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Discussion

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Discussion After the Speeches of Richard M. Brennan and William H. Duffey

QUESTION, Professor King: We are told that the U.S. Government has made serious efforts to get countries such as South Korea, Taiwan, and others in the Far East to amend their laws. Much of this is being done through section 301 of the Trade Act. I wanted to give Richard Brennan an opportunity to comment on this. What is your feeling about what has been accomplished by these Government efforts?

ANSWER, Mr. Brennan: Let me start with Korea. In 1986 the U.S. Government self-initiated section 301 actions against Korea for inadequate and ineffective intellectual property protection.

Maybe we are making a presumption here that everybody knows what section 301 is. It is a part of the 1974 Trade Act. In essence it says that when another nation has policies or practices that burden U.S. commerce and the U.S. President determines that those policies are unreasonable, unjustifiable or discriminatory, then action can be taken against that nation. We did this with Korea in July of 1987 and about a year later they passed new and fairly good intellectual property law protection.

The problem we have now is one of enforcement. The patent on chemicals and pharmaceuticals is a question of whether or not the product or process was in the "pipeline" and how it would be handled. The Koreans expect about a dozen products to be involved in our country, and so we are negotiating with them on that. That will be resolved without a lot of difficulty.

The trade representative's office sent me over a summary of all the section 301 cases that have come up in the last thirteen years. There were sixty-three cases in thirteen years, and roughly twenty-eight of them were agricultural cases.

There is a lot of bickering between the United States and the European Community on pasta imports. There were successful steel cases on section 301, but a lot of them we terminated. Section 301 is basically a negotiating part of the statute. It is saying, "We want you to sit down and work this problem out with us." It really is not intended for retaliation. I am a little bit concerned about a lot of people seeing section 301 as a cure-all. It is a very, very expensive process and we have had egg on our face in a couple of cases. My advice would be if you are going have a 301 action you ought to be very sure before you start spending money that the President of the United States is going to agree with it, because that is where the final decisions are made.

QUESTION, Professor King: William Duffey, one of the things I wanted to ask you about is this proposed agreement. What teeth it will have? Does it accommodate the problem of high technology and biotechnology in terms of a uniform approach toward the granting of patents?

ANSWER, Mr. Duffey: There are two fronts that this is moving on; one is trilateral and the other is global. In the case of the WIPO, they can develop a treaty. This is a very optimistic outlook, considering the Group of 77, who are the LDC countries. It is going to require not only achieving a model treaty that is acceptable to those countries, but also to try to get each country, including the European Commission, Belgium, France, and Britain, to ratify it. That is what makes that so optimistic in thought.

Now more immediately, among the trilaterals and dealing with biotechnology in particular, there is no doubt that those three negotiating patent offices see the need for broad patent protection to cover everything: microorganisms, plants, and animals, which is a very controversial issue. I do not want to be too sanguine about this because I think the trilaterals are probably two or three years, at least, from something at hand.

QUESTION, Mr. Lah: I am addressing this to you, Mr. Brennan, as to counterfeiting. In the past few years, we have seen a flood of counterfeit products ranging from bolts that are used in large construction to jeans. What are the proposals and maybe what are some of your ideas on what can be done with this very serious problem, in the U.S. context?

ANSWER, Mr. Brennan: Well, in the U.S. context, counterfeiting laws were changed in 1984 and very extended criminal penalties were added. I am going from memory now, but I think the first offense is a fine of up to \$250,000 and five years in jail and the second offense about double that. So you are talking fairly serious criminal penalties. There have been quite a few cases prosecuted under that.

The bolt and fastener issue is a tremendous problem. The Department of Defense, going through some of logistic supply depots, found that between twenty-nine and forty percent of the nuts, bolts and fasteners in this inventory were counterfeit. Part of these does go into buildings, bridges, and automobiles. The problem is that all the information currently available in most of these products is an international marking that this is a No. 8 bolt. They are not, *per se*, trademarks and a lot of the companies are going to put in a trademark logo on their bolts.

The other thing that is happening is a great deal of these products are coming from Taiwan and Japan and some of it is being transhipped through Canada, repackaged and brought down here. Transhipments through Canada are a serious problem on a lot of our items.

QUESTION, Mr. Lah: Is anything going on with an international-type negotiation to settle this problem?

ANSWER, Mr. Brennan: The GATT would probably be what we are all trying to do on that, to get some sort of international agreement. GATT enforcement would be very important, not only at the border, but within the country and would permit companies to prosecute within a country.

