by
15 the way – but somebody, whether we're talking stock and equity funds, things, you know, there are people who are already spending millions and millions of dollars to comply with this thing. And if a tiny fraction of that were put forward to publicising the views that we're hearing hear today in Canada against the IGA, if we have time to do that, in the United States, I am convinced it could pay huge dividends.

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So, one thing I would ask you to do is put your thinking caps on. Whom do you know? You know, maybe you know some rich individuals. Maybe you know some people in the financial community, who can say, "Yeah, you're right. This is a dumb thing to do. It's going to cost me a lot more money to comply with this than to fight the thing. Let's get this
25 thing started."

So, anyway, that's – I think that's pretty much all I've got and I'm happy to take any questions.

--- **APPLAUSE**

Mr. Al Gullon: Thank you very, very much. I've taken a few notes, but I hope that
5 we can remain in communication.

I had what I thought was an inspiration as a result of your talk. That inspiration is Canada
should tell the US, the Canadian government should tell the US, we are putting legislation
into Parliament which will take effect after, or unless you repeal, after FATCA – which will
10 withhold 30% of all income by Americans in Canada. In other words, if you can do it, we
can do it. And the out for both sides is to repeal FATCA.

Mr. James Jatras: I think that would be a great idea. Obviously there's a
prerequisite for that. And that is you don't do this. I mean obviously that would require the
15 government to say no to FATCA initially, and then if you, the Americans, continue with this,
then we will take the following counter-measure. Absolutely. Yes, I agree.

Comment (off microphone): And I like "a real friend says no."

20--- **LAUGHTER**

Mr. James Jatras: Thanks.

Hon. Sinclair Stevens: I was wondering if you can bring us up to date. What
25 countries have signed IGAs with the United States with respect to this? Has the United
Kingdom signed something?

Mr. James Jatras: They were the first one. And then I believe Denmark was the second one.

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Comment (off microphone): Denmark.

Mr. James Jatras: That's right. I was mistaken. It wasn't Ireland. Denmark.

Comment (off microphone): Yeah, Ireland has signed.

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Mr. James Jatras: Oh, Ireland, too. Okay. And Mexico has too. I've seen a report that Mexico has signed.

Comment (off microphone): Yeah, but the only one in force ---

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Mr. James Jatras: Right.

Comment (off microphone): --- is the UK.

Mr. James Jatras: Has Parliament actually ---

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Comment (off microphone): No. That's right. It's -- it needs to go (inaudible) .

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Mr. James Jatras: Because you see inconsistent things reported too. As they say, they've initialled an agreement. Well, they initialled it or signed it, and so -- and Switzerland has the Model 2 non-reciprocal version, which frankly I don't understand. Why does a country do that at all? I mean what's -- drop the pretence that it's a partnership? This just basically says, "Okay, we will comply."

Ms. Allison Christian: What the Swiss agreement says is that, “We’ll ask our banks to seek waivers.” That’s literally what it says, “We’ll ask all of our --” they’re saying, “We’re not going to collect from the PFFIs and then give it to you. We’re going to say it’s okay for the PFFIs to give it to you. So, we’re just going to allow, in contravention of bank 5secrecy, the old bank secrecy, right ---

Mr. James Jatras: Which means they would basically suspend ---

Ms. Allison Christians: Sanction it, yes.

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Mr. James Jatras: -- application of bank secrecy. Yeah.

Ms. Allison Christians: Yes. Yes. Yes. So, they’re just telling their own companies, “You go ahead and seek waivers.” But what they’ve sort of done here is, I think 15they’ve given themselves a bit of an escape hatch in that, okay, Swiss PFFIs are going to seek waivers, and if not, they don’t have to close accounts, that they do have to withhold. They don’t have to close accounts, but they do have to withhold it. So, they’ve – I don’t know. It’s a little bit – I don’t ---

Mr. James Jatras: Yeah, I do sometimes wonder if some of these countries are 20pursuing a kind of a rope-a-dope strategy or they ---

Ms. Allison Christians: No, I don’t know what the Swiss agreement – I don’t know what anyone is – frankly I think that is an abomination and the US would be embarrassed if 25people understood what was going on there, because I mean if it’s supposed to be catching fat cat tax cheats, and the first thing you do is make a favourable – anyway, so to answer that question, the UK one is the farthest along.

