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Discussion

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Discussion After the Speeches of Joseph Kattan and Calvin Goldman

QUESTION, *Mr. Yosowitz*: Thank you very much, Cal. I would like to pose one question to both of you.

You both touched on a subject: the Pilkington glass case, a British company, I think, in a nonmerger intellectual property case. Cal mentioned the international guidelines, the new guidelines, and I also have heard Anne Bingaman around various parts of the country talking about how she is raring to go after those people and some people in some other countries. Would you care to comment on that case or that concept?

ANSWER, *Mr. Kattan*: I would love to comment on the Pilkington case by way of exposure, having spent a good deal of the last two years representing Pilkington.

The Pilkington case is, in my view, a disturbing extension of U.S. antitrust to conduct which took place outside the United States. It essentially attempted to impose U.S. standards upon the conduct of foreign companies. The case involved the British company that thirty-five years ago came up with a radically new way of making glass. It chose to protect its glass technologists with trade secrets, as well as through patents, so that even today those trade secrets retain much of their value.

An American company, PPG Industries, had licensed that technology from Pilkington and was, by the terms of its license, permitted to use that technology in the United States. Well, PPG wanted to use that technology outside the United States and wanted to engage in sublicensing, which its license did not permit it to do. Irregardless, it went out and it did just that. Pilkington sued and enforced its trade secret license in U.K. arbitration. The U.K. arbitrators found that PPG had infringed Pilkington's intellectual property and awarded damages to Pilkington.

PPG then sought the help of the U.S. government. The U.S. government, in the form of the antitrust department, decided that the results of the U.K. arbitration, which held that the intellectual property remained valid, was something it could disregard. The United States concluded that the intellectual property had lost much of its remaining value today, and it did not justify the restrictions on competition which were embodied in the license. I think the simple answer to that is, to the extent that intellectual property does not have a great deal of value, it would be very easy for a competitor to circumvent and do without to the extent that they feel they have to use that intellectual property in order to compete abroad.

That tells you that intellectual property has value. Essentially the U.S. government put itself in the position of a judge deciding that the intellectual property was simply not sufficiently valuable. And in order to promote the export of U.S. technology, they chose to override the terms of the license agreement that had been freely negotiated between two very large companies and had been sustained in an arbitration outside the United States.

COMMENT, *Mr. Klitgaard*: I think that is one of the most short-sighted views anyone could ever take, because U.S. companies are in a position of licensing foreign companies, putting restrictions on where they can re-license. And to apply that kind of a standard to Pilkington or to anybody else as freely entered into is simply operating in the 18th century.

And not to honor those intellectual property rights, from my perspective, after all these years in the field, really is kind of a mindless application of the law.

If you remember what I put up on the board at the end of my lecture, I do not think, therefore, I am not. That fit right into that category. And I am not even representing Pilkington.

ANSWER, *Mr. Goldman*: I do not represent Pilkington, either, but I agree with everything that has been said. I expressed some pretty strong views from the perspective of a non-U.S. practitioner earlier this month at the ABA meeting. But, those views were directed at the new U.S. international guidelines that were also released that day, the day before the intellectual property guidelines were released.

The guidelines for international antitrust released jointly by the FTC and the DOJ go further than the 1988 guidelines in a number of respects, and we believe that they reflect a reincarnation of a long-arm approach in a strong-arm sense.

Having said that, there is another case that affected Canada directly. The FTC a few years ago decided to take jurisdiction, not only take it, but exercise jurisdiction against Institut Marieus in its acquisition of certain facilities in Toronto, Canada. Also, it imposed an order on what could be done with those facilities, how long they could be leased and so on, even though the Canadian government was not going to impose any order over those facilities. In the U.S. government's view, the potential competition was in relation to the rabies vaccine and the development of rabies. It is a gain in the same field that we are talking about, but the FTC split three to two on that with a very strong descent by commissioner Owen for her and another.

After having said that, the view right now is that the U.S. government seems to be fired up to take even broader jurisdiction without recognizing traditional principals of committee, because they can fall back on the Hartford Insurance decision of the U.S. Supreme Court a year or so ago. There is a concern out there, and what you have seen in

Pilkington and Institut of Marieus just may happen again.

QUESTION, *Mr. Faye*: I just wondered, in reading the *Financial Press*, I got the impression that Russia, when it went free had aluminum they could not use legally. All of you people got together and said, we will give you higher prices, and all of a sudden aluminum companies are making great profits. I wonder if someone would tell us, was that an antitrust problem?

ANSWER, *Mr. Yosowitz*: That is not an intellectual property issue. But, I will discuss it since you brought it up. The memorandum of understanding is among governments. The governments of the United States, Canada, the United Kingdom, the European Common Market, Australia, and Norway talked to the Russians. What was happening was that the European Union had enacted a quota system against Russian metal. There were some competitors, not Alcan, but some other U.S. competitors who were planning an antidumping suit. The U.S. government heard about that and did not want to impede the new economy of Russia. So, they got together and talked to the Russians and said, "you have environmental problems, and you have cash flow problems. Your capital equipment is going bad. We will give you some aid, if you will then act as a responsible citizen in a world economy."

Governments did this. It was not companies. There was a memorandum of understanding where no U.S. company or any other company in the world was obligated to do anything, nor were the Russians obligated to do anything. But if they wanted aid from these governments, they had to cut some production. That is what you may have heard about or read about. As I said, it is a memorandum of understanding between governments.

QUESTION, *Professor King*: I had a question for Joe Kattan.

We heard a few years ago about joint activities in the automotive industry. What is the status of these activities? Are they working, or what is going on?

ANSWER, *Mr. Kattan*: Well, I think the most celebrated case was the NUMMI case, the GM Toyota joint venture, that took a lot of doing to persuade the government even during the Reagan administration to let the transaction go through. There was a lot of lobbying against the transaction by Chrysler, for example, which had argued the transaction would reduce competition in the automotive field. The FTC decided to permit the parties to go forward, the reason being that GM would use the joint venture to learn more innovative Japanese auto manufacturing techniques. But, this tied the company's hands in some ways by imposing requirements on them to establish a brick wall type of arrangement to prevent the flow competitively of sensitive information.

A couple of years ago, GM and Toyota moved for that order to be vacated, and they were successful. The way that the automobile market

has evolved over the last ten years has shown that the competitive concerns that had been raised at the time were not very serious concerns, and that the automobile industry is very, very competitive. Whether the joint venture was the mechanism through which GM learned to be more efficient, I think that is open to debate.

COMMENT, *Professor King*: I just wanted to thank you very much, Sandy Yosowitz, for chairing this session. It was a very good session, and I want to thank our speakers, too, Joe Kattan and Cal Goldman. We learned a lot.