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Discussion after the Speeches of Mr. Mackey, Mr. Allen and Mr. Souza

Discussion

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Discussion After the Speeches of Mr. Mackey, Mr. Allen and Mr. Souza

QUESTION, Professor King: One question I have deals with the degree of protection in the People's Republic of China ("PRC") and the Soviet Union. The PRC did not have any patent law until fairly recently. The Soviet Union had one, but until recently it had not been used as extensively by Western firms as one might have expected, given the size of the country.

What is your assessment of the protections available in these two countries for U.S. technology? Are there any concerns that you have, particularly with regard to weaknesses, in terms of transfers of technology?

ANSWER, Mr. Mackey: Let me start with the Soviet Union. We view an inventor services patent in the Soviet Union as merely a basis to support a contractual arrangement. The likelihood that one will be able to enforce a patent in the Soviet Union is very slim.

As for the PRC, it is too early to tell. We have taken out patent-free technology in China. We consider our basic protection the fact that a fair sum of money has been paid for the technology, and that the Chinese have so far observed the terms of the contract. We do not look at the Chinese patent system as anywhere near the level of productivity and usefulness that exists in, for example, Western European countries such as Germany.

COMMENT, Mr. Allen: Personally I think that once you secure a patent in North American countries, you have made a complete disclosure of things. The knowledge can be used anywhere, and that is one of the hazards of obtaining the patent. Most of our products are not patentable and we have never been threatened by anyone else's patents. I do not think we would be put out of business by one or two patents.

The heart of our activity, and I think the heart of most companies' activity, at least in our industry, is in the trade secret area. Looking at what we have done in China in the trade secret area, I think our technology is protected in several ways. First, we have a majority interest in the enterprise. Second, we are managing and directing the enterprise. Third, there are confidentiality arrangements in which an enterprise that we control and direct would be unwilling to intervene. Fourth, our technology is constantly evolving and changing. That is why we spend so much money.

If someone were to contravene these provisions, they would find that they were in a frozen state when it came to technology development.

When one considers the relatively small cost of buying this technology, of acquiring and using it, of getting access to successful technology at a price that is an actual fraction of the cost of developing it, they would be absolutely idiotic to even attempt to do that.

QUESTION, Professor Shanker: Mr. Allen, as you enter into these various arrangements to do your work abroad, what forum do you have available, if any, for dealing with disputes that cannot be resolved by your review of underlying contractual arrangements? Do you give any attention to that in your underlying agreement? Do you provide a forum to deal with the resolution of disputes that arise and cannot be resolved?

ANSWER, Mr. Allen: Usually, in our international contract we have an arbitration clause. That arbitration clause often contemplates the arbitration being held outside the jurisdictions of either of the two parties involved. The Chinese, in particular, like Sweden to be a designated place for arbitrations.

I must say, however, that arbitration is an overworked word. I have been in practice for almost thirty years, and I have only come close to arbitration on two occasions. I have never been involved in an arbitration. In fact, in our own organization we have never had any litigation for a dispute with a licensee or partner that we have not been able to sit down and resolve in a calm fashion.

I am rarely aware of any problems. If there are day-to-day difficulties, they are negotiated and put to rest at a very low level in the organization. It is a theoretical problem, but in actual fact it has not been a problem for us.

COMMENT, Mr. Mackey: In thirty years in this business we have gone to arbitration on only one occasion, and even then we negotiated a settlement before the arbitration.

COMMENT, Professor King: In addition, the fact that you have the arbitration clause may act as a stimulus to settlement by the other party, because that means you do not have to go into the home-country court, some of which are notorious for their lack of impartiality.

QUESTION, Mr. Blackburn: My recent travels in Argentina and Brazil suggest to me that there is a commonality of interest on licensing, intellectual property matters and technology transfers among industries in the United States and industries in Brazil and Argentina. The problem, as perceived by some of us, is communication with the government authorities. There seems to be a dichotomy, a lack of common understanding between industries in Brazil and the Brazilian authorities. What comments do you have regarding improving those communications? How do you improve communication between the Brazilian government and Brazilian industries, who seem to have a different views of dealing with technology transfers?

COMMENT, Mr. Allen: They want it and they want to facilitate it, yet there is great difficulty in doing it on mutually acceptable terms.

ANSWER, Mr. Souza: As a consequence of democratization in Brazil, we have a growing group of important businessmen who can be more vocal and more powerful in effectively conveying their viewpoint. Communications will improve as the political situation of the country improves.

QUESTION, Mr. Zuijdewijk: The United States has taken trade sanctions against Brazil for inadequate property protection in certain areas. Would you care to comment on this development?

ANSWER, Mr. Souza: If I am not mistaken, that was the first implementation of section 301 of the U.S. Trade Act against the developing countries. The basis for using section 301 was that the United States considered patent protection for pharmaceuticals to be inadequate in this area.

The market for pharmaceuticals in Brazil is more than 30% foreign companies. You have one of two situations. Either non-compliance with legislation designed to protect patents is a consequence of the actions of those foreign companies, or if there are problems with protection, it is not really an important issue because Brazil accounts for less than 10% of the market.

Brazil raised the issue of section 301 actions within GATT. At first, the position of the United States was to vote against the resolution. GATT resolutions have to be obtained on a consensual basis, but the United States finally agreed and the GATT panel has been instituted. The matter it will discuss is whether, for instance, a section 301 action could interfere with GATT provisions.

QUESTION, Mr. Reifsnnyder: In the United States, when talking with foreign countries, we are told about their intellectual property system and their provisions for compulsory licensing. But they lack product protection, and they have an insufficient patent term. On the other hand, they often say in response, "We don't really use compulsory licensing provisions that much, or to the extent we do use them, we do not abuse them. We do have process patent protection, which gives them more or less the protection that is needed. In today's world you will not be selling the same product twenty years from now anyhow, so why worry about a twenty year term."

I would like to ask the business representatives here about this. Can you give testimony of how important some of the traditional aspects are?

ANSWER, Mr. Mackey: We consider them very important. The comments that Mr. Jancin advanced earlier are widely supported in the business community throughout the United States. Certain technologies are moving very fast, others are moving very slowly. In the pharmaceutical business, you have a very long development process. It is not moving that fast. On the other hand, the electronics business moves extremely fast. We used to be able to design a telephone system and sell it for thirty years. Now the turnover is shorter. Mr. Allen can be more precise than

I can, but we are working in shorter cycles of five to seven years instead of thirty to forty years.

COMMENT, Mr. Allen: I detect in this question a pre-occupation with the patent. Patents are very important and we must not underestimate them, but in terms of a final product we cross-license IBM, AT&T, L.M. Erickson and a vast number of other companies to all of our patents. They cannot duplicate our products. I am not sure they would want to, but they cannot duplicate our products. So if we have scant or uncertain patent protection in certain areas, that is not going to affect us. We place a great deal of emphasis on trade secrets, property or technology, not different patents.

QUESTION, Professor King: How do you do that, by contract?

ANSWER, Mr. Allen: We cover it by contract or we keep it to ourselves.

COMMENT, Professor King: I want to thank Leonard Mackey, Clive Allen and Celso Souza for giving us the benefit both of the developed and developing countries manufacturing point of view. We heard both sides and we thank you for it.