From the US perspective, they don't need any, as far as I can tell, any Senate review at all. They are being considered, I think, competent authority agreements.

Mr. James Jatras: The IGA, yeah, absolutely.

Ms. Allison Christians: Yeah, right.

Mr. James Jatras: In fact at the – one conference I was at, there was a guy from Treasury there. He said, they're executive agreements from the US point of view.

Ms. Allison Christians: Yeah, they're not even that. I don't think they're even that. I think that's aspirational.

Mr. James Jatras: But that what he said they were. But, yeah.

Ms. Allison Christians: Yeah, well, he doesn't know.

Mr. James Jatras: Yeah.

Ms. Allison Christians: And I'll tell you why. Because the constitutional scholars that have studied treaties and executive agreements would not recognise the IGA. So, the Treasury does not know what an EA is, an executive agreement is. It is a competent authority – what the IGA is. If they don't even take that to Senate, they don't even take that to the House, that's just a competent authority agreement. That's all. Which a competent authority is – this is how they're packaging it. But I'll tell you, there's a lot of murky stuff around that that we could look at.

But anyway, to answer the question, the UK is farthest along. We also have them with Denmark, Mexico, Switzerland and Ireland.

Mr. James Jatras: Ireland.

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Question: Spain?

Ms. Allison Christians: No.

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Mr. James Jatras: That was reported, though, as well, but then I saw nothing on it after that.

Ms. Allison Christians: But they did sign. They were one of the five. The EU in ---

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Mr. James Jatras: Well, that was the thing in principle with France and Germany and so forth.

Ms. Allison Christians: Yeah. Right. The embarrassment is, where's the agreement with France? They were supposed to be next.

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Mr. James Jatras: And I think you point out a good thing, too – is that if we ever were able to get some traction and a real representation on FATCA, all of these legal and constitutional infirmities would be very fertile ground.

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Ms. Allison Christians: I can't believe you can't get that guy that asked if NAFTA was unconstitutional -- who was that? He's a very respected academic in the US and Yoo, John Yoo.

Mr. James Jatras: Yeah, okay.

Ms. Allison Christians: Yeah, he's known for other reasons, for being notorious, right, because he's the apologist for ---

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Mr. James Jatras: Was he the -- he was the torture guy?

Ms. Allison Christians: Yeah, exactly. But he and a bunch of people asked whether NAFTA and these executive agreements were themselves unconstitutional. And there's no
10 reason why this IGA especially would offend even the biggest defenders of the executive agreement, because this isn't any -- even that. It's not even pretending to be a treaty of any kind.

Mr. James Jatras: Now, at least their public position is that it's an executive
15 agreement.

Ms. Allison Christians: Yeah.

Mr. James Jatras: What it is on the other side, by the way ---

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Ms. Allison Christians: Right. Right.

Mr. James Jatras: --- is an interesting question because on the other side, some of them might have to consider a treaty for domestic purposes.

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Ms. Allison Christians: Well, I think Canada would have to go through parliamentary procedure.

Mr. James Jatras: How can something be a treaty on one side and not a treaty on the other?

Ms. Allison Christians: Well, that's American exceptionalism is the answer to that, and it always has been.. And if you go look at those articles on what is an executive agreement, I mean you have to understand that it's actually an interesting problem for lawmakers. Somebody like maybe – you've got a list of some very conservative people here, but you could even get Carl Levin on board on a constitutional challenge because it's the President. Who wrote FATCA? Congress. But the President is going to go sign agreements under which he is not going to have the executive branch enforce a law, written by Congress, totally on his own. The President is doing that without any congressional approval whatsoever through an IGA. In other words ---

Mr. James Jatras: Except what they're doing, as I understand is, is using the very broad deemed-compliant ---

Ms. Allison Christians: Yes, I know, but I mean just as a ---

Mr. James Jatras: --- provision of the law to say to, "Well, the secretary has very broad authority."