COMMENT, Professor King: On this business of the counterfeiting, the evidence is replete that not only is it a question of cost, but also in terms of dangers to the consumer. Frequently in cases where they buy the counterfeit good it has not made properly and there have been some horror stories resulting for the consumer. A lot of damage has been done in that area.

Thus, there is a public policy aspect to this as we do go into a more technology-oriented world.

COMMENT, Mr. Brennan: In response to your comment, my group has started a product safety and industrial design task force. They are in the process of gathering information from a broad cross section of companies, but there are real problems here. The automobile industry has very serious problems with fan belts, brake liners, gas filters, and gas caps. The GM representative in our group went to Saudi Arabia last year and checked on the inventory of GM parts in Saudi Arabia. Forty percent were counterfeit, and other manufacturers' cars were probably about as high.

So you take that with the nuts and bolts and fastener and eyeglasses and even cosmetics, and we have some very serious problems.

COMMENT, Mr. Epling: I just wish to comment on that bolt problem. Almost all of that is on the Type 8 and 8.2 bolts, which are industrial use bolts and not used in construction at all. There is the 8325 and the 490 bolts used for construction that is almost anecdotal as whether or not there really is a problem.

But I have an observation and I would appreciate your comment. It seems to me that the fundamental problem in this protection of intellectual property is our own acceptance of people stealing from us. We have tolerated it for so long. We tolerated it from Korea. The option was immediately at hand to get the Koreans to stop it. We simply say it is unacceptable, that civilized people do not steal from each other. I wonder if the fundamental problem is we just need to stop accepting it. That option is there, we can negotiate an end to the problems in Taiwan that exist today. You would have to give them a few months to clean up their act, but they would stop it if we told them to stop.

COMMENT, Mr. Brennan: I agree with you on a point of logic. We do have leverage, from the standpoint of trade with both Korea and Taiwan, probably more than with any other countries, and the section 301 cases are trying to use it. It is just very difficult to get them to enforce these things.

COMMENT, Mr. Epling: With Brazil for example, we have strong leverage if we simply use it.

COMMENT, Mr. Brennan: Our trade with Brazil is not as much as you think. They can live without us. It is not at all like Korea or Taiwan. It is no way near that. I wish you were right.

QUESTION, Professor King: Do you have much support from foreign countries in your coalition?

ANSWER, Mr. Brennan: Yes, we do. There is a new effort being rekindled over in Europe, particularly on counterfeiting. From the standpoint of the countries in the Far East, we do not have that much involvement. We would like to have more and we are trying to get more, but we really do not have as much as we would like.

QUESTION, Mr. Musgrove: When you have got the laws passed in Korea, can the U.S. company which is suffering from the counterfeiting undertake the prosecution in their jurisdiction with the authorities so at least the prosecution can get underway? My firm acts from time to time for people with protected property rights in Canada who, whether they are American or Canadian, come to us. We undertake the initial investigation, we provide that information to the police, and we have had some considerable success.

ANSWER, Mr. Brennan: In some instances, yes, but that is really kind of the enforcement problem with those countries. Are you able to conduct yourself the way we think you should be able to, and is there some form of due process?

One of the problems in Taiwan is that the people coming before the judges and the prosecutors are their cousins, and their nephews, so they slap them on the wrist and say bye-bye. Getting tough enforcement is a problem. Also, the ability to gather evidence and so on in these countries is not as easy as it is here by any means.

I am not sure if the Korean laws have changed in that regard. I think we can, but I cannot recall the specifics of the Korean change.

QUESTION, Ms. Dallmeyer: I am interested that you have not mentioned anything about section 337 protection of intellectual property rights. That interest was stimulated by you relating that people were talking about section 301. Is that response from people who think section 337 is not working very well or is it wishful thinking, just to solve things at one fell swoop? Do you have any comments on that?

ANSWER, Mr. Brennan: Well, Bill and I were on the advisory committee involved on the U.S.-Canada Free Trade Agreement. People in Canada have a different view of section 337 than we do. I always try to avoid it. It is being used all the time. It is also expensive, but there are section 337 cases being brought. There are changes proposed in the trade bill to drop the injury test because it is felt by many in industry that if you have been robbed, you have been robbed. But it is still an effective piece of law, and it is being used quite a bit.

COMMENT, Professor King: We have had a very full session here today. I want to thank Richard Brennan and also Bill Duffey.

