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Discussion

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## Discussion After the Speeches of Joseph P. Griffin, Warren Grover and David G. Gill

*QUESTION, Professor King:* I had a question for Joe Griffin. You mentioned the *Antitrust Guide* of 1977, and the plans for revision. What is the posture of a business in terms of following the *Antitrust Guide* of 1977, and of looking at the anticipated *Guide* of the year 2000, if it comes out at that time. What is the current status of the *Guide*?

*ANSWER, Mr. Griffin:* There are now on the record a number of speeches by Charles Rule and some other people outlining basically what they intend the *Guide* to do. Let me try to summarize those quickly for you.

The format will remain basically the same: an opening statement of principles and policy, followed by a number of hypothetical examples with analyses of how those examples would be analyzed. The change will be in the substance, most starkly in the licensing area. Basically, what you can do is every place where there is a "not" in the current guide, just cross it out. Those of you who follow antitrust, remember there used to be something called "the nine no-nos" of patent licensing. They are all now "yes-yeses."

That whole area has been turned on its head by the administration. Charles Rule has given a number of speeches specifically repudiating the nine no-nos and saying that now they are all wonderful practices and we want to encourage them.

The other areas that are going to see the most dramatic changes are the vertical areas. You may remember there is already in existence vertical guidelines about things like distribution arrangements and vertical restraints, and the international guide will be written to take account of those.

The other two areas likely to see dramatic changes are joint ventures and mergers. There will be some change in the jurisdiction area. Basically, they are going to try to create a dichotomy between a government brought-suit and a private suit, which I find to be outrageous. It flies directly in the face of the Foreign Sovereign Immunities Act. When you think about it, under the Foreign Sovereign Immunities Act, a piece of legislation now ten years old, the courts have the final word on whether a sovereign is immune or not, even if it is the U.S. Government that is the plaintiff. In the face of that, for the Justice Department to say that if they bring a suit they cannot be challenged as to whether or not the sovereign should be sued on the basis of comity or on the basis of sovereign compulsion, I find to be a breach of the law.

On what will happen with politics, the problem is not whether or not the *Guide* will be changed after the 1988 election. The problem is whether or not it will become irrelevant because trade policy will simply further submerge antitrust policy, and to the extent that there is an inconsistency, the trend clearly seems to be to protect competitors and markets, not to protect competition. So my concern is not that the *Guide* itself will be rewritten once again, but that in a year or two it will not make any difference at all what the *Guide* says.

*QUESTION, Mr. Stayin:* Along that same line I wanted to ask you, the Export Trading Company Act has been pushed very, very aggressively by the Export Trading Company Office in the Commerce Department. They are trying to get all the trade associations in Washington to have their members to adopt this and try to use this as a very effective vehicle for competing.

What about trade associations meeting and discussing what they do in foreign markets? For example, you have a panel of members who discuss what they pay their distributors in Korea or in France, or they might choose some other type of activity that, if they were to discuss what they pay their distributors in the United States, and get involved in vertical restraints, they would be subject to antitrust enforcement. What will happen under our current regime?

*ANSWER, Mr. Griffin:* I will answer the question, but let me begin by making a point of philosophy.

It is my belief, based on being a battle-scared veteran of Washington, that any time you ask the Government to tell you something in writing you will get the most conservative, cautious answer possible. I submit that as simply a truism.

Therefore, I ask why are you asking the Commerce and Justice Departments to give you something in writing? The law is actually pretty clear that if you meet in the United States and have trade association discussions that concern only conduct outside of the United States that affects only non-Americans, there is no jurisdiction over that conduct in the first place, and there is no need for a certificate of immunity. The problem is obviously one of classic trade association, a problem of how do you prove what you discussed? There are, of course, remedies such as having outside witnesses there. Another problem is if you look at who we are using as the export trading company vehicle, without trying to be too pejorative about it, they are small, unsophisticated operations. There is not a single large multinational that has applied as an export trading company. Why is that?