Ms. Allison Christians: Right.

Mr. James Jatras: "He can deem compliant anything he wants ---

Ms. Allison Christians: Yes.

Mr. James Jatras: --- If it accomplishes the purpose of the Act."

Ms. Allison Christians: Yeah, but I mean if you've got those guys seeing what they were doing here as a constitutional matter. This is not a treaty. It is not even pretending – I mean I love it that the Treasury's calling it an executive agreement because that's – it is not. 5 An executive agreement, there's a couple of different kinds. But most scholars agree that you have to at least pretend to ask Congress to give the President the power ---

Mr. James Jatras: Yeah.

10 **Ms. Allison Christians:** --- to bind the United States as against other countries. And if you're not even going to consult Congress, they call it a sole executive agreement, like just an outright ---

Mr. James Jatras: Yeah. Yeah.

15 **Ms. Allison Christians:** --- then the President is usurping the power of Congress. That's a separation of powers issue.

Mr. James Jatras: Well, someone once observed that the nice thing about our 20 constitution is that it present no obstacle to our current form of government.

Ms. Allison Christians: Right.

25 ---
LAUGHTER

Mr. James Jatras: Sir, yes.

Hon. Sinclair Stevens: As a follow-up, would it be possible, with your connections in Washington, to give us a recent update exactly where is the United Kingdom agreement? Because if we're making a submission to Finance in Ottawa, I would like to satisfy them that UK is not on side because I think it'll influence them if there is a firm agreement involving the United Kingdom.

Mr. James Jatras: Well, in terms of anything in the future that has to be done, as Professor Christians pointed out, Congress is being left completely out of the loop on the IGA with the UK and with all the other IGAs.

10

The only thing that would be necessary on the US side is that Treasury would have to promulgate regulations on domestic American institutions to provide the non-reciprocal/reciprocal information to the partner country under article 2(b) of the IGA.

15 Now, Treasury's position is they already have all the legal authority they need to issue those regulations. We haven't seen those regulations, but that's their position. So, presumably at some point they'll kick those out. But that would be a unilateral action on the part of Treasury.

20 On the British side, it's much more complicated because they actually would have to get Parliament to pass, as I say, FATCAoid legislation, British legislation, to force their institutions to supply the information to their revenue service for transmission then to the IRS. So, there's lots of things the British would have to do.

25 **Hon. Sinclair Stevens:** Yes, well, that would be very helpful if you could, in some kind of authoritative way, give us information as to how its complicated in the United Kingdom and they should not assume that they have anything close to a signed agreement..

Mr. James Jatras: Well, I agree, but I have to say this is one of the differences between our system, of course, which is not a parliamentary system, and the parliamentary system. It is assumed in a parliamentary system that if the government commits to something, they've got the votes to pass it through Parliament, that that's really – it's a done deal. On the American side, you can never be sure if you have to get congressional action for anything the executive agrees to, which is why they're avoiding Congress on implementing this thing.

And by the way, it's also one way, reason, why people misunderstand the American side. You hear over and over again foreigners saying, "Well, now that's Treasury has issues these Regs, it's pretty clear FATCA will not be repealed." What's that got to do with anything? We don't have a parliamentary system. What the Treasury Department does in issuing regs has – you know, the idea that it's government policy or the Americans have decided to do something, it's a ridiculous notion in our system. But, unfortunately, I think in the British system it's not ridiculous. If the British Treasury Service, or whatever their department is, has signed something with the Americans, they're confident they can get it through Parliament, it's just a question of time.

Ms. Allison Christians: Yeah, and I'll just add to that. It's not good news, right. So, they signed on September 12th, 2012, and they had this sort of explanatory note, which is a shameful document. Yeah, (inaudible) two page nonsense. And, worse – this is the really bad news – the UK is considering what people are calling "Son of FATCA." The UK is considering legislation that would mimic the US legislation.

Mr. James Jatras: And it would apply initially on the Crown dependencies.

Ms. Allison Christians: Exactly.

Mr. James Jatras: And now I saw recently the Isle of Man said they will accept it, but Jersey and Guernsey say they won't unless the Brits make it global like FATCA ---

Ms. Allison Christians: Right.

Mr. James Jatras: --- which I really don't understand at all, but ---

Ms. Allison Christians: I don't know what they're talking about. So, they're saying, they're talking about an omnibus bill. They're saying that they'll put that all together, the FATCA, the IGA, the implementing legislation, and the Son of FATCA. That will all come together somehow someday. So, it's not done. It's not done.

Mr. James Jatras: It's not. Yeah, hey, maybe they'll do us a favour and screw it up, you know. It'd be great.

Ms. Allison Christians: (inaudible), yes, (inaudible), right.

Hon. Sinclair Stevens: Anyway, my point is anything you can give us to neutralise the impression that the UK has already signed or is going to sign will help.

Mr. James Jatras: Well, let me ask a question in that regard. I mean how done a deal do you think it is up here? I mean do you think that they've all but initialled this thing and they're just going through the motions on public comments? Because they're obviously ignoring any objections.

Comment (off microphone): Yeah, that's what we're worried about.

Comment (off microphone): They did it with Shiprider. They did it with the Border Action Plan. There's just no reason to trust them whatsoever.

Mr. John Richardson: This is just a thought on my part. I think that it is incredibly dangerous to take that position. You are planting in your minds, or we are planting in our minds, the seed of a total capitulation. I believe that what needs to happen and come out of this is, first of all, I once heard it said "Some people make things happen, some people watch things happen, and some people ask what happened."

10 Most people, including the media, including the mainstream parties, are absolutely, without a doubt, in the camp of "What happened?" People who are aware of this who are not here today are in the "What happened?" In this room, because of our interest, our commitment and our awareness, we are members of a small group of people who are in a position, to the extent that this can be influenced, to influence it. And the absolute worse thing, given that
15 we are the only people in this position to do this, is to psychologically make the decision that this is a done deal. It is not a done deal. It is simply not a done deal.

The Conservative government, it's been around now for seven years. It's a long time for any government. It's very difficult for any government to stay in power beyond that. And what
20 we do know about them is they're, like most political parties, that first and foremost they want to remain in government.

This is an issue that, if understood, if marketed, and if people, if everybody goes out and tells ten people and get them to tell ten more people, and if the government is required to justify
25 this, it may make a difference.

Now, I want to go back to 2003 in Canada. You may recall what was happening was that the US was, you know, in front of the United Nations making noise about attacking Iraq. You

will recall that Prime Minister Chrétien in the House of Commons one day said Canada's not going to go along with the Iraq thing. You may recall the tremendous effect that that had on the US psyche. It was absolutely unbelievable. At the time, the US ambassador to Canada was, you know, on the phone et cetera et cetera.

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I believe that Mr. Jatras is absolutely correct that Canada is the single most important country, the single most important peg in, if we call sort of, a FATCA hole. And I believe, I agree with you a hundred percent, that if Canada says no, that a large number of other countries are also going to say no.

10

The US is attempting, in the same way they did in the invasion of Iraq in 2003 -- you may recall the language, the Coalition of the Willing -- they are trying to create a Coalition of the Willing right now, and interestingly the UK is the very first on board again. They're nothing but just, you know, the number one member of the Coalition of the Willing. And these other 15 countries are, you know, I actually don't think they've made much progress at all. I think they're making one hell of a lot of noise. But when I look at what's going on in terms of anything that any reasonable person could construe as a signed IGA, it just ain't there.

And the worst thing, given the position that Canada has, both geographically, historically in 20 relation to the United States, is to jump in on this. It seems to me that's there's only one answer to this IGA and it is "No," and I wouldn't even add the "thanks."

Mr. James Jatras: That's absolutely correct. And the question is, how do you recreate that 2003 moment? Who can stand up in a place where people have to pay attention 25 to it and say what you just said in the same way it occurred in 2003? I mean unfortunately the Progressive Canadian Party doesn't have a seat in Parliament. And the ones who do have seats in Parliament are watching -- not even watching. They're prepared to say "What

happened?" after it happened. How do you force the issue? That's the question. How do you get out in the public debate?