I submit that it is because they know the problem with conservative answers from Washington, they think they have competent counsel or can obtain it and see no need to comply with the notice requirements which simply give competitors, not necessarily U.S. competitors, but foreign competitors, notice of what they intend to do. Why would any intel-

ligent businessperson want to do that? Consequently, I am not a fan of the export trading company legislation and I think the statistics that I quoted earlier tend to bear it out.

For example, they were talking about the creation of 600,000 new jobs when that act was passed. When I called the other day to get the statistics, they said they were still compiling that data, they were not sure. When I said, "Is it less than ten?" the fellow said, "I can't answer."

*QUESTION, Professor King:* I want to ask David Gill a question. We have seen that the EC has gone a step further than the United States in terms of antitrust progress, or adventure, if you want to describe it by another name.

I wondered if the EC antitrust rules adversely affect EC competitors of U.S. and Canadian firms in terms of what has been applied under the Rome Treaty and also the regulations that have been issued by the commission?

*ANSWER, Mr. Gill:* That is a difficult question to answer, because the EC laws also stop at the water edge. They really pertain to relations among the EC countries. One thing that is clear is that the EC has been steadily developing over the past fifteen years a much more detailed array of antitrust laws than had previously been the case. It is going to be very interesting to see what happens in developing this new proposed regulation on controlling mergers.

That does not answer your question, I know, but I think the real fact is that EC companies, similar to the U.S. companies and to Canadian companies, are faced with a real and very well enforced set of anti-trust regulations.

*COMMENT, Mr. Cunningham:* I would like to offer a brief vignette in commenting on Warren Grover's discussion of the extent to which the United States has a zeal for extraterritoriality.

Warren mentioned a Canadian company that engaged for years in defrauding American shareholders with gold mines in Honduras. I was the U.S. counsel for those defrauded U.S. shareholders, and at one point the Canadian judge sustained the holding of a shareholders' meeting of that Canadian company despite the fact that it did not comply with U.S. proxy rules. It was sustained on the ground that it was a Canadian company in full compliance with Canadian law. I was treated shortly thereafter to a meeting with the Federal Trade Commission chief of enforcement and the Federal Communications Commission general counsel who engaged in an hour's learned discussion in areas in which they might indict the Canadian judge, thereby, enforcing Canadian law. So to the extent that you think that there is a clash of cultures here you may not even appreciate the full scope of it.

*QUESTION, Mr. Salembier:* I was very interested to hear the statement from Joe Griffin regarding the increasing prevalence in trade policy over antitrust concerns in the United States. However, I have not heard

much today of what I always thought was the clearest extension of anti-trust concerns throughout the national trade agreements, namely anti-dumping.

First, do you see any indication for U.S. anti-dumping policy from the trends that you have describe in the theory of antitrust? My second question is for Mr. Gill. Do you see, given the inability of the two countries come to an agreement in the FTA negotiations on anti-dumping matters, any connection between what you have described as a very rosy picture for cooperation of the antitrust area?

*ANSWER, Mr. Griffin:* As they say, I am so glad you asked that question. I was at a meeting about two weeks ago with Judge Ginsburg. You may remember that he had been a head of the Antitrust Division before he became a judge. We were having a luncheon and the issue that you raised about anti-dumping and antitrust came up. He offered the following analysis, which he was at pains to say was not only his, but also the Chicago school of analysis, which is, if other people want to dump products in the United States, that should be encouraged. That if other countries want to subsidize low prices to American consumers not only should we not prevent that, we should encourage it because it is a gift to American consumers. When we asked about jobs and all the standard arguments, his reply was, as the Chicago school reply is to everything, "In the long run the market will sort that out."

On the policy side, what I was trying to get at was that in the 1950s and 1960s there was an American preoccupation with competition in the United States, and keeping that competition fair and free and open. Now the preoccupation is "us against the rest of the world," "how do we keep the playing field level," and "how do we keep international trade fair?" One of the proposals of how to deal with that phenomena is to make antitrust a weapon in the fight against unfair international trade. Why do not we bring conspiracy cases and other kinds of cases against foreigners who are dumping, or who are engaging in subsidiaries?

There is a technical problem on the antitrust side; consumer welfare is going up because they are paying a lower price. I think my point is, the basis of the policy debate has shifted. If you listen to the candidates in the presidential election, they are all on the same track about making international trade free and fair. Theoretically, we are going to have level playing fields and we are going to use whatever weapons we have at our disposal. No candidate is saying, "and by the way, I will, as one of my platforms planks, make U.S. competitors in the United States follow the same rules."

*COMMENT, Mr. Cunningham:* I am going to talk about the technical side of this issue this evening. I will say one thing, I think the United States has moved from the position of the 1960s in the way we were concerned about the U.S. market and consumers toward the position that most other developed countries take, in which we are concerned more about retaining production in this country.

*COMMENT, Mr. Gill:* On the second question I think that perhaps I should refer this to Richard Cunningham as well. I would say that it is going to be a lot easier to settle antitrust differences between the two countries, in my estimation, than to settle anti-dumping or trade matters. The trade matters are always much more closely thought out as involving real dollars and some very emotional issues as well as real economic issues. What is very interesting to me, though, is that the FTA does contain this provision for dispute settlement, establishing bi-national panels to attempt to resolve differences in the anti-dumping and countervailing duty. That is a tremendous achievement even though it does, in effect, mask an inability to put down a final resolution of that dispute.

*QUESTION, Mr. Fried:* This is a follow-up question on the same subject and I hope it does not get into tonight's subject matter. A free trade area should, insofar as possible, create a single market. The borders should be irrelevant for trading purposes and market principles should prevail.

Anti-dumping, which is in the United States identified as unfair trade, covers practices which are both anti-competitive and technically not anti-competitive. Technically, getting rid of products at the end the season, for example, a winter sweater in April, comes within dumping. Competition law would not define that as unfair.

Thus the theory would go, would it not make sense in a free trade area not to have dumping statutes at all, but rather only to use price discrimination and predatory pricing remedies? Your comments seem to suggest the reverse, that the availability, the quickness, the cheapness and petitioner-oriented trade statutes have been used instead of antitrust laws to harass or to pursue foreign competition.

If you take away the trade remedy, it will lead to an increase in the use of price discrimination and predatory pricing remedies, not to protect true competition, but once again, to harass the foreign competitor.

*ANSWER, Mr. Griffin:* I think that is right. My fear is that we are not going to get rid of the dumping remedy and we are going to expand the use of antitrust suits. I use as my precedent for this the Japanese television cases.

If you remember in the 1960s, the U.S. industry, still pretty large and viable, lost basically a major counterattack on all fronts. They filed a whole series of every different kind of trade remedy proceeding of which they could think. At the same time, they launched a massive antitrust conspiracy case and a criminal dumping case, the remnants of which ended up in the Supreme Court in the *Zenith* cases eighteen years later.

My point is that one offshoot of the Free Trade Agreement may be that the markets are going to open up, the boundaries are going to become less relevant, and those American industries that feel threatened are going to put on tremendous pressure to use all available remedies. That was one reason why those who are interested in either modifying or

eliminating dumping in this situation will not succeed and at the same time the antitrust remedies will be brought into play because of the private treble damage action, even in situations where the American Government does not feel that it would be appropriate.

*COMMENT, Mr. Fried:* The reason that I ask is because the Free Trade Agreement permits both countries, during a five year period starting January 1989, to negotiate a replacement regime through subsidiaries in a dumping remedy.

One option that is widely reported publicly that had been looked at in the negotiations was the possibility of whether or not the competition laws, rather than the dumping laws, were to deal with private pricing practices. Subsidies and countervailing duties are a different question. But, in addition to the current dispute settlement issue, there is the possibility of some substantive changes in rules applicable to North American trade.

*COMMENT, Professor King:* We have had a great session. I want to thank, on behalf of all of us, Joe Griffin, Warren Grover, and David Gill.