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Rev. Dorian Baxter: I was going to ask, you're dovetailing with what John just said.

Mr. Al Gullon: Before.

Rev. Dorian Baxter: Sorry. Go ahead.

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Mr. Al Gullon: Before. The latest audience member is from the Green Party ---

APPLAUSE

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Mr. Al Gullon --- and it just so happens that Elizabeth is a personal friend of mine.

Rev. Dorian Baxter: Well that is wonderful and ---

Comment (off microphone): Even better.

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Rev. Dorian Baxter: I wonder if we could just ask the member of the Green Party just to introduce himself, and thank you so much for coming. I know. Elizabeth was in touch with me by e-mail. Please go ahead.

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Mr. Erich Jacoby-Hawkins: Yes, sorry I couldn't come. I had to come down from Barrie and I just found out about the conference a couple of days ago. So, I was able to rearrange enough to be here for part of it, anyway. And so I'd like to bring greetings on behalf of the Green Party of Canada.

My name is Erich Jacoby-Hawkins and I am the Critic for National Revenue and Ecological Fiscal Reform on our Shadow Cabinet. And I have been in communication with Elizabeth yesterday and today about this, and she is very concerned about this for all the reasons that have been brought up. We'd like to gather as much information as we can.

5

Now, unfortunately the House isn't sitting, now they've gone on their holiday break. They went a couple of days early, for one thing. They skipped out on Wednesday instead of the planned Friday, and I'm not sure of the date that they're due to come back. And I don't know if something may be signed in the meantime.

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But certainly if we had a petition with at least 25 signatures on it, she can present that in the House, and the government is required to respond in some way to a petition.

Comment/s (off microphone): (inaudible)

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Mr. Jacoby-Hawkins: But if we can have one, you know, by the time the House is sitting again, we can certainly present that through her, and the government is required to respond in some way to any petition that's brought forward.

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Question (off microphone): (inaudible)

Mr. Jacoby-Hawkins: No. No, that can't happen until the House is sitting again. And if there are any other information we can bring forward at that time, I think she would be able to have an opportunity to do that and will look forward to that.

25

As far as our stance on this, I mean on the one hand, of course, measures that are *bona fide* ways to try and reduce tax evasion through offshore tax havens and stuff have a place, but

they need to be done through the right procedures, through bilateral agreements, not through unilateral – with these bizarre sanctions.

But we believe that our current course of actions should essentially be to advise Canadian banks to ignore FATCA completely and see what happens. And if the US does try to impose these sanctions, they should easily fail under any challenge of the WTO or even NAFTA, Chapter 11. Because it seems to me that this is exactly the kind of investor-state provision that normally we have a big problem with being in NAFTA because it gets used against us. But if the American government is making laws that penalise the profits of Canadian banks, the banks themselves should be able to make a claim for penalties and overturn the law. So, and this is an odd case where that might actually work in our favour.

But certainly there is no need to pre-emptively agree to follow these guidelines, especially where they violate the privacy laws of our own country and our own constitutional rights, and people who are resident in Canada are protected fully by those rights and should continue to be fully protected.

So, I'd like to gather whatever information we can from this session and I'll convey it back to our office and work on it from that end.

20

Mr. John Richardson: Do you think she might be amenable to any other action that would help throw the dead cat on the table before Parliament comes back into session? For example, like a newspaper commentary or something like that? Because I think it's so important that an Opposition voice that can be heard can ask the hard questions in public of a government. That might have the effect of forestalling a signature during that interim period.

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Mr. Erich Jacoby-Hawkins: Absolutely. I think that would be an excellent way. And I know she is able to get op-eds into several of the national papers. So ---

Comment: I heard her this morning on CBC. She's did a wonderful job, you know, with the whole issue around the China deal and (inaudible).

Comment (off microphone): (inaudible).

Mr. Erich Jacoby-Hawkins: Yeah. And let me check my schedule. She has one or two more end-of-year interviews schedule with, I think, CTV. CBC Radio, was that today?

Comment (off microphone): Radio.

Mr. Erich Jacoby-Hawkins: Radio. And then she has one on CBC television on Tuesday, and CTV on Sunday, and those are both sort of end of year wrap-ups. So, if we had a good strong paragraph, because unfortunately tv especially is sound bite politics. The radio actually you can get a little more information through. But tv, if we had a, you know, basically a paragraph with the strongest points, that would be excellent.

Mr. James Jatras: And I think if it were tied to specifically that the government should not go inside something until Parliament comes back in and there's a chance to examine this issue – because, you know, to tell the truth, I don't think Flaherty and those guys, I don't think they're wild about this either. I think they're doing it because CBA and other institutions are pushing them, saying “We have to do it, we have to do it.” If they thought they were going to pay for it politically, that the Opposition was going to make some hay out of this, I think it might cause them to take a step back, which is all we need from them right now.

Mr. Erich Jacoby-Hawkins: So, absolutely if we could put together, you know, a good solid primer, and make sure we (inaudible). Like some of the things, it seems like we're not quite sure exactly what's specified, what might be signed. So, the more we can find out about that, the better.

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Mr. James Jatras: That we do know.

Mr. Erich Jacoby-Hawkins: Okay. Excellent.

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Mr. James Jatras: The nice thing about dealing with dictat from a foreign state is the foreign state just dictates what you have to sign. It makes it convenient for everybody. The IGA text is not negotiable. The only thing that's negotiable is the Annex 2, which lists the types of institutions that will be deemed compliant and don't have to do the FATCAoid thing in the partner country. But the IGA itself is not subject to revision. Like I said, it's easy for everybody.

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Mr. Erich Jacoby-Hawkins: All right. Well, I'll make sure I get a copy of that text from you and we'll work from it.

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Comment (off microphone): Thank you very much.

--- **APPLAUSE**

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Rev. Dorian Baxter: I just wanted to make sure that I had the pronunciation of your first name correctly. It's Erich. Great. The spelling is a little different, so I wasn't sure. But thank you. Thank you, Erich, very much.

And I would like to say this. John, if – we’ve got a number of lawyers in the room here. If somebody would handcraft a petition, that we would sign and hand to Eric before he goes, that would be a step in the right direction. So, would you be willing to do that, John and get help?

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Mr. John Richardson: Yes, I would. Absolutely. I think that’s a great idea. So, what – let’s ac – are we – do we have further questions for Mr. Jatras or where are we on the day? Okay.

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Comment: We’re done with this guy.

--- **LAUGHTER**

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Mr. John Richardson: Okay. That was a fabulous, fab-u-lous presentation for which we all thank you.

--- **APPLAUSE**

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Mr. John Richardson: What I think we need to do here for a second is – or actually maybe we’ll take a ten minute break here. Somebody who feels – actually I’m wondering if perhaps, Mr. Stevens, you might be the right person to lead the petition in terms of the text.

Hon. Sinclair Stevens: Okay.

25

Mr. John Richardson: Okay. Yeah, so why don’t we – I think both in terms of your background and your position. So, why don’t we actually take a break here for the purpose of getting that petition organised. And I invite you to hold court in whatever, either

outside or whatever part of the room you like, to work on that, presumably with the assistance of Allison as well.

So, yeah, let's take – we'll take 15 minutes, then. And perhaps at the end of the 15 minutes, part of the goal of the break would be to actually read the petition at the end of the 15 minutes, get it signed, and off to the place that it needs to be. And after that, we have – who could have known? More content, more great speakers.

Thank you.

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--- **APPLAUSE**

THE FOREGOING IS A TRUE AND ACCURATE TRANSCRIPT
OF THE PROCEEDINGS OF THE FATCA FACT FINDING FORUM
15 HELD AT TORONTO, CANADA, 15 DECEMBER 2012

Mary M. Walls
The Isaac Brock Society
29 December 2012